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# Contents

**Federal Register**

Vol. 76, No. 133

Tuesday, July 12, 2011

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**Separate Parts In This Issue**



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**Reader Aids**

Consult the Reader Aids section at the end of this page for phone numbers, online resources, finding aids, reminders, and notice of recently enacted public laws.

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## CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

**10 CFR**
50 ..... 40777

**12 CFR**
349 ..... 40779

**14 CFR**
71 ..... 40797
121 ..... 40798

**15 CFR**
748 ..... 40804

**21 CFR**
520 ..... 40808

**33 CFR**
165 ..... 40808

**37 CFR**
**Proposed Rules:**
2 ..... 40839
7 ..... 40839

**39 CFR**
**Proposed Rules:**
111 (2 documents) ..... 40844

**40 CFR**
180 ..... 40811, 40849
**Proposed Rules:**
721 ..... 40850

**42 CFR**
**Proposed Rules:**
409 ..... 40988
424 ..... 40988
440 ..... 41032
484 ..... 40988

**44 CFR**
65 ..... 40815

**47 CFR**
1 ..... 40817

**48 CFR**
9901 ..... 40817
9903 ..... 40817

**49 CFR**
190 ..... 40820
**Proposed Rules:**
571 ..... 40860

**50 CFR**
224 ..... 40822
660 ..... 40836
679 (3 documents) ..... 40836, 40837, 40838
**Proposed Rules:**
17 ..... 40868

# Rules and Regulations

Federal Register
Vol. 76, No. 133
Tuesday, July 12, 2011

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## NUCLEAR REGULATORY COMMISSION

### 10 CFR Part 50

**RIN 3150–AG48**

**[NRC–2008–0486]**

## Interim Enforcement Policy for Certain Fire Protection Issues

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Policy statement; revision.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC or the Commission) is revising its interim Enforcement Policy on enforcement discretion for certain fire protection issues to extend the enforcement discretion to correspond with a submittal schedule for new license amendment requests (LARs). This interim policy affects licensees that are transitioning to use the National Fire Protection Association Standard 805, ''Performance-Based Standard for Fire Protection for Light Water Reactor Electric Generating Plants'' (NFPA 805).

**DATES:** This policy revision is effective July 12, 2011. The NRC is not soliciting comments on this revision to its Enforcement Policy.

**ADDRESSES:** You can access publicly available documents related to this policy statement using the following methods:

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

• *NRC's Agencywide Documents Access and Management System (ADAMS):* Publicly available documents created or received at the NRC are available online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of the NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.* The Enforcement Policy is available through ADAMS under Accession No. ML093480037.

• *Federal Rulemaking Web Site:* Supporting materials related to this policy statement can be found at *http://www.regulations.gov* by searching on Docket ID NRC–2008–0486.

The NRC maintains the Enforcement Policy on its Web site at *http://www.nrc.gov/about-nrc/regulatory/enforcement/enforce-pol.html.*

**FOR FURTHER INFORMATION CONTACT:** Gerry Gulla, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2872; e-mail: *Gerald.Gulla@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Background

On June 16, 2004, the NRC revised its Enforcement Policy to include an interim Enforcement Policy applicable to licensees that are transitioning to the risk-informed, performance-based fire protection requirement in NFPA 805. However, because of the complexity and evolving issues related to fire protection, the NRC revised its interim Enforcement Policy several times. The following table lists the corresponding **Federal Register** notices and provides brief descriptions of the associated revisions.

| **Federal Register** notice | Date | Brief description |
|---|---|---|
| 69 FR 33684 | June 16, 2004 | Describes the initial interim Enforcement Policy on fire protection. |
| 70 FR 2662 | January 14, 2005 | Revises the submittal date for licensees to receive enforcement discretion for existing identified fire protection program noncompliant issues. |
| 71 FR 19905 | April 18, 2006 | Extends the enforcement discretion from 2 years to 3 years from the date as specified in the licensee's letter of intent to transition to NFPA 805. |
| 73 FR 52705 | September 10, 2008 | Grants additional enforcement discretion so that licensees can use lessons learned from the pilot process. |

On March 4, 2011, the NRC published SECY–11–0033 (ADAMS Accession No. ML11083A061), ''Proposed NRC Staff Approach to Address Resource Challenges Associated with Review of a Large Number of NFPA 805 License Amendment Requests.'' In SECY–11–0033, the staff proposed to increase the current resources for the NFPA 805 LARs and to work with industry to develop a schedule for staggering the LAR submittals. In SRM–SECY–11–0033, dated April 20, 2011 (ADAMS Accession No. ML111101452), the Commission approved this staggered approach and instructed the staff to submit a Commission paper with an attached proposed revision to the NFPA 805 interim Enforcement Policy for Commission approval.

### II. Discussion

Initially, the NRC expected to receive approximately 16 LARs in 2007. However, because of the unforeseen complexity of the transitioning process, the interim Enforcement Policy has undergone a number of revisions that have changed the submittal due date for many licensees. These revisions have created a ''grouping effect,'' and now the NRC expects approximately 23 LARs by the end of June 2011. The Commission has approved the use of additional resources for NFPA 805 LAR reviews and working with industry to develop and create a staggered LAR submittal schedule. The NRC held a public meeting on April 14, 2011, during which the staff and stakeholders discussed the staggered approach. The meeting focused on (1) The staggered approach to LAR submittals, (2) identifying industry considerations for staggered LAR submittals, and (3)

discussing the staff's LAR review approach and adjustment to monthly status meetings.

An industry working group is currently generating a list of transitioning licensees with suggested corresponding LAR submittal dates necessary to support this staggered submittal approach. Once the working group completes the list, the staff will review and decide whether to approve it. The NRC expects the sequencing of the submittals to result in approximately seven LARs by July 1, 2011; 10 additional LARs by July 1, 2012; another 10 LARs by July 1, 2013; and the remainder by July 1, 2014. The NRC will require licensees, with the exception of the first group of licensees scheduled to submit around July 1, 2011, to submit a letter by June 29, 2011, that acknowledges their new commitment date. Enforcement discretion will continue while the staff is processing and responding to the commitment letters.

Once this process is completed, the NRC will hold the licensee accountable for submitting an acceptable LAR on the date as stated in its commitment letter. A failure on the part of the licensee to submit an acceptable LAR on or before the NRC approved date will result in a loss of enforcement discretion. However, licensees with appropriate justification and staff approval may regain enforcement discretion once an acceptable LAR is submitted. If enforcement discretion is not granted, any identified noncompliance with the requirements of Title 10 of the Code of Federal Regulations (10 CFR) 50.48(b) (or the requirements in a fire protection license condition) may be subject to enforcement actions. While the LAR is under review, enforcement discretion will continue as long as the noncompliances meet the criteria as stated in the policy. The NRC staff will maintain the number of scheduled reviews per year. For example, the staff will work with licensees, if necessary, to amend the submittal schedule to substitute one site for another if a submitted LAR does not pass the NRC's acceptance review.

Nuclear safety is the first consideration in any request for additional enforcement discretion. The NRC will continue to apply normal inspection schedules and processes during the transition process (including staggering the LAR submittals) to ensure that licensees maintain their existing fire protection program licensing basis. The approved fire protection program uses numerous levels of defense in depth with regard to fire protection. Most noncompliance issues only affect one level of defense in depth, leaving two or more ''layers'' of protection to provide significant safety margin. Licensees must address all nonconforming conditions with adequate compensatory measures to ensure fire safety with sufficient defense-in-depth. As a result, the plant preserves nuclear safety because the licensee implements compensatory measures that offset the risk of the nonconforming conditions in accordance with the approved fire protection program. Therefore, extending enforcement discretion should not significantly impact fire safety.

**Procedural Requirements**

*Paperwork Reduction Act*

This Policy Statement contains and references information collection requirements that are subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). These requirements were approved by the Office of Management and Budget, under approval number 3150–0136.

*Public Protection Notification*

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting documents displays a currently valid OMB control number.

*Congressional Review Act*

In accordance with the Congressional Review Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with OMB's Office of Information and Regulatory Affairs.

Accordingly, the NRC has revised its Enforcement Policy to read as follows:

*NRC Enforcement Policy*

9.1 Enforcement Discretion for Certain Fire Protection Issues (10 CFR 50.48)

This section contains the interim Enforcement Policy that the NRC will follow to exercise enforcement discretion for certain noncompliances with the requirements in Title 10 of the Code of Federal Regulations (10 CFR) 50.48, ''Fire Protection'' (or fire protection license conditions), that are identified as a result of a licensee's transition to the new risk-informed, performance-based fire protection approach included in 10 CFR 50.48(c) and for certain existing identified noncompliances that reasonably may be resolved by compliance with 10 CFR 50.48(c). Under 10 CFR 50.48(c), reactor licensees may voluntarily comply with the risk-informed, performance-based fire protection approaches in National Fire Protection Association Standard 805, ''Performance-Based Standard for Fire Protection for Light Water Reactor Electric Generating Plants'' (NFPA 805), 2001 Edition (with limited exceptions stated in the rule language).

Enforcement discretion may apply to noncompliances identified during the licensee transition process. This timeframe starts on the date as specified in the licensee's letter of intent to transition to 10 CFR 50.48(c) and ends (1) 3 years after that initial start date or (2) on the date as specified in the licensee's commitment letter, as amended and approved by the NRC. If the licensee is unable to submit its license amendment request (LAR) within the timeframe stated above, it will lose its enforcement discretion. However, licensees with appropriate justification and staff approval may regain enforcement discretion once an acceptable [1] LAR is submitted. If enforcement discretion is not granted, any identified noncompliances may be subject to enforcement action.

Once an acceptable LAR is submitted, enforcement discretion for previously identified noncompliances [2] and any newly identified noncompliances discovered either by the licensee or the NRC while the LAR is under review will continue to be in place until the NRC dispositions the LAR.[3] If the NRC finds the amendment request unacceptable but gives the licensee an opportunity to provide supplemental information, the enforcement discretion will continue while the licensee prepares the supplemental information, provided that it submits the information within the timeframe stipulated by the staff. If the NRC finds the amendment acceptable after receipt of the supplemental information, enforcement discretion will continue until the NRC dispositions the amendment. A licensee that submits an LAR that is not acceptably supplemented or an LAR that was initially characterized as unacceptable with no opportunity to provide supplemental information will lose its enforcement discretion. However, licensees with appropriate justification and NRC approval may

[1] The agency will use the Office of Nuclear Reactor Regulation's (NRR) Office Instruction, LIC–109, ''Acceptance Review Procedures,'' to evaluate the LAR for acceptability.

[2] These are noncompliances that were previously granted enforcement discretion before submittal of the LAR.

[3] Noncompliances that are identified during the LAR review process and that are determined to be either associated with a finding of high safety significance or willful will be considered for potential enforcement action.

regain enforcement discretion once an acceptable LAR is submitted. If enforcement discretion is not granted, any indentified noncompliances may be subject to enforcement action.

Once the NRC accepts an LAR for licensing review, the timeliness and quality of the responses to requests for additional information (RAI) will significantly affect the LAR review schedule. Licensees that do not respond in a timely fashion to staff RAIs or do not provide quality RAI responses may lose enforcement discretion.

If, after submitting the letter of intent to comply with 10 CFR 50.48(c) and before submitting the LAR, a licensee decides not to complete the transition to 10 CFR 50.48(c), the licensee must submit a letter stating its intent to retain its existing licensing basis and withdrawing its letter of intent to comply with 10 CFR 50.48(c). After the licensee's withdrawal from the transition process, the NRC, as a matter of practice, will not take enforcement action against any noncompliance that the licensee corrected during the transition process and will, on a case-by-case basis, consider refraining from taking action if reasonable and timely corrective actions are in progress (e.g., an exemption has been submitted for NRC review). The NRC will disposition noncompliances that the licensee has not corrected, and noncompliances that were identified after the date of the withdrawal letter, in accordance with normal enforcement practices.

a. Noncompliances Identified During the Licensee's Transition Process

Under this interim Enforcement Policy, the NRC will normally not take enforcement action for a violation of 10 CFR 50.48(b) (or the requirements in a fire protection license condition) involving a problem in an area such as engineering, design, implementing procedures, or installation if the violation is documented in an inspection report and meets all of the following criteria:

1. The licensee identified the violation as a result of a voluntary initiative to adopt the risk-informed, performance-based fire protection program under 10 CFR 50.48(c), or, if the NRC identified the violation, the NRC found it likely that the licensee would have identified the violation in light of the defined scope, thoroughness, and schedule of its transition to 10 CFR 50.48(c).

2. The licensee corrected the violation or will correct the violation after completing its transition to 10 CFR 50.48(c). Also, the licensee took immediate corrective action or compensatory measures or both within a reasonable time commensurate with the risk significance of the issue following identification; this action should involve expanding the initiative, as necessary, to identify other issues caused by similar root causes.

3. Routine licensee efforts, such as normal surveillance or quality assurance activities, were not likely to have previously identified the violation.

4. The violation was not willful.

The NRC may take enforcement action when the licensee has not met these conditions or when a violation that is associated with a finding of high safety significance is identified.

Although the NRC may exercise discretion for violations meeting the required criteria, if the licensee failed to make a required report to the agency, then it will normally issue a separate enforcement action for the licensee's failure to make the required report.

b. Existing Identified Noncompliances

In addition, the licensee may have existing identified noncompliances that could reasonably be corrected under 10 CFR 50.48(c). For these noncompliances, the NRC is providing enforcement discretion for the implementation of corrective actions until the licensee has made the transition to 10 CFR 50.48(c), provided that the noncompliances meet all of the following criteria:

1. The licensee has entered the noncompliance into its corrective action program and implemented appropriate compensatory measures.

2. The noncompliance is not associated with a finding that the Reactor Oversight Process significance determination process would evaluate as red, or otherwise it would not be categorized at Severity Level I.

3. The noncompliance was not willful.

4. The licensee submitted a letter of intent by December 31, 2005, stating its intent to transition to 10 CFR 50.48(c).

Dated at Rockville, MD, this 5th day of July 2011.

For the Nuclear Regulatory Commission.

**Andrew L. Bates,**

*Acting Secretary of the Commission.*

[FR Doc. 2011–17291 Filed 7–11–11; 8:45 am]

**BILLING CODE 7591–01–P**

## FEDERAL DEPOSIT INSURANCE CORPORATION

## 12 CFR Part 349

**RIN 3064–AD81**

## Retail Foreign Exchange Transactions

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Final rule.

**SUMMARY:** The FDIC is adopting a final rule that imposes requirements for foreign currency futures, options on futures, and options that an insured depository institution supervised by the FDIC engages in with retail customers. The final rule also imposes requirements on other foreign currency transactions that are functionally or economically similar, including so-called ''rolling spot'' transactions that an individual enters into with a foreign currency dealer, usually through the Internet or other electronic platform, to transact in foreign currency. The regulations do not apply to traditional foreign currency forwards, spots, or swap transactions that an insured depository institution engages in with business customers to hedge foreign exchange risk. The final rule applies to all state nonmember banks and, as of July 21, 2011, also to all state savings associations.

**DATES:** This final rule is effective July 15, 2011.

**FOR FURTHER INFORMATION CONTACT:** Nancy W. Hunt, Associate Director, (202) 898–6643; Bobby R. Bean, Chief, Policy Section, (202) 898–6705; John Feid, Senior Capital Markets Specialist, (202) 898–8649; Division of Risk Management Supervision; David N. Wall, Assistant General Counsel, (703) 562–2440; Thomas Hearn, Counsel, (202) 898–6967; Diane Nguyen, Counsel, (703) 562–6102; Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

**SUPPLEMENTARY INFORMATION:**

### I. Background

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act).[1] As amended by the Dodd-Frank Act,[2] the Commodity Exchange Act (CEA) provides that a United States financial

[1] Public Law 111–203, 124 Stat. 1376.

[2] Dodd-Frank Act sec. 742(c)(2) (to be codified at 7 U.S.C. 2(c)(2)(E)). In this preamble, citations to the retail forex statutory provisions will be to the section where the provisions will be codified in the CEA.

institution [3] for which there is a Federal regulatory agency [4] shall not enter into, or offer to enter into, a transaction described in section 2(c)(2)(B)(i)(I) of the CEA with a retail customer [5] except pursuant to a rule or regulation of a Federal regulatory agency allowing the transaction under such terms and conditions as the Federal regulatory agency shall prescribe [6] (a ''retail forex rule''). Section 2(c)(2)(B)(i)(I) includes ''an agreement, contract, or transaction in foreign currency that * * * is a contract of sale of a commodity for future delivery (or an option on such a contract) or an option (other than an option executed or traded on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(a)).'' [7] A Federal regulatory agency's retail forex rule must treat similarly all such futures and options and all agreements, contracts, or transactions that are functionally or economically similar to such futures and options.[8]

This Dodd-Frank Act amendment to the CEA takes effect 360 days from the enactment of the Act.[9] After that date an institution for which the FDIC is the ''appropriate Federal banking agency'' pursuant to section 3(q) of the Federal Deposit Insurance Act, 12 U.S.C. section 1813(q), hereafter referred to as an FDIC-supervised IDI) may not engage in off-exchange foreign currency futures and options with a customer who does not qualify as an eligible contract participant under the CEA (ECP) except pursuant to a retail forex rule issued by the FDIC. The restrictions in the final rule do not apply to (1) transactions with a customer who qualifies as an ECP, (2) transactions that are spot contracts irrespective of whether the customer is or is not an ECP; or (3) forward contracts between a seller and a buyer that have the ability to deliver and accept delivery, respectively, in connection with their line of business. The retail forex rule does, however, apply to ''rolling spot'' transactions in foreign currency. The discussion of the definition of ''retail forex transaction'' below elaborates on the distinctions between rolling spot transactions and spot and forward contracts.

Any retail forex rule must prescribe appropriate requirements with respect to disclosure, recordkeeping, capital and margin, reporting, business conduct, and documentation requirements, and may include such other standards or requirements as the Federal regulatory agency determines to be necessary.[10]

## II. Overview of the Final Rule and Related Action

On September 10, 2010, the Commodity Futures Trading Commission (CFTC) adopted a retail forex rule for persons subject to its jurisdiction.[11] On April 22, 2011, the OCC proposed a retail forex rule for FDIC-supervised IDIs modeled on the CFTC's retail forex rule.[12] On May 11, 2011, the FDIC approved for publication a notice of proposed rulemaking. The NPR was published in the **Federal Register** on May 17, 2011 and the comment period closed on June 16, 2011. In response to NPR, the FDIC received six comments: Two comments from banks; a comment from a banking trade association; and three comments from individuals.

The FDIC is now adopting the proposed rule text as a final rule with few modifications.

In the preamble to the proposal, the FDIC indicated that retail forex transactions are subject to the Interagency Statement on Retail Sales of Nondeposit Investment Products (NDIP Policy Statement).[13] The NDIP Policy Statement describes the FDIC's expectations for an FDIC-supervised IDI that engages in the sale of nondeposit investment products to retail customers. The NDIP Policy Statement addresses issues such as disclosure, suitability, sales practices, compensation, and compliance.

In the proposal, the FDIC asked for comment on whether application of the NDIP Policy Statement created issues that the FDIC should address.

One commenters said that the NDIP Policy Statement should not apply to retail forex transactions, asserting that the retail forex rule, alone, would be sufficient to protect retail customers, and the imposition of the NDIP Policy Statement on retail forex transactions would create confusion and ambiguity. No specific provisions were identified, however, that create confusion or ambiguity. The commenter further argued that because the NDIP Policy Statement does not apply to CFTC registrants, its application to retail forex transactions would not promote consistent regulatory treatment of retail forex transactions.

The FDIC believes that it is appropriate to apply the NDIP Policy Statement to retail forex transactions. The consumer protections that the NDIP Policy Statement provides are no less important for retail forex transactions than for other nondeposit investment products. Moreover, there is no direct conflict between this rule and the NDIP Policy Statement because the Statement requires FDIC-supervised IDIs to develop policies and procedures to ensure that nondeposit investment product sales are conducted in compliance with applicable laws and regulations. If an FDIC-supervised IDI has questions regarding how the NDIP Policy Statement applies to its retail forex business, it should seek clarification from its examiners.

## III. Section-by-Section Analysis

### *Section 349.1—Authority, Purpose, and Scope*

This section authorizes an FDIC-supervised IDI to conduct retail forex transactions. As mentioned in the proposed rule, the FDIC will become the ''appropriate Federal banking agency'' for State savings association upon the transfer of the powers of the Office of Thrift Supervision to the FDIC and other federal banking agencies. Accordingly, by virtue of this statutorily-mandated transfer of power, State savings associations will become FDIC-supervised IDIs as of the transfer date (July 21, 2011) and thus will be subject to the FDIC's final retail forex rule.

The FDIC requested comment on whether the retail forex rule should apply to an FDIC-supervised IDI's foreign branches conducting retail forex transactions abroad, whether with U.S. or foreign customers. One commenter responded that there is no U.S. policy interest in applying U.S. consumer protection rules to transactions with non-U.S. residents conducted by foreign

[3] The CEA defines ''financial institution'' as including ''a depository institution (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)).'' 7 U.S.C. 1a(21)(E).

[4] Section 2(c)(2)(E)(i)(III) of the CEA, as amended by § 742(c), defines a ''Federal regulatory agency'' to mean the CFTC, the Securities and Exchange Commission, an appropriate Federal banking agency, the National Credit Union Association, and the Farm Credit Administration. Section 1a(2) of the CEA defines an ''appropriate Federal banking agency'' by incorporation of section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)). *See* Dodd-Frank Act sec. 312(c) (amending 12 U.S.C. 1813(q) to redefine ''appropriate Federal banking agency'').

[5] A retail customer is a person who is not an ''eligible contract participant'' under the CEA.

[6] 7 U.S.C. 2(c)(2)(E)(ii)(I).

[7] 7 U.S.C. 2(c)(2)(B)(i)(II).

[8] 7 U.S.C. 2(c)(2)(E)(iii)(II).

[9] *See* Dodd-Frank Act sec. 754.

[10] 7 U.S.C. 2(c)(2)(E)(iii)(I).

[11] *Regulation of Off-Exchange Retail Foreign Exchange Transactions and Intermediaries,* 75 FR 55409 (Sept. 10, 2010) (Final CFTC Retail Forex Rule). The CFTC proposed these rules prior to the enactment of the Dodd-Frank Act. *Regulation of Off-Exchange Retail Foreign Exchange Transactions and Intermediaries,* 75 FR 3281 (Jan. 20, 2010) (Proposed CFTC Retail Forex Rule).

[12] Retail Foreign Exchange Transactions, 76 FR 22633 (Apr. 22, 2011).

[13] *See* FDIC FIL–9–94 (Feb. 15, 1994); *see also* FDIC FIL–61–95 (Sept. 13, 1995).

branches. Such transactions are subject to foreign regulatory requirements that could be inconsistent with the retail forex rule. Subjecting those transactions to two sets of regulatory requirements would also place FDIC-supervised IDIs at a competitive disadvantage abroad.

One commenter opposed applying the retail forex rule to any transaction conducted out of a foreign branch of a U.S. depository institution, whether with a U.S. or non-U.S. retail customer. The commenter argued that foreign customers and U.S. persons with accounts overseas will be unnecessarily confused by the reach of the U.S. rule, especially when similar accounts at non-U.S. banks may not be subject to margin rules that are part of the retail forex rule. The commenter also argues that, by including foreign branches in its scope, the rule may inadvertently apply to products that were never intended to be covered, because they are not available or offered in the United States.

The FDIC recognizes the concerns raised by the commenter. Retail forex transactions between a foreign branch of an FDIC-supervised IDI and a non-U.S. customer are subject to any applicable disclosure, recordkeeping, capital, margin, reporting, business conduct, documentation, and other requirements of applicable foreign law. Therefore, those transactions are not subject to the requirements of §§ 349.3 and 349.5 to 349.16.

*Section 349.2—Definitions*

This section defines terms specific to retail forex transactions and to the regulatory requirements that apply to retail forex transactions.

The definition of ''retail forex transaction'' generally includes the following transactions in foreign currency between an FDIC-supervised IDI and a person that is not an eligible contract participant: [14] (i) A future or option on such a future; [15] (ii) options not traded on a registered national securities exchange; [16] and (iii) certain leveraged, margined, or bank-financed transactions,[17] including rolling spot forex transactions. The definition generally tracks the statutory language in section 2(c)(2)(B) and (C) of the CEA.[18]

Certain transactions in foreign currency are not ''retail forex transactions.'' For example, a spot forex transaction where one currency is bought for another and the two currencies are exchanged within two days would not meet the definition of ''retail forex transaction.'' [19] Similarly, ''retail forex transaction'' does not include a forward contract that creates an enforceable obligation to make or take delivery, provided that each counterparty has the ability to deliver and accept delivery in connection with its line of business.[20] In addition, the definition does not include transactions done through an exchange, because in those cases the exchange would be the counterparty to both the FDIC-supervised IDI and the retail forex customer, rather than the FDIC-supervised IDI directly facing the retail forex customer.

The proposed rule sought comment on whether leveraged, margined, or bank-financed forex transactions, including rolling spot forex transactions (so-called *Zelener* [21] contracts), should be regulated as retail forex transactions; the FDIC preliminarily believed that they should.[22]

One commenter supported the inclusion of rolling spot transactions in the definition of ''retail forex transactions.'' A rolling spot forex transaction nominally requires delivery of currency within two days, like spot transactions. However, in practice, the contracts are indefinitely renewed every other day and no currency is actually delivered until one party affirmatively closes out the position.[23] Therefore, the contracts are economically more like futures than spot contracts, although courts have held them to be spot contracts in form.[24] Like the CFTC's retail forex rule and the OCC's proposed retail forex rule, the final rule's definition includes leveraged, margined, or bank-financed rolling spot forex transactions, as well as certain other leveraged, margined, or bank-financed transactions.

Two commenters sought clarification that forex forwards would not be included in the definition, because transactions that convert or exchange actual currencies for any commercial or investment purpose are a traditional product offered by FDIC-supervised IDIs and do not raise the consumer protection issues associated with futures or rolling spot forex transactions.

The FDIC agrees that a forex forward that is not leveraged, margined, or financed by the FDIC-supervised IDI does not meet the definition of ''retail forex transaction.'' However, a leveraged, margined, or bank-financed forex forward is a retail forex transaction unless it creates an enforceable obligation to deliver between a seller and buyer that have the ability to deliver and accept delivery, respectively, in connection with their line of business [25] or the FDIC determines that the forward is not functionally or economically similar to a forex future or option, as described below.

One commenter sought clarification whether the term ''retail forex transaction'' includes a product known as a non-deliverable forex forward (NDF). The commenter describes an NDF as a cash-settled forward in which contractual parties are obligated to settle on the settlement date. In an NDF, the commenter explained, instead of taking physical delivery of the underlying foreign currency upon settlement, settlement is made in U.S. dollars based on the difference between the contractual forward rate and fixing rate.

[14] The definition of ''eligible contract participant'' is found in the CEA and is discussed below.

[15] 7 U.S.C. 2(c)(2)(B)(i)(I).

[16] 7 U.S.C. 2(c)(2)(B)(i)(I).

[17] 7 U.S.C. 2(c)(2)(C).

[18] 7 U.S.C. 2(c)(2)(B) and (C).

[19] *See generally CFTC* v. *Int'l Fin. Servs. (New York), Inc.,* 323 F. Supp. 2d 482, 495 (S.D.N.Y. 2004) (distinguishing between foreign exchange futures contracts and spot contracts in foreign exchange, and noting that foreign currency trades settled within two days are ordinarily spot transactions rather than futures contracts); *see also Bank Brussels Lambert* v. *Intermetals Corp.,* 779 F. Supp. 741, 748 (S.D.N.Y. 1991).

[20] *See* 7 U.S.C. 2(c)(2)(C)(i)(II)(bb)(BB); *CFTC* v. *Int'l Fin. Servs. (New York), Inc.,* 323 F. Supp. 2d 482, 495 (S.D.N.Y. 2004) (distinguishing between forward contracts in foreign exchange and foreign exchange futures contracts); *see also* William L. Stein, *The Exchange-Trading Requirement of the Commodity Exchange Act,* 41 Vand. L.Rev. 473, 491 (1988). In contrast to forward contracts, futures contracts generally include several or all of the following characteristics: (i) Standardized nonnegotiable terms (other than price and quantity); (ii) parties are required to deposit initial margin to secure their obligations under the contract; (iii) parties are obligated and entitled to pay or receive variation margin in the amount of gain or loss on the position periodically over the period the contract is outstanding; (iv) purchasers and sellers are permitted to close out their positions by selling or purchasing offsetting contracts; and (v) settlement may be provided for by either (a) cash payment through a clearing entity that acts as the counterparty to both sides of the contract without delivery of the underlying commodity; or (b) physical delivery of the underlying commodity. *See* Edward F. Greene et al., *U.S. Regulation of International Securities and Derivatives Markets* § 14.08[2] (8th ed. 2006).

[21] *CFTC* v. *Zelener,* 373 F.3d 861 (7th Cir. 2004); *see also CFTC v. Erskine,* 512 F.3d 309 (6th Cir. 2008).

[22] 7 U.S.C. 2(c)(2)(E)(iii) (requiring that retail forex rules treat all functionally or economically similar transactions similarly); *see* 17 CFR 5.1(m) (defining ''retail forex transaction'' for CFTC-registered retail forex dealers)

[23] For example, in *Zelener,* the retail forex dealer retained the right, at the date of delivery of the currency to deliver the currency, roll the transaction over, or offset all or a portion of the transaction with another open position held by the customer. *See CFTC* v. *Zelener,* 373 F.3d 861, 868 (7th Cir. 2004).

[24] *See, e.g., CFTC* v. *Erskine,* 512 F.3d 309, 326 (6th Cir. 2008); *CFTC* v. *Zelener,* 373 F.3d 861, 869 (7th Cir. 2004).

[25] *See* 7 U.S.C. 2(c)(2)(C)(i)(II)(bb)(BB).

An NDF would not be a covered transaction if a bank's customer were an ECP. Where the counterparty is a non-ECP, that is, a retail customer, an NDF would be a covered transactions if it were entered into on a leveraged or margined basis, or financed by the bank.

The final rule contains a provision that allows the FDIC to exempt specific transactions or types of transaction from the third prong of the ''retail forex transaction'' definition. The FDIC is concerned that certain traditional banking products, which are distinguishable from speculative rolling spot forex transactions, may inadvertently fall within the definition of ''retail forex transaction'' as leveraged, margined, or bank-financed forex transactions. This result was not intended by the Dodd-Frank Act, which requires retail forex rules to treat similarly transactions that are functionally or economically similar to forex futures or options.[26] FDIC-supervised IDIs may seek a determination that a given transaction or types of transaction does not fall within the third prong of the ''retail forex transaction'' definition by submitting a written request to the FDIC.

One commenter asked for confirmation that deposit accounts with foreign exchange features are outside the scope of the rule. The Legal Certainty for Bank Products Act of 2000, as amended by the Dodd-Frank Act, generally exempts ''identified banking products'' from the CEA.[27] Identified banking products include: Deposit accounts, savings accounts, certificates of deposit, or other deposit instruments issued by a bank; banker's acceptances; letters of credit issued or loans made by a bank; debit accounts at a bank arising from a credit card or similar arrangement; and certain loan participations.[28] Because identified banking products are not subject to the CEA, they are not prohibited by section 2(c)(2)(E)(ii) of the CEA. To provide clarity, the final rule excludes identified banking products from the definition of ''retail forex transaction.'' Identified banking products that have embedded foreign exchange features, for example a deposit account in which the customer may deposit funds in one currency and withdraw funds in another, are not retail forex transactions.

This section defines several terms by reference to the CEA, the most important of which is ''eligible contract participant.'' Foreign currency transactions with eligible contract participants are not considered retail forex transactions and are therefore not subject to this rule. In addition to a variety of financial entities, certain governmental entities, businesses, and individuals may be eligible contract participants.[29]

*Section 349.3—Prohibited Transactions*

This section prohibits an FDIC-supervised IDI and its institution-affiliated parties from engaging in fraudulent conduct in connection with retail forex transactions. This section also prohibits an FDIC-supervised IDI from acting as a counterparty to a retail forex transaction if the FDIC-supervised IDI or its affiliate exercises discretion over the customer's retail forex account because the FDIC views such self-dealing as inappropriate.

The FDIC received no comments to this section, and adopts it as proposed.

*Section 349.4—Filing Procedures*

This section requires that, before engaging in a retail forex business, as defined in section 349.2, an FDIC-supervised IDI shall provide prior written notice and obtain the FDIC's prior written consent. The notice would be filed with the appropriate FDIC office and would include: (1) A brief description of the FDIC-supervised IDI's proposed retail forex business and the manner in which it will be conducted; (2) the amount of the institution's existing or proposed direct or indirect investment in the retail forex business as well as calculations sufficient to indicate compliance with all capital requirements in section 349.8, discussed below, and all other applicable capital standards; (3) a copy of the institution's comprehensive business plan that includes a discussion of, among other things, conflict of interest and how the operation of the retail forex business is consistent with the institution's overall strategy; (4) a description of the institution's target customers for its proposed retail forex business and related information, including without limitation credit evaluations, customer appropriateness, and ''know your customer'' documentation; (5) a resolution by the institution's board of directors that the proposed retail forex business is an appropriate activity for the institution and that the institution's written policies, procedures, and risk measurement and management systems and controls address conducting retail forex business in a safe and sound manner and in compliance with this part; and (6) sample disclosures sufficient to demonstrate compliance with section 349.6, discussed below.

The FDIC may request additional information, as necessary, prior to issuing its consent.

For FDIC-supervised IDIs that have an existing retail forex business, the final rule will allow the entity to continue to operate the business for up to six months if it provides the written notice and requests the FDIC's written consent within 30 days of the effective date of this rule.

The FDIC received no comment on this section and adopts it as proposed.

*Section 349.5—Application and Closing Out of Offsetting Long and Short Positions*

This section requires an FDIC-supervised IDI to close out offsetting long and short positions in a retail forex account. The FDIC-supervised IDI would have to offset such positions regardless of whether the customer has instructed otherwise. The CFTC concluded that ''keeping open long and short positions in a retail forex customer's account removes the opportunity for the customer to profit

[26] 7 U.S.C. 2(c)(2)(E)(iii)(II).

[27] 7 U.S.C. 27a(a)(1). An identified banking product offered by an FDIC-supervised IDI could become subject to the CEA if the FDIC determines, in consultation with the CFTC and the Securities and Exchange Commission, that the product would meet the definition of a ''swap'' under the CEA or a ''security-based swap'' under Securities Exchange Act of 1934 and has become known to the trade as a swap or security-based swap, or otherwise has been structured as an identified banking product for the purpose of evading the provisions of the CEA, the Securities Act of 1933, or the Securities Exchange Act of 1934. 7 U.S.C. 27a(b).

[28] 7 U.S.C. 27(b) (citing Gramm-Leach-Bliley Act sec. 206(a)(1) to (5)).

[29] The term ''eligible contract participant'' is defined at 7 U.S.C. 1a(18), and for purposes most relevant to this proposed rule generally includes:

(a) a corporation, partnership, proprietorship, organization, trust, or other entity—

(1) that has total assets exceeding $10,000,000;

(2) the obligations of which under an agreement, contract, or transaction are guaranteed or otherwise supported by a letter of credit or keepwell, support, or other agreement by certain other eligible contract participants; or

(3) that—

(i) has a net worth exceeding $1,000,000; and

(ii) enters into an agreement, contract, or transaction in connection with the conduct of the entity's business or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by the entity in the conduct of the entity's business;

(b) subject to certain exclusions,

(1) a governmental entity (including the United States, a State, or a foreign government) or political subdivision of a governmental entity;

(2) a multinational or supranational governmental entity; or

(3) an instrumentality, agency or department of an entity described in (b)(1) or (2); and

(c) an individual who has amounts invested on a discretionary basis, the aggregate of which is in excess of—

(1) $10,000,000; or

(2) $5,000,000 and who enters into the agreement, contract, or transaction in order to manage the risk associated with an asset owned or liability incurred, or reasonably likely to be owned or incurred, by the individual.

on the transactions, increases the fees paid by the customer and invites abuse.'' [30] The FDIC agreed with this concern in the notice of proposed rulemaking.

One commenter indicated that a customer should be given the opportunity to provide instructions with respect to the manner in which the customer's retail forex transaction are offset when: (i) The customer maintains separate accounts managed by different advisors; (ii) the customer maintains separate accounts using different trading strategies; or (iii) the customer employs different trading strategies in one account and lies certain orders to risk-manage that exposure. Two commenters also sought clarification that a customer could provide specific offset instructions in writing or orally, and that such instructions could be on a blanket basis.

The FDIC agrees that a customer should be able to offset retail forex transactions in a particular manner, if he or she so chooses. Paragraph (c) has been modified to provide that, notwithstanding the default offset rules in paragraphs (a) and (b), the FDIC-supervised IDI must offset retail forex transactions pursuant to a customer's specific instructions. Blanket instructions are not sufficient for this purpose, as they could obviate the default rule. However, offset instructions need not be given separately for each pair of orders in order to be ''specific.'' Instructions that apply to sufficiently defined sets of transactions could be specific enough. Finally, consistent with the changes to section 349.12, offset instructions may be provided in writing or orally provided that any oral instruction be captured by a recording mechanism.

*Section 349.6—Disclosure*

This section requires an FDIC-supervised IDI to provide retail forex customers with a risk disclosure statement similar to the one required by the CFTC's retail forex rule, but tailored to address certain unique characteristics of retail forex in FDIC-supervised IDIs. The prescribed risk disclosure statement would describe the risks associated with retail forex transactions.

Two commenters agreed with the need for a robust risk disclosure statement, but suggested that a shorter, clearer, more direct, and less redundant statement would be more effective. One commenter recommended that the proposed disclosure statement be a sample or safe harbor language for banks to use as they find appropriate.

After careful consideration, the final rule incorporates several changes to the disclosures to eliminate redundancies, address ambiguities, and convey the information more clearly.

The proposal requested comment on whether the risk disclosure statement should disclose the percentage of profitable retail forex accounts.

One commenter said that disclosing the ratio of profitable to nonprofitable retail forex accounts is not useful because those ratios depend on many factors (including the trading expertise of customers) and could suggest that a bank is a more attractive retail forex counterparty than another.

In its retail forex rule, the CFTC requires its registrants to disclose to retail customers the percentage of retail forex accounts that earned a profit, and the percentage of such accounts that experienced a loss, during each of the most recent four calendar quarters.[31] The CFTC explained that ''the vast majority of retail customers who enter these transactions do so solely for speculative purposes, and that relatively few of these participants trade profitably.'' [32] In its final rule, the CFTC found this requirement appropriate to protect retail customers from ''inherent conflicts embedded in the operations of the retail over-the-counter forex industry.'' [33] The FDIC agrees with the CFTC and thus the final rule requires this disclosure.

The proposal requested comment on whether the risk disclosure statement should include a disclosure that when a retail customer loses money trading, the dealer makes money.

One of the commenters said that this disclosure is inaccurate because in most cases a bank may immediately hedge retail forex transactions or nets them with similar transactions and therefore does not profit from exchange rate fluctuations. The commenter argued it is more accurate to inform customers that the bank may or does mark-up (or down) transactions or apply commission rates to transactions that will result in income to the bank.

The FDIC understands that the economic model of a retail forex business may be to profit from spreads, fees, and commissions. Nonetheless, because any FDIC-supervised IDI engaging in retail forex transactions is trading as principal, by definition, when the retail forex customer loses money, the FDIC-supervised IDI makes money on that transaction. The FDIC therefore believes that this disclosure is accurate and helps potential retail forex customers understand the nature of retail forex transactions. Similarly, the CFTC's retail forex rule requires a disclosure that when a retail customer loses money trading, the dealer makes money on such trades, in addition to any fees, commissions, or spreads.[34] The final rule includes this disclosure requirement.

The proposal asked whether it would be convenient to banks and retail forex customers to allow the retail forex risk disclosure to be combined with other disclosures that FDIC-supervised IDIs make to their customers.

One commenter asked the FDIC to confirm that banks may add topics to the risk disclosure statement.

The FDIC is concerned that the effectiveness of the disclosure could be diminished if surrounded by other topics. Therefore, the final rule requires the risk disclosure statement to be given to potential retail forex customers as set forth in the rule. FDIC-supervised IDIs may describe and provide additional information on retail forex transactions in a separate document.

One commenter further asked the FDIC to confirm that the risk disclosure statement may be appended to account opening agreements or forms, and that a single signature by the customer on a combined account agreement and disclosure form can be used as long as the customer is directed to and acknowledges the risk disclosure statement immediately prior to the signature line.

The FDIC believes that a separate risk disclosure document appropriately highlights the risks in retail forex transactions, and that requiring a separate signature for the separate risk disclosure appropriately calls a potential retail forex customer's attention to the risk disclosure statement. However, a bank may attach the risk disclosure to a related document, such as the account agreement.

The proposal requested comment on whether the risk disclosure statement should include a disclosure of fees the bank charges retail forex customers.

One of the commenters agreed that the disclosure of fees is appropriate, but should not include income from hedging retail forex customers' positions or income streams not charged to the customer. Moreover, the same commenter stated it is impractical to

[30] Proposed CFTC Retail Forex Rule, 75 FR at 3287 n.54.

[31] 17 CFR 5.5(e)(1).

[32] Proposed CFTC Retail Forex Rule, 75 FR at 3289.

[33] Final CFTC Retail Forex Rule, 75 FR at 55412.

[34] 17 CFR 5.5(b).

numerically state the bid/ask spread given that it may vary.

The final rule, like the proposed rule, does not require FDIC-supervised IDIs to disclose income streams not charged to the retail forex customer. However, an FDIC-supervised IDI must do more than simply describe the means by which they earn revenue. To the extent practical, it must quantify the fees, commissions, spreads, and charges it charges the retail forex customer. The FDIC further believes that disclosure of the bid/ask spread is possible in a variety of ways. If an FDIC-supervised IDI bases its prices off of the prices provided by a third party, then the FDIC-supervised IDI may disclose the use of the third party's pricing and the markup charged to retail forex customers. Alternatively, the FDIC-supervised IDI may disclose the bid/ask spread by quoting both the bid and ask prices to retail forex customers prior to entering into a retail forex transaction. These quotes may be provided as part of an electronic trading platform or, after a retail forex customer calls the FDIC-supervised IDI for a retail forex transaction, by providing both a bid and ask price for the transaction.

One of the bank commenters read the proposed disclosure to suggest that a bank cannot seek to recover losses not covered by a customer's margin account via an appropriate dispute resolution forum, and asked the FDIC confirm that this was not the case.

It is not clear how common it will be for a retail forex customer to incur retail forex obligations, including losses, in excess of margin funds. Section 48.9(d)(4) requires an FDIC-supervised IDI, in the event that a retail forex customer's margin falls below the amount needed to satisfy the margin requirement to either: (1) Collect sufficient margin from the retail forex customer; or (2) liquidate the retail forex customer's retail forex transactions. This requirement precludes an FDIC-supervised IDI from allowing customer's retail forex transactions to remain open and continuing to accrue losses after it has determined that additional margin funds are required. The final rule does not forbid an FDIC-supervised IDI, from seeking to recover a deficiency from a retail forex customer by obtaining a money judgment or other enforceable order in an appropriate venue and then exercising its collection rights as a judgment creditor. The disclosure has been revised to make this fact clear.

Finally, the commenter said that the disclosure regarding the availability of FDIC-insurance for retail forex transactions should be clarified.

In the final rule, the disclosure requires an FDIC-supervised IDI to state that retail forex transactions are not FDIC-insured. The commenter agreed with that statement. It noted, however, that margin funds may be insured deposits. The FDIC is charged with interpreting the deposit insurance provisions of the FDI Act, and the insured status of margin funds will turn on whether the funds are held in a way consistent with those provisions, as interpreted by the FDIC. Nevertheless, an FDIC-supervised IDI may disclose the availability of FDIC insurance for retail forex margin accounts in a separate document if permitted by law, including FDIC requirements related to such disclosure and applicable provisions of the NDIP Policy Statement.

*Section 349.7—Recordkeeping*

This section specifies which documents and records an FDIC-supervised IDI engaged in retail forex transactions must retain for examination by the FDIC. This section also prescribes document maintenance standards. The FDIC notes that records may be kept electronically as permitted under the Electronic Signatures in Global and National Commerce Act.[35]

One of the commenters, had a concern with proposed section 349.7(a)(5), which states that immediately upon the written or verbal receipt of a retail forex transactions order, an FDIC-supervised IDI shall prepare a written order memorandum, sometimes referred to as a trade confirmation, for the order. The commenter requested clarification about whether the use of a telephone recording system and the retention of telephone recordings would satisfy such recordkeeping requirements if details of the transaction are affirmed or confirmed with the customer over a recorded telephone line.

After considering this comment, the FDIC has amended section 349.7 to permit the use of oral phone orders provided they are recorded and customers are advised that they are speaking on a recorded line.

Recordkeeping requirements found in section 349.13(a)(4) of the proposed rule were moved into this section to centralize recordkeeping requirements in one section. Furthermore, the recordkeeping requirements for order tickets are now medium-neutral: an FDIC-supervised IDI may prepare an order ticket by recording an oral conversation, for example via a telephone recording system. This change reflects a change to section 349.12 that allows a retail customer to authorize a retail forex transaction orally.

*Section 349.8—Capital Requirements*

This section requires that an FDIC-supervised IDI that offers or enters into retail forex transactions must be ''well capitalized'' as defined in the FDIC's prompt corrective action regulation [36] or the FDIC-supervised IDI must obtain an exemption from the FDIC. In addition, an FDIC-supervised IDI must continue to hold capital against retail forex transactions as provided in the FDIC's capital regulation.[37] This rule does not amend the FDIC's prompt corrective action regulation or capital regulation.

*Section 349.9—Margin Requirements*

Paragraph (a) requires an FDIC-supervised IDI that engages in retail forex transactions, in advance of any such transaction, to collect from the retail forex customer margin equal to at least 2 percent of the notional value of the retail forex transaction if the transaction is in a major currency pair, and at least 5 percent of the notional value of the retail forex transaction otherwise. These margin requirements are identical to the requirements imposed by the CFTC's retail forex rule.

The proposed rule requested comment on whether it should define the major currencies in the final rule, but no comments addressed this issue. The proposed approach to identifying major currencies is adopted in the final rule.

A major currency pair is a currency pair with two major currencies. The major currencies currently are the U.S. Dollar (USD), Canadian Dollar (CAD), Euro (EUR), United Kingdom Pound (GBP), Japanese Yen (JPY), Swiss franc (CHF), New Zealand Dollar (NZD), Australian Dollar (AUD), Swedish Kronor (SEK), Danish Kroner (DKK), and Norwegian Krone (NOK).[38] An evolving market could change the major currencies, so the FDIC is not proposing to define the term ''major currency,'' but rather expects that FDIC-supervised IDIs will obtain an interpretive letter from the FDIC prior to treating any currency other than those listed above as a ''major currency.'' [39]

For retail forex transactions, margin protects the retail forex customer from

[35] 15 U.S.C. 7001(d).

[36] 12 CFR part 6.

[37] 12 CFR part 3.

[38] *See* National Futures Association, *Forex Transactions: A Regulatory Guide* 17 (Feb. 2011); Federal Reserve Bank of New York, *Survey of North American Foreign Exchange Volume* tbl. 3e (Jan. 2011); Bank for International Settlements, *Report on Global Foreign Exchange Market Activity in 2010* at 15 tbl. B.6 (Dec. 2010).

[39] The Final CFTC Retail Forex Rule similarly does not define ''major currency.''

the risks related to trading with excessive leverage. The volatility of the foreign currency markets exposes retail forex customers to substantial risk of loss. High leverage can significantly increase a customer's losses and gains. Even a small move against a customer's position can result in a substantial loss. Even with required margin, losses can exceed the margin posted, and if the account is not closed out, and depending on the specific circumstances, the customer could be liable for additional losses. Given the risks that inherent in the trading of retail forex transactions by retail customers, the only funds that should be invested in such transactions are those that the customer can afford to lose.

Prior to the CFTC's rule, non-bank dealers routinely permitted customers to trade with 1 percent margin (leverage of 100:1) and sometimes with as little as 0.25 percent margin (leverage of 400:1). When the CFTC proposed its retail forex rule in January 2010, it proposed a margin requirement of 10 percent (leverage of 10:1). In response to comments, the CFTC reduced the required margin in the final rule to 2 percent (leverage of 50:1) for trades involving major currencies and 5 percent (leverage of 20:1) for trades involving non-major currencies.

The proposal requested comment on whether these margin requirements were appropriate to protect retail forex customers.

One commenter, while not objecting to the amount of margin required, suggested that customers should have some reasonable time to meet margin calls before they are deemed to have defaulted and face a forced liquidation of their positions.

Subject to reasonable collection times as described below, an FDIC-supervised IDI must ensure that there is always sufficient margin in a retail forex customer's margin account for the customer's open retail forex transactions. If the amount of margin in a retail forex customer's margin account is insufficient to meet the requirements of paragraph (a), then the FDIC-supervised IDI must make a margin call to replenish the margin account to an acceptable level. Retail forex customers should have a reasonable amount of time to post required margin for retail forex transactions. The general market practice is for retail forex counterparties to make margin calls at the close of trading on a trading day based on margin levels at the end of that day or at the open of trading on the next trading day based on margin levels at the end of that prior day. If the retail forex customer does not post sufficient margin by the end of the next close of trading, then the retail forex counterparty liquidates the customer's retail forex account. In other words, by the close of business on a given trading day, the margin account must be sufficient to meet the margin requirements as at the end of the prior trading day.

Paragraph (b) specifies the acceptable forms of margin that customers may post. FDIC-supervised IDIs must establish policies and procedures providing for haircuts for noncash margin collected from customers and must review these haircuts annually. However, it may be prudent for FDIC-supervised IDIs to review and modify the size of the haircuts more frequently. The FDIC requested comment on whether the final rule should specify haircuts for noncash margin. The FDIC received no comments on this paragraph and adopts this paragraph as proposed.

Paragraph (c) requires an FDIC-supervised IDI to hold each retail forex customer's retail forex transaction margin in a separate account. This paragraph is designed to work with the prohibition on set-off in paragraph (e), so that an FDIC-supervised IDI may not have an account agreement that treats all of a retail forex customer's assets held by a bank as margin for retail forex transactions.

One commenter requested clarification that this paragraph allows FDIC-supervised IDIs to place margin into an omnibus or commingled account for operational convenience, provided that the bank keeps records of each customer's margin balance.

FDIC-supervised IDIs may place margin collected from retail forex customers into an omnibus or commingled account if the bank keeps records of each retail forex customer's margin balance. A ''separate account'' is one separate from the retail forex customer's other accounts at the bank. For example, margin for retail forex transactions cannot be held in a retail forex customer's savings account. Funds in a savings account pledged as retail forex margin must be transferred to a separate margin account, which could be an individual or an omnibus margin account. The final rule contains slightly modified language to clarify this intent.

Paragraph (d) requires an FDIC-supervised IDI to collect additional margin from the customer or to liquidate the customer's position if the amount of margin held by the FDIC-supervised IDI fails to meet the requirements of paragraph (a). The proposed rule would have required the FDIC-supervised IDI to mark the customer's open retail forex positions and the value of the customer's margin to the market daily to ensure that a retail forex customer does not accumulate substantial losses not covered by margin.

The proposal requested comment on how frequently retail forex customers' margin accounts should be marked to market.

One commenter asked that the final rules permit marking to market more frequently than daily if the FDIC-supervised IDI's systems and customer agreements permit. The final rule, like the proposed rule, requires marking to market at least once per day. Nothing in paragraph (d) forbids a more frequent schedule.

Paragraph (e) prohibits an FDIC-supervised IDI from applying a retail forex customer's losses against any asset or liability of the retail forex customer other than money or property pledged as margin. An FDIC-supervised IDI's relationship with a retail forex customer may evolve out of a prior relationship of providing financial services or may evolve into such a relationship. Thus it is more likely that an FDIC-supervised IDI acting as a retail forex counterparty will hold other assets or liabilities of a retail forex customer, for example a deposit account or mortgage, than a retail forex dealer regulated by the CFTC. The FDIC believes it is inappropriate to allow an FDIC-supervised IDI to leave trades open and allow additional losses to accrue that can be applied against a retail forex customer's other assets or liabilities held by the FDIC-supervised IDI or an affiliate. However, should a retail forex customer's losses exceed the amount of margin he or she has pledged, this rule does not forbid an FDIC-supervised IDI from seeking to recover the deficiency in an appropriate forum, such as a court of law. The FDIC-supervised IDI would be an unsecured creditor of the retail forex customer with respect to that claim.

One commenter suggested that retail forex customers should be able to pledge assets other than those held in the customer's margin account. For example, a customer could nominate a deposit account as containing margin for its retail forex transactions.

Nothing in this rule prevents retail forex customers from pledging other assets they have at the bank as margin for retail forex transactions. However, once those assets are pledged as margin, the FDIC-supervised IDI must transfer them to the separate margin account. For example, if a retail forex customer pledges $500 in her checking account as margin, then the bank must deduct $500 from the checking account and place

$500 in the margin account. The FDIC believes this transfer appropriately alerts retail forex customers to the nature of the pledge. An FDIC-supervised IDI may not evade this requirement by merely taking a security interest in assets pledged as margin: pledged assets must be placed in a separate margin account.

*Section 349.10—Required Reporting to Customers*

This section requires an FDIC-supervised IDI engaging in retail forex transactions to provide each retail forex customer a monthly statement and confirmation statements.

The proposal sought comment on whether this section provides for statements that would be useful and meaningful for retail forex customers, or whether other information would be more appropriate.

One commenter sought clarification that the statements may be provided electronically, and also suggested that retail forex customers would be better served with continuous online access to account information rather than monthly statements. One commenter recommended that the customer should have the opportunity to opt out of receiving monthly statements (whether paper or electronic) and confirmation statements for each retail forex transaction.

The FDIC encourages FDIC-supervised IDIs to provide real-time, continuous access to account information, and this rule does not prevent FDIC-supervised IDIs from doing so. However, the FDIC believes it is valuable to require FDIC-supervised IDIs to provide retail forex account information to retail forex customers at least once per month. Monthly statements may be provided electronically as permitted under the Electronic Signatures in Global and National Commerce Act.[40]

*Section 349.11—Unlawful Representations*

This section prohibits an FDIC-supervised IDI and its institution-affiliated parties from representing that the Federal government, the FDIC, or any other Federal agency has sponsored, recommended, or approved retail forex transactions or products in any way. This section also prohibits an FDIC-supervised IDI from implying or representing that it will guarantee against or limit retail forex customer losses or not collect margin as required by section 349.9. This section does not prohibit an FDIC-supervised IDI from sharing in a loss resulting from error or mishandling of an order, and guaranties entered into prior to effectiveness of the prohibition would only be affected if an attempt is made to extend, modify, or renew them. This section also does not prohibit an FDIC-supervised IDI from hedging or otherwise mitigating its own exposure to retail forex transactions or any other foreign exchange risk.

The FDIC received no comments on this section and adopts it as proposed.

*Section 349.12—Authorization To Trade*

The proposed rule required FDIC-supervised IDIs to have specific written authorization from a retail forex customer before effecting a retail forex transaction. Three commenters said that requiring specific written authorization from a retail forex customer before effecting a retail forex transaction for that customer would be impractical. One of the commenters indicated that such a requirement could be burdensome and detrimental to the customer's interests, for example if the customer cannot, due to technical difficulties, convey written instructions.

The FDIC agrees with this concern, and further notes that the CFTC's retail forex rule does not require written authorization for each retail forex transaction. The final rule requires an FDIC-supervised IDI to obtain a retail forex customer's specific authorization to effect a particular trade. FDIC-supervised IDIs must keep records of authorizations to trade pursuant to this rule and if the customer conveys his or her authorization orally by telephone, the authorization must be preserved by recording.

*Section 349.13—Trading and Operational Standards*

This section largely follows the trading standards of the CFTC's retail forex rule, which were developed to prevent some of the deceptive or unfair practices identified by the CFTC and the National Futures Association.

Under paragraph (a), an FDIC-supervised IDI engaging in retail forex transactions is required to establish and enforce internal rules, procedures and controls (1) to prevent front running, in which transactions in accounts of the FDIC-supervised IDI or its related persons are executed before a similar customer order; and (2) to establish settlement prices fairly and objectively.

One commenter requested clarification that the prohibition on front running applies only when the person entering orders for the bank's account or the account of related persons has knowledge of unexecuted retail customer orders, and that a bank may comply with this provision by erecting a firewall between the retail forex order book and other forex trading desks.

The final rule requires FDIC-supervised IDIs to establish reasonable policies, procedures, and controls to address front running. This provision is designed to prevent the FDIC-supervised IDIs from unfairly taking advantage of information they gain from customer trades. Effective firewalls and information barriers are reasonable policies, procedures, and controls to ensure that an FDIC-supervised IDI does not take unfair advantage of its retail forex customers. The final rule clarifies paragraph (a) accordingly.

Paragraph (b) prohibits an FDIC-supervised IDI engaging in retail forex transactions from disclosing that it holds another person's order unless disclosure is necessary for execution or is made at the FDIC's request. The FDIC received no comments on this paragraph and adopts this paragraph as proposed.

Paragraph (c) ensures that related persons of another retail forex counterparty do not open accounts with an FDIC-supervised IDI without the knowledge and authorization of the account surveillance personnel of the other retail forex counterparty with which they are affiliated. Similarly, paragraph (d) ensures that related persons of an FDIC-supervised IDI do not open accounts with other retail forex counterparties without the knowledge and authorization of the account surveillance personnel of the FDIC-supervised IDI with which they are affiliated.

One commenter requested confirmation that FDIC-supervised IDIs may rely on a representation of potential customers that they are not affiliated with a retail forex counterparty. Paragraph (c) prohibits an FDIC-supervised IDI from *knowingly* handling the retail forex account of a related person of a retail forex counterparty. To the extent reasonable, FDIC-supervised IDIs may rely on representations of potential retail forex customers. However, if an FDIC-supervised IDI has actual knowledge that a retail forex customer is a related person of a retail forex counterparty, then no representation by the customer will allow the bank to handle that retail forex account. An FDIC-supervised IDI should inquire as to whether a potential retail forex customer is related to a retail forex counterparty to avoid violating paragraph (c) through willful ignorance.

One commenter also requested clarification that these paragraphs apply only to employees of firms that offer

[40] 15 U.S.C. 7001(c).

retail forex transactions, and, in the case of banks, only employees of the retail forex business and not any employee of the bank that offers retail forex transactions. The FDIC agrees that the prohibition in paragraph (c) and (d) should only apply to employees working in the retail forex business; paragraphs (c) and (d) are designed to prevent evasion of the prohibition against front running. The final rule clarifies this point.

Paragraph (e) prohibits an FDIC-supervised IDI engaging in retail forex transactions from (1) entering a retail forex transaction to be executed at a price that is not at or near prices at which other retail forex customers have executed materially similar transactions with the FDIC-supervised IDI during the same time period, (2) changing prices after confirmation, (3) providing a retail forex customer with a new bid price that is higher (or lower) than previously provided without providing a new ask price that is similarly higher (or lower) as well, and (4) establishing a new position for a retail forex customer (except to offset an existing position) if the FDIC-supervised IDI holds one or more outstanding orders of other retail forex customers for the same currency pair at a comparable price.

Paragraph (e)(3) does not prevent an FDIC-supervised IDI from changing the bid or ask prices of a retail forex transaction to respond to market events. The FDIC understands that market practice among CFTC-registrants is not to offer requotes, but to simply reject orders and advise customers they may submit a new order (which the dealer may or may not accept). Similarly, an FDIC-supervised IDI may reject an order and advise customers they may submit a new order.

The proposal sought comment on whether paragraph (e)(3) appropriately protected retail forex customers, or whether a prohibition on re-quoting would be simpler.

One commenter argued that the prohibition on re-quoting in paragraph (e)(3) is overly broad and should permit new bids or offers to reflect updated spreads. In the alternative, the commenter suggested prohibiting re-quoting and requiring that, in the event an order is not confirmed, the customer must submit a new order at the then-currently displayed price. As stated above, rather than allowing re-quotes, an FDIC-supervised IDI may reject orders and request that customers submit a new order. Paragraph (e)(3) is consistent with the CFTC's retail forex rule and the FDIC adopts it as proposed.

Paragraph (e)(4) requires an FDIC-supervised IDI engaging in retail forex transactions to execute similar orders in the order they are received. The prohibition prevents an FDIC-supervised IDI from offering preferred execution to some of its retail forex customers but not others.

*Section 349.14—Supervision*

This section imposes on an FDIC-supervised IDI and its agents, officers, and employees a duty to supervise subordinates with responsibility for retail forex transactions to ensure compliance with the FDIC's retail forex rule.

The proposal requested comment on whether this section imposed requirements not already encompassed by safety and soundness standards. Having received no comment on this section, the FDIC adopts it as proposed.

*Section 349.15—Notice of Transfers*

This section describes the requirements for transferring a retail forex account. Generally, an FDIC-supervised IDI must provide retail forex customers 30 days' prior notice before transferring or assigning their account. Affected customers may then instruct the FDIC-supervised IDI to transfer the account to an institution of their choosing or liquidate the account. There are three exceptions to the above notice requirement: a transfer in connection with the receivership or conservatorship under the Federal Deposit Insurance Act; a transfer pursuant to a retail forex customer's specific request; and a transfer otherwise allowed by applicable law. An FDIC-supervised IDI that is the transferee of retail forex accounts must generally provide the transferred customers with the risk disclosure statement of section 6 and obtain each affected customer's written acknowledgement within 60 days.

The FDIC received no comments to this section and adopts it as proposed.

*Section 349.16—Customer Dispute Resolution*

This section imposes limitations on how an FDIC-supervised IDI may handle disputes arising out of a retail forex transaction. For example, this section would restrict an FDIC-supervised IDI's ability to require mandatory arbitration for such disputes.

The FDIC received no comments to this section and adopts it as proposed.

## IV. Regulatory Analysis

*A. Regulatory Flexibility Act*

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), generally requires an agency that is issuing a final rule to prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of the proposed rule on small entities. The RFA provides that an agency is not required to prepare and publish an initial regulatory flexibility analysis if the agency certifies that the proposed rule will not, if promulgated as a final rule, have a significant economic impact on a substantial number of small entities. Under regulations issued by the Small Business Administration, a small entity includes an FDIC-supervised IDI with assets of $175 million or less.[41] The rule would impose recordkeeping and disclosure requirements on any FDIC-supervised IDI, including one that engages in retail forex transactions with their customers.

Pursuant to section 605(b) of the RFA, the FDIC certifies that this proposed rule will not have a significant economic impact on a substantial number of the small entities it supervises. Accordingly, a regulatory flexibility analysis is not required. In making this determination, the FDIC estimated that there are no banks under $1 billion in assets currently engaging in retail forex transactions with their customers. Therefore, the FDIC estimates that no small banks under its supervision would be affected by the proposed rule.

Further, in response to the NPR, the FDIC received no comments with respect to RFA.

*B. Paperwork Reduction Act*

Request for Comment on Proposed Information Collection

In accordance with section 3512 of the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), the FDIC may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The information collection requirements contained in the notice of proposed rulemaking were submitted by the FDIC to OMB for review and approval under section 3506 of the PRA and section 1320.11 of OMB's implementing regulations (5 CFR part 1320 *et seq.*). In response, OMB filed comments with the FDIC in accordance with 5 CFR 1320.11(c). The comments indicated that OMB was withholding approval at that time. The FDIC was directed to examine public comment in response to the NPRM and include in the supporting statement of the

[41] Small Business Administration regulations define ''small entities'' to include banks with a four-quarter average of total assets of $175 million or less (13 CFR 121.201).

Information Collection Request (ICR) to be filed at the final rule stage a description of how the agency has responded to any public comments on the ICR, including comments maximizing the practical utility of the collection and minimizing the burden. The FDIC did receive several comments addressing the substance and/or method of the disclosure and reporting requirements contained in the rule. These comments and the FDIC's response to the comments are included in the preamble discussion and in a revised Supporting Statement submitted to OMB. The information collection requirements in the final rule are found in sections 349.4–349.7, 349.9–349.10, 349.13, 349.15–349.16.

The FDIC has a continuing interest in comments on its information collections. Therefore, comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility;

(b) The accuracy of the estimate of the burden of the information collection, 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 information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

Information Collection

*Title of Information Collection:* Retail Foreign Exchange Transactions.

*Frequency of Response:* On Occasion.

*Affected Public:* Businesses or other for-profit.

*Respondents:* State nonmember insured banks and foreign banks having insured branches.

*Filing Requirements*

The filing process in section 349.4 requires that, prior to initiating a retail forex business, an FDIC-supervised IDI provide the FDIC with prior notice, obtain the FDIC's prior written consent, and submit the documents provided for in proposed section 349.4(c). The FDIC-supervised IDI must also provide other information required by the FDIC, such as documentation of customer due diligence. An FDIC-supervised IDI already engaged in a retail forex business may continue to do so, provided it requests the FDIC's written consent.

Disclosure Requirements

Section 349.5, regarding the application and closing out of offsetting long and short positions, requires an FDIC-supervised IDI to promptly provide the customer with a statement reflecting the financial result of the transactions and the name of the introducing broker to the account. The customer must provide specific written instructions on how the offsetting transaction should be applied.

Section 349.6 requires that an FDIC-supervised IDI furnish a retail forex customer with a written disclosure before opening an account and receive an acknowledgment from the customer that it was received and understood. It also requires the disclosure by an FDIC-supervised IDI of its fees and other charges and its profitable accounts ratio.

Section 349.10 requires an FDIC-supervised IDI to issue monthly statements to each retail forex customer and to send confirmation statements following transactions.

Section 349.13(b) allows disclosure by an FDIC-supervised IDI that an order of another person is being held by them only when necessary to the effective execution of the order or when the disclosure is requested by the FDIC. Section 349.13(c) prohibits an FDIC-supervised IDI engaging in retail forex transactions from knowingly handling the account of any related person of another retail forex counterparty unless it receives proper written authorization, promptly prepares a written record of the order, and transmits to the counterparty copies all statements and written records. Section 349.13(d) prohibits a related person of an FDIC-supervised IDI engaging in forex transactions from having an account with another retail forex counterparty unless it receives proper written authorization and copies of all statements and written records for such accounts are transmitted to the counterparty.

Section 349.15 requires an FDIC-supervised IDI to provide a retail forex customer with 30-days prior notice of any assignment of any position or transfer of any account of the retail forex customer. It also requires an FDIC-supervised IDI to which retail forex accounts or positions are assigned or transferred to provide the affected customers with risk disclosure statements and forms of acknowledgment and receive the signed acknowledgments within 60 days.

The customer dispute resolution provisions in section 349.16 require certain endorsements, acknowledgments, and signature language. It also requires that within 10 days after receipt of notice from the retail forex customer that they intend to submit a claim to arbitration, the FDIC-supervised IDI provide them with a list of persons qualified in the dispute resolution and that the customer must notify the FDIC-supervised IDI of the person selected within 45 days of receipt of such list.

Policies and Procedures; Recordkeeping

Sections 349.7 and 349.13 require that an FDIC-supervised IDI engaging in retail forex transactions keep full, complete, and systematic records and establish and implement internal rules, procedures, and controls. Section 349.7 also requires that an FDIC-supervised IDI keep account, financial ledger, transaction and daily records, as well as memorandum orders, post-execution allocation of bunched orders, records regarding its ratio of profitable accounts, possible violations of law, records for noncash margin, and monthly statements and confirmations. Section 349.9 requires policies and procedures for haircuts for noncash margin collected under the rule's margin requirements, and annual evaluations and modifications of the haircuts.

*Estimated PRA Burden:*

*Estimated Number of Respondents:* 3 FDIC-supervised IDIs; 1 service provider.

*Total Reporting Burden:* 48 hours.

*Total Disclosure Burden:* 5,326 hours.

*Total Recordkeeping Burden:* 664 hours.

*Total Annual Burden:* 6,038 hours.

*C. Effective Date Under the Administrative Procedures Act*

This final rule takes effect on July 15, 2011. 5 U.S.C. 553(d)(1) requires publication of a substantive rule not less than 30 days before its effective date, except in cases where the rule grants or recognizes an exemption or relieves a restriction. Section 2(c)(2)(E)(ii) of the CEA would prohibit FDIC-supervised IDIs from engaging in retail forex transactions unless this final rule becomes effective on July 16, 2011. This final rule would relieve that restriction and allow FDIC-supervised IDIs to continue to engage in retail forex transactions without delay. Furthermore, under 5 U.S.C. 553(d)(3), an agency may find good cause to publish a rule less than 30 days before its effective date. The FDIC finds such good cause, as the 30-day delayed effective date is unnecessary under the provisions of the final rule. In Section 349.4(c) of the final rule, the FDIC

allows FDIC-supervised IDIs a 30-day grace period to inform the FDIC of its retail forex activity, along with up to a six-month window to comply with the provisions of the retail forex rule.

*D. Effective Date Under the CDRI Act*

The Riegle Community Development and Regulatory Improvement Act of 1994 (CDRI Act), 12 U.S.C. 4801 *et seq.,* provides that new regulations that impose additional reporting or disclosure requirements on insured depository institutions do not take effect until the first day of a calendar quarter after the regulation is published, unless the agency determines there is good cause for the regulation to become effective at an earlier date. The FDIC finds good cause that this final rule should become effective on July 15, 2011, as it would be in the public interest to require the disclosure and consumer protection provisions in this rule to take effect at this earlier date. If the rule did not become effective until October 1, 2011, then FDIC-supervised IDIs would not be able to provide retail forex transactions to customers to meet their financial needs.

*E. Small Business Regulatory Enforcement Fairness Act*

The Office of Management and Budget (OMB) has determined that the Final Rule is not a ''major rule'' within the meaning of the relevant sections of the Small Business Regulatory Enforcement Act of 1996 (SBREFA), 5 U.S.C. 801 *et seq.*

*F. Solicitation of Comments on Use of Plain Language*

Section 722 of the Gramm-Leach-Bliley Act, Public Law 106–102, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. No commenters suggested that the proposed rule was materially unclear, and the FDIC believes that the Final Rule is substantively similar to the proposed rule.

**List of Subjects in 12 CFR Part 349**

Banks, Consumer protection, Definitions, Foreign currencies, Foreign exchange, State nonmember insured bank, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the FDIC adds part 349 to Title 12, Chapter III of the Code of Federal Regulations to read as follows:

## PART 349—RETAIL FOREIGN EXCHANGE TRANSACTIONS

Sec.



**Authority:** 12 U.S.C.1813(q), 1818, 1819, and 3108; 7 U.S.C. 2(c)(2)(E), 27 *et seq.*

### § 349.1 Authority, purpose and scope.

(a) *Authority.* An FDIC-supervised insured depository institution that engages in retail forex transactions shall comply with the requirements of this part.

(b) *Purpose.* This part establishes rules applicable to retail forex transactions engaged in by FDIC-supervised insured depository institutions and applies on or after the effective date.

(c) *Scope.* Except as provided in paragraph (d) of this section, this part applies to FDIC-supervised insured depository institutions.

(d) *International applicability.* Sections 349.3 and 349.5 to 349.16 do not apply to retail foreign exchange transactions between a foreign branch of an FDIC-supervised IDI and a non-U.S. customer. With respect to those transactions, an FDIC-supervised IDI must comply with any disclosure, recordkeeping, capital, margin, reporting, business conduct, documentation, and other requirements of applicable foreign law.

### § 349.2 Definitions.

For purposes of this part—

The following terms have the same meaning as in the Commodity Exchange Act: ''Affiliated person of a futures commission merchant''; ''Associated person''; ''Contract of sale''; ''Commodity''; ''Eligible contract participant''; ''Futures commission merchant''; ''Security''; and ''Security futures product''.

*Affiliate* has the same meaning as in § 2(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(k)).

*Commodity Exchange Act* means the Commodity Exchange Act (7 U.S.C. 1 *et seq.*).

*FDIC-supervised insured depository institution* means any insured depository institution for which the Federal Deposit Insurance Corporation is the appropriate Federal banking agency pursuant to § 3(q) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(q).

*Forex* means foreign exchange.

*Institution-affiliated party* or *IAP* has the same meaning as in 12 U.S.C. 1813(u)(1), (2), or (3).

*Insured depository institution* or *IDI* has the same meaning as in 12 U.S.C. 1813(c)(2).

*Introducing broker* means any person who solicits or accepts orders from a retail forex customer in connection with retail forex transactions.

*Retail forex account* means the account of a retail forex customer, established with an FDIC-supervised insured depository institution, in which retail forex transactions with the FDIC-supervised insured depository institution as counterparty are undertaken, or the account of a retail forex customer that is established in order to enter into such transactions.

*Retail forex account agreement* means the contractual agreement between an FDIC-supervised insured depository institution and a retail forex customer that contains the terms governing the customer's retail forex account with the FDIC-supervised insured depository institution.

*Retail forex business* means engaging in one or more retail forex transactions with the intent to derive income from those transactions, either directly or indirectly.

*Retail forex customer* means a customer that is not an eligible contract participant, acting on his, her, or its own behalf and engaging in retail forex transactions.

*Retail forex proprietary account* means: a retail forex account carried on the books of an FDIC-supervised insured depository institution for one of the following persons; a retail forex account of which 10 percent or more is owned by one of the following persons; or a retail forex account of which an aggregate of 10 percent or more of which is owned by more than one of the following persons:

(1) The FDIC-supervised insured depository institution;

(2) An officer, director or owner of ten percent or more of the capital stock of the FDIC-supervised insured depository institution; or

(3) An employee of the FDIC-supervised insured depository institution, whose duties include:

(i) The management of the FDIC-supervised insured depository institution's business;

(ii) The handling of the FDIC-supervised insured depository institution's retail forex transactions;

(iii) The keeping of records, including without limitation the software used to make or maintain those records, pertaining to the FDIC-supervised insured depository institution's retail forex transactions; or

(iv) The signing or co-signing of checks or drafts on behalf of the FDIC-supervised insured depository institution;

(4) A spouse or minor dependent living in the same household as of any of the foregoing persons; or

(5) An affiliate of the FDIC-supervised insured depository institution;

*Retail forex counterparty* includes, as appropriate:

(1) An FDIC-supervised insured depository institution;

(2) A retail foreign exchange dealer;

(3) A futures commission merchant; and

(4) An affiliated person of a futures commission merchant.

*Related person,* when used in reference to a retail forex counterparty, means:

(1) Any general partner, officer, director, or owner of ten percent or more of the capital stock of the FDIC-supervised insured depository institution;

(2) An associated person or employee of the retail forex counterparty, if the retail forex counterparty is not an FDIC-supervised insured depository institution;

(3) An IAP, if the retail forex counterparty is an FDIC-supervised insured depository institution; and

(4) Any relative or spouse of any of the foregoing persons, or any relative of such spouse, who shares the same home as any of the foregoing persons.

*Retail forex transaction* means an agreement, contract, or transaction in foreign currency, other than an identified banking product or a part of an identified banking product, that is offered or entered into by FDIC-supervised insured depository institution with a person that is not an eligible contract participant and that is:

(1) A contract of sale of a commodity for future delivery or an option on such a contract;

(2) An option, other than an option executed or traded on a national securities exchange registered pursuant to § 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78(f)(a)); or

(3) Offered or entered into on a leveraged or margined basis, or financed by an FDIC-supervised insured depository institution, its affiliate, or any person acting in concert with the FDIC-supervised insured depository institution or its affiliate on a similar basis, other than:

(i) A security that is not a security futures product as defined in § 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)); or

(ii) A contract of sale that—

(A) Results in actual delivery within two days; or

(B) Creates an enforceable obligation to deliver between a seller and buyer that have the ability to deliver and accept delivery, respectively, in connection with their line of business; or

(iii) An agreement, contract, or transaction that the FDIC determines is not functionally or economically similar to:

(A) A contract of sale of a commodity for future delivery or an option on such a contract; or

(B) An option, other than an option executed or traded on a national securities exchange registered pursuant to Section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78(f)(a)).

*Retail forex obligations* means obligations of a retail forex customer with respect to retail forex transactions, including, but not limited to, trading losses, fees, and commissions.

### § 349.3 Prohibited transactions.

(a) *Fraudulent conduct prohibited.* No FDIC-supervised insured depository institution or its IAPs may, directly or indirectly, in or in connection with any retail forex transaction:

(1) Cheat or defraud or attempt to cheat or defraud any person;

(2) Willfully make or cause to be made to any person any false report or statement or cause to be entered for any person any false record; or

(3) Willfully deceive or attempt to deceive any person by any means whatsoever.

(b) *Acting as counterparty and exercising discretion prohibited.* If an FDIC-supervised insured depository institution can cause retail forex transactions to be effected for a retail forex customer without the retail forex customer's specific authorization, then neither the FDIC-supervised insured depository institution nor its affiliates may act as the counterparty for any retail forex transaction with that retail forex customer.

### § 349.4 Filing procedures.

(a) *General.* Before commencing a retail forex business, an FDIC-supervised insured depository institution shall provide the FDIC prior written notice and obtain the FDIC's prior written consent.

(b) *Where to file.* A notice required by this section shall be submitted in writing to the appropriate FDIC office.

(c) *Contents of filing.* A complete letter notice shall include the following information:

(1) *Filings generally.* (i) A brief description of the FDIC-supervised institution's proposed retail forex business and the manner in which it will be conducted;

(ii) The amount of the institution's existing or proposed direct or indirect investment in the retail forex business as well as calculations sufficient to indicate compliance with all capital requirements in § 349.8 and all other applicable capital standards;

(iii) A copy of the FDIC-supervised insured depository institution's comprehensive business plan that includes a discussion of, among other things, how the operation of the retail forex business is consistent with the institution's overall strategy;

(iv) A description of the FDIC-supervised insured depository institution's target customers for its proposed retail forex business and related information, including without limitation credit evaluations, customer appropriateness, and ''know your customer'' documentation;

(v) A resolution by the FDIC-supervised insured depository institution's board of directors that the proposed retail forex business is an appropriate activity for the institution and that the institution's written policies, procedures, and risk measurement and management systems and controls address conducting retail forex business in a safe and sound manner and in compliance with this part;

(vi) Sample risk disclosures sufficient to demonstrate compliance with § 349.6.

(2) *Copy of application or notice filed with another agency.* If an FDIC-supervised insured depository institution has filed an application or notice with another regulatory authority which contains all of the information required by subparagraph (c)(1) of this part, the institution may submit a copy to the FDIC in lieu of a separate filing.

(3) *Additional information.* The FDIC may request additional information to complete the processing of the notification.

(d) *Treatment of Existing Retail Forex Business.* Any FDIC-supervised insured depository institution that is engaged in retail forex business on July 15, 2011 may continue to do so for up to six

months, subject to an extension of time by the FDIC, provided that it notifies the FDIC of its retail forex business and requests the FDIC's written consent in accordance with paragraph (a) of this section.

(e) *Compliance with the Commodities Exchange Act.* Any FDIC-supervised insured depository institution that is engaged in retail forex business on July 15, 2011 shall be deemed, during the six-month period (including any extension) provided in paragraph (e) of this section, to be acting pursuant to a rule or regulation described in § 2(c)(2)(E)(ii)(I) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(E)(ii)(I)).

**§ 349.5 Application and closing out of offsetting long and short positions.**

(a) *Application of purchases and sales.* Any FDIC-supervised insured depository institution that—

(1) Engages in a retail forex transaction involving the purchase of any currency for the account of any retail forex customer when the account of such retail forex customer at the time of such purchase has an open retail forex transaction for the sale of the same currency;

(2) Engages in a retail forex transaction involving the sale of any currency for the account of any retail forex customer when the account of such retail forex customer at the time of such sale has an open retail forex transaction for the purchase of the same currency;

(3) Purchases a put or call option involving foreign currency for the account of any retail forex customer when the account of such retail forex customer at the time of such purchase has a short put or call option position with the same underlying currency, strike price, and expiration date as that purchased; or

(4) Sells a put or call option involving foreign currency for the account of any retail forex customer when the account of such retail forex customer at the time of such sale has a long put or call option position with the same underlying currency, strike price, and expiration date as that sold shall:

(i) Immediately apply such purchase or sale against such previously held opposite transaction; and

(ii) Promptly furnish such retail forex customer with a statement showing the financial result of the transactions involved and the name of any introducing broker to the account.

(b) *Close-out against oldest open position.* In all instances where the short or long position in a customer's retail forex account immediately prior to an offsetting purchase or sale is greater than the quantity purchased or sold, the FDIC-supervised insured depository institution shall apply such offsetting purchase or sale to the oldest portion of the previously held short or long position.

(c) *Transactions to be applied as directed by customer.* Notwithstanding paragraphs (a) and (b) of this section, the offsetting transaction shall be applied as directed by a retail forex customer's specific instructions. These instructions may not be made by the FDIC-supervised insured depository institution or an IAP.

**§ 349.6 Disclosure.**

(a) *Risk disclosure statement required.* No FDIC-supervised insured depository institution may open or maintain open an account that will engage in retail forex transactions for a retail forex customer unless the FDIC-supervised insured depository institution has furnished the retail forex customer with a separate written disclosure statement containing only the language set forth in paragraph (d) of this section and the disclosures required by paragraphs (e) and (f) of this section.

(b) *Acknowledgement of risk disclosure statement required.* The FDIC-supervised insured depository institution must receive from the retail forex customer a written acknowledgement signed and dated by the customer that the customer received and understood the written disclosure statement required by paragraph (a) of this section.

(c) *Placement of risk disclosure statement.* The disclosure statement may be attached to other documents as the initial page(s) of such documents and as the only material on such page(s).

(d) *Content of risk disclosure statement.* The language set forth in the written disclosure statement required by paragraph (a) of this section shall be as follows:

**Risk Disclosure Statement**

Retail forex transactions involve the leveraged trading of contracts denominated in foreign currency with an FDIC-supervised insured depository institution as your counterparty. Because of the leverage and the other risks disclosed here, you can rapidly lose all of the funds or property you give the FDIC-supervised insured depository institution as margin for such trading and you may lose more than you pledge as margin.

Your FDIC-supervised insured depository institution is prohibited from applying losses that you experience on retail forex transactions on any funds or property of yours other than funds or property that you have given or pledged as margin for retail forex transactions.

You should be aware of and carefully consider the following points before determining whether such trading is appropriate for you.

(1) Trading is a not on a regulated market or exchange—your FDIC-supervised insured depository institution is your trading counterparty and has conflicting interests. The retail forex transaction you are entering into is not conducted on an interbank market, nor is it conducted on a futures exchange subject to regulation as a designated contract market by the Commodity Futures Trading Commission. The foreign currency trades you transact are trades with your FDIC-supervised insured depository institution as the counterparty. When you sell, the FDIC-supervised insured depository institution is the buyer. When you buy, the FDIC-supervised insured depository institution is the seller. As a result, when you lose money trading, your FDIC-supervised insured depository institution is making money on such trades, in addition to any fees, commissions, or spreads the FDIC-supervised insured depository institution may charge.

(2) An electronic trading platform for retail foreign currency transactions is not an exchange. It is an electronic connection for accessing your FDIC-supervised insured depository institution. The terms of availability of such a platform are governed only by your contract with your FDIC-supervised insured depository institution. Any trading platform that you may use to enter into off-exchange foreign currency transactions is only connected to your FDIC-supervised insured depository institution. You are accessing that trading platform only to transact with your FDIC-supervised insured depository institution. You are not trading with any other entities or customers of the FDIC-supervised insured depository institution by accessing such platform. The availability and operation of any such platform, including the consequences of the unavailability of the trading platform for any reason, is governed only by the terms of your account agreement with the FDIC-supervised insured depository institution.

(3) You may be able to offset or liquidate any trading positions only through your banking entity because the transactions are not made on an exchange or regulated contract market, and your FDIC-supervised insured depository institution may set its own prices. Your ability to close your

transactions or offset positions is limited to what your FDIC-supervised insured depository institution will offer to you, as there is no other market for these transactions. Your FDIC-supervised insured depository institution may offer any prices it wishes, including prices derived from outside sources or not in its discretion. Your FDIC-supervised insured depository institution may establish its prices by offering spreads from third party prices, but it is under no obligation to do so or to continue to do so. Your FDIC-supervised insured depository institution may offer different prices to different customers at any point in time on its own terms. The terms of your account agreement alone govern the obligations your FDIC-supervised insured depository institution has to you to offer prices and offer offset or liquidating transactions in your account and make any payments to you. The prices offered by your FDIC-supervised insured depository institution may or may not reflect prices available elsewhere at any exchange, interbank, or other market for foreign currency.

(4) Paid solicitors may have undisclosed conflicts. The FDIC-supervised insured depository institution may compensate introducing brokers for introducing your account in ways that are not disclosed to you. Such paid solicitors are not required to have, and may not have, any special expertise in trading, and may have conflicts of interest based on the method by which they are compensated. You should thoroughly investigate the manner in which all such solicitors are compensated and be very cautious in granting any person or entity authority to trade on your behalf. You should always consider obtaining dated written confirmation of any information you are relying on from your FDIC-supervised insured depository institution in making any trading or account decisions.

(5) Retail forex transactions are not insured by the Federal Deposit Insurance Corporation.

(6) Retail forex transactions are not a deposit in, or guaranteed by, an FDIC-supervised insured depository institution.

(7) Retail forex transactions are subject to investment risks, including possible loss of all amounts invested.

Finally, you should thoroughly investigate any statements by any FDIC-supervised insured depository institution that minimize the importance of, or contradict, any of the terms of this risk disclosure. These statements may indicate sales fraud.

This brief statement cannot, of course, disclose all the risks and other aspects of trading off-exchange foreign currency with an FDIC-supervised insured depository institution.

I hereby acknowledge that I have received and understood this risk disclosure statement.

_____

Date

_____

Signature of Customer

(e)(1) *Disclosure of profitable accounts ratio.* Immediately following the language set forth in paragraph (d) of this section, the statement required by paragraph (a) of this section shall include, for each of the most recent four calendar quarters during which the FDIC-supervised insured depository institution maintained retail forex customer accounts:

(i) The total number of retail forex customer accounts maintained by the FDIC-supervised insured depository institution over which the FDIC-supervised insured depository institution does not exercise investment discretion;

(ii) The percentage of such accounts that were profitable for retail forex customer accounts during the quarter; and

(iii) The percentage of such accounts that were not profitable for retail forex customer accounts during the quarter.

(2) The FDIC-supervised insured depository institution's statement of profitable trades shall include the following legend: ''Past performance is not necessarily indicative of future results.'' Each FDIC-supervised insured depository institution shall provide, upon request, to any retail forex customer or prospective retail forex customer the total number of retail forex accounts maintained by the FDIC-supervised insured depository institution for which the FDIC-supervised insured depository institution does not exercise investment discretion, the percentage of such accounts that were profitable, and the percentage of such accounts that were not profitable for each calendar quarter during the most recent five-year period during which the FDIC-supervised insured depository institution maintained such accounts.

(f) *Disclosure of fees and other charges.* Immediately following the language required by paragraph (e) of this section, the statement required by paragraph (a) of this section shall include:

(1) The amount of any fee, charge, commission, or spreads that the FDIC-supervised insured depository institution may impose on the retail forex customer in connection with a retail forex account or retail forex transaction;

(2) An explanation of how the FDIC-supervised insured depository institution will determine the amount of such fees, charges, commissions, or spreads; and

(3) The circumstances under which the FDIC-supervised insured depository institution may impose such fees, charges, commissions, or spreads.

(g) *Future disclosure requirements.* If, with regard to a retail forex customer, the FDIC-supervised insured depository institution changes any fee, charge, commission or spreads required to be disclosed under paragraph (f) of this section, then the FDIC-supervised insured depository institution shall mail or deliver to the retail forex customer a notice of the changes at least 15 days prior to the effective date of the change.

(h) *Form of disclosure requirements.* The disclosures required by this section shall be clear and conspicuous and designed to call attention to the nature and significance of the information provided.

(i) *Other disclosure requirements unaffected.* This section does not relieve an FDIC-supervised insured depository institution from any other disclosure obligation it may have under applicable law.

**§ 349.7 Recordkeeping.**

(a) *General rule.* An FDIC-supervised insured depository institution engaging in retail forex transactions shall keep full, complete and systematic records, together with all pertinent data and memoranda, pertaining to its retail forex business, including:

(1) *Retail forex account records.* For each retail forex account:

(i) The name and address of the person for whom the account is carried or introduced and the principal occupation or business of the person.

(ii) The name of any other person guaranteeing the account or exercising trading control with respect to the account;

(iii) The establishment or termination of the account; and

(iv) A means to identify the person who has solicited and is responsible for the account or assign account numbers in such a manner as to identify that person.

(v) The funds in the account, net of any commissions and fees;

(vi) The account's net profits and losses on open trades;

(vii) The funds in the account plus or minus the net profits and losses on open trades, adjusted for the net option value in the case of open options positions;

(viii) Financial ledger records that show separately for each retail forex customer all charges against and credits to such retail forex customer's account, including deposits, withdrawals, and transfers, and charges or credits resulting from losses or gains on closed transactions; and

(ix) A list of all retail forex transactions executed for the account, with the details specified in paragraph (a)(2) of this section;

(2) *Retail forex transaction records.* For each retail forex transaction:

(i) The price at which the FDIC-supervised insured depository institution placed the order, or, in the case of an option, the premium that the retail forex customer paid;

(ii) The customer account identification information;

(iii) The currency pair;

(iv) The size or quantity of the order;

(v) Whether the order was a buy or sell order;

(vi) The type of order, if the order was not a market order;

(vii) The size and price at which the order is executed, or in the case of an option, the amount of the premium paid for each option purchased, or the amount credited for each option sold;

(viii) For options, whether the option is a put or call, expiration date, quantity, underlying contract for future delivery or underlying physical, strike price, and details of the purchase price of the option, including premium, mark-up, commission, and fees; and

(ix) For futures, the delivery date; and

(x) If the order was made on a trading platform:

(A) The price quoted on the trading platform when the order was placed, or, in the case of an option, the premium quoted;

(B) The date and time the order was transmitted to the trading platform; and

(C) The date and time the order was executed;

(3) *Price changes on a trading platform.* If a trading platform is used, daily logs showing each price change on the platform, the time of the change to the nearest second, and the trading volume at that time and price;

(4) *Methods or algorithms.* Any method or algorithm used to determine the bid or asked price for any retail forex transaction or the prices at which customer orders are executed, including, but not limited to, any markups, fees, commissions or other items which affect the profitability or risk of loss of a retail forex customer's transaction;

(5) *Daily records* which show for each business day complete details of:

(i) All retail forex transactions that are futures transactions executed on that day, including the date, price, quantity, market, currency pair, delivery date, and the person for whom such transaction was made;

(ii) All retail forex transactions that are option transactions executed on that day, including the date, whether the transaction involved a put or call, the expiration date, quantity, currency pair, delivery date, strike price, details of the purchase price of the option, including premium, mark-up, commission and fees, and the person for whom the transaction was made;

(iii) All other retail forex transactions executed on that day for such account, including the date, price, quantity, currency and the person for whom such transaction was made; and

(6) *Other records.* Written acknowledgements of receipt of the risk disclosure statement required by section 349.6(b), records required under paragraph (b) through (f) of this section, trading cards, signature cards, street books, journals, ledgers, payment records, copies of statements of purchase, and all other records, data and memoranda that have been prepared in the course of the FDIC-supervised insured depository institution's retail forex business.

(b) *Ratio of profitable accounts.* (1) With respect to its active retail forex customer accounts over which it did not exercise investment discretion and that are not retail forex proprietary accounts open for any period of time during the quarter, an FDIC-supervised insured depository institution shall prepare and maintain on a quarterly basis (calendar quarter):

(i) A calculation of the percentage of such accounts that were profitable;

(ii) A calculation of the percentage of such accounts that were not profitable; and

(iii) Data supporting the calculations described in paragraphs (b)(1)(i) and (b)(1)(ii) of this section.

(2) In calculating whether a retail forex account was profitable or not profitable during the quarter, the FDIC-supervised insured depository institution shall compute the realized and unrealized gains or losses on all retail forex transactions carried in the retail forex account at any time during the quarter, and subtract all fees, commissions, and any other charges posted to the retail forex account during the quarter, and add any interest income and other income or rebates credited to the retail forex account during the quarter. All deposits and withdrawals of funds made by the retail forex customer during the quarter must be excluded from the computation of whether the retail forex account was profitable or not profitable during the quarter. Computations that result in a zero or negative number shall be considered a retail forex account that was not profitable. Computations that result in a positive number shall be considered a retail forex account that was profitable.

(3) A retail forex account shall be considered ''active'' for purposes of paragraph (b)(1) of this section if and only if, for the relevant calendar quarter, a retail forex transaction was executed in that account or the retail forex account contained an open position resulting from a retail forex transaction.

(c) *Records related to possible violations of law.* An FDIC-supervised insured depository institution engaging in retail forex transactions shall make a record of all communications, including customer complaints, received by the FDIC-supervised insured depository institution or its IAPs concerning facts giving rise to possible violations of law related to the FDIC-supervised insured depository institution's retail forex business. The record shall contain: the name of the complainant, if provided; the date of the communication; the relevant agreement, contract, or transaction; the substance of the communication; the name of the person who received the communication, and the final disposition of the matter.

(d) *Records for noncash margin.* An FDIC-supervised insured depository institution shall maintain a record of all noncash margin collected pursuant to section 349.9. The record shall show separately for each retail forex customer:

(1) A description of the securities or property received;

(2) The name and address of such retail forex customer;

(3) The dates when the securities or property were received;

(4) The identity of the depositories or other places where such securities or property are segregated or held, if applicable;

(5) The dates in which the FDIC-supervised insured depository institution placed or removed such securities or property into or from such depositories; and

(6) The dates of return of such securities or property to such retail forex customer, or other disposition thereof, together with the facts and circumstances of such other disposition.

(e) *Order Tickets.* (1) Except as provided in paragraph (e)(2) of this section, immediately upon the receipt of a retail forex transaction order, an FDIC-supervised insured depository institution must prepare an order ticket for the order (whether unfulfilled, executed, or canceled). The order ticket must include:

(i) Account identification (account or customer name with which the retail forex transaction was effected);

(ii) Order number;

(iii) Type of order (market order, limit order, or subject to special instructions);

(iv) Date and time, to the nearest minute, the retail forex transaction order was received (as evidenced by timestamp or other timing device);

(v) Time, to the nearest minute, the retail forex transaction order was executed; and

(vi) Price at which the retail forex transaction was executed.

(2) *Post-execution allocation of bunched orders.* Specific identifiers for retail forex accounts included in bunched orders need not be recorded at time of order placement or upon report of execution as required under paragraph (e)(1) of this section if the following requirements are met:

(i) The FDIC-supervised insured depository institution placing and directing the allocation of an order eligible for post-execution allocation has been granted written investment discretion with regard to participating customer accounts and makes the following information available to retail forex customers upon request:

(A) The general nature of the post-execution allocation methodology the FDIC-supervised insured depository institution will use;

(B) Whether the FDIC-supervised insured depository institution has any interest in accounts which may be included with customer accounts in bunched orders eligible for post-execution allocation; and

(C) Summary or composite data sufficient for that customer to compare its results with those of other comparable customers and, if applicable, any account in which the FDIC-supervised insured depository institution has an interest.

(ii) Post-execution allocations are made as soon as practicable after the entire transaction is executed;

(iii) Post-execution allocations are fair and equitable, with no account or group of accounts receiving consistently favorable or unfavorable treatment; and

(iv) The post-execution allocation methodology is sufficiently objective and specific to permit the FDIC to verify the fairness of the allocations using that methodology.

(f) *Record of monthly statements and confirmations.* An FDIC-supervised insured depository institution shall retain a copy of each monthly statement and confirmation required by section 349.10.

(g) *Manner of maintenance.* The records required by this section must clearly and accurately reflect the information required and provide an adequate basis for the audit of the information. Record maintenance may include the use of automated or electronic records provided that the records are easily retrievable, readily available for inspection, and capable of being reproduced in hard copy.

(h) *Length of maintenance.* An FDIC-supervised insured depository institution shall keep each record required by this section for at least five years from the date the record is created.

### § 349.8 Capital requirements.

An FDIC-supervised insured depository institution offering or entering into retail forex transactions must be well capitalized as defined by 12 CFR part 325, unless specifically exempted by the FDIC in writing.

### § 349.9 Margin requirements.

(a) *Margin required.* An FDIC-supervised insured depository institution engaging, or offering to engage, in retail forex transactions must collect from each retail forex customer an amount of margin not less than:

(1) Two percent of the notional value of the retail forex transaction for major currency pairs and 5 percent of the notional value of the retail forex transaction for all other currency pairs;

(2) For short options, 2 percent for major currency pairs and 5 percent for all other currency pairs of the notional value of the retail forex transaction, plus the premium received by the retail forex customer; or

(3) For long options, the full premium charged and received by the FDIC-supervised insured depository institution.

(b)(1) *Form of margin.* Margin collected under paragraph (a) of this section or pledged by a retail forex customer for retail forex transactions in excess of the requirements of paragraph (a) of this section must be in the form of cash or the following financial instruments:

(i) Obligations of the United States and obligations fully guaranteed as to principal and interest by the United States;

(ii) General obligations of any State or of any political subdivision thereof;

(iii) General obligations issued or guaranteed by any enterprise, as defined in 12 U.S.C. 4502(10);

(iv) Certificates of deposit issued by an insured depository institution, as defined in § 3(c)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)(2));

(v) Commercial paper;

(vi) Corporate notes or bonds;

(vii) General obligations of a sovereign nation;

(viii) Interests in money market mutual funds; and

(ix) Such other financial instruments as the FDIC deems appropriate.

(2) *Haircuts.* An FDIC-supervised insured depository institution shall establish written policies and procedures that include:

(i) Haircuts for noncash margin collected under this section; and

(ii) Annual evaluation, and, if appropriate, modification of the haircuts.

(c) *Separate margin account.* Margin collected by the FDIC-supervised insured depository institution from a retail forex customer for retail forex transactions or pledged by a retail forex customer for retail forex transactions shall be placed into a separate account containing only such margin.

(d) *Margin calls; liquidation of position.* For each retail forex customer, at least once per day, an FDIC-supervised insured depository institution shall:

(1) Mark the value of the retail forex customer's open retail forex positions to market;

(2) Mark the value of the margin collected under this section from the retail forex customer to market;

(3) Determine if, based on the marks in paragraphs (c)(1) and (2) of this section, the FDIC-supervised insured depository institution has collected margin from the retail forex customer sufficient to satisfy the requirements of this section; and

(4) Collect such margin from the retail forex customer as the FDIC-supervised insured depository institution may require to satisfy the requirements of this section, or liquidate the retail forex customer's retail forex transactions.

(e) *Set-off prohibited.* An FDIC-supervised insured depository institution may not:

(1) Apply a retail forex customer's retail forex obligations against any funds or other asset of the retail forex customer other than margin in the separate margin account described in paragraph (c) of this section;

(2) Apply a retail forex customer's retail forex obligations to increase the amount owed by the retail forex customer to the FDIC-supervised insured depository institution under any loan; or

(3) Collect the margin required under this section by use of any right of set-off.

### § 349.10 Required reporting to customers.

(a) *Monthly statements.* Each FDIC-supervised insured depository

institution must promptly furnish to each retail forex customer, as of the close of the last business day of each month or as of any regular monthly date selected, except for accounts in which there are neither open positions at the end of the statement period nor any changes to the account balance since the prior statement period, but in any event not less frequently than once every three months, a statement that clearly shows:

(1) For each retail forex customer:

(i) The open retail forex transactions with prices at which acquired;

(ii) The net unrealized profits or losses in all open retail forex transactions marked to the market;

(iii) Any money, securities or other property in the separate margin account required by § 349.9(c); and

(iv) A detailed accounting of all financial charges and credits to the retail forex customer's retail forex accounts during the monthly reporting period, including: money, securities, or property received from or disbursed to such customer; realized profits and losses; and fees, charges, commissions, and spreads.

(2) For each retail forex customer engaging in retail forex transactions that are options:

(i) All such options purchased, sold, exercised, or expired during the monthly reporting period, identified by underlying retail forex transaction or underlying currency, strike price, transaction date, and expiration date;

(ii) The open option positions carried for such customer and arising as of the end of the monthly reporting period, identified by underlying retail forex transaction or underlying currency, strike price, transaction date, and expiration date;

(iii) All such option positions marked to the market and the amount each position is in the money, if any;

(iv) Any money, securities or other property in the separate margin account required by § 349.9(c); and

(v) A detailed accounting of all financial charges and credits to the retail forex customer's retail forex accounts during the monthly reporting period, including: money, securities, or property received from or disbursed to such customer; realized profits and losses; premiums and mark-ups; and fees, charges, and commissions.

(b) *Confirmation statement.* Each FDIC-supervised insured depository institution must, not later than the next business day after any retail forex transaction, send:

(1) To each retail forex customer, a written confirmation of each retail forex transaction caused to be executed by it for the customer, including offsetting transactions executed during the same business day and the rollover of an open retail forex transaction to the next business day;

(2) To each retail forex customer engaging in forex option transactions, a written confirmation of each forex option transaction, containing at least the following information:

(i) The retail forex customer's account identification number;

(ii) A separate listing of the actual amount of the premium, as well as each mark-up thereon, if applicable, and all other commissions, costs, fees and other charges incurred in connection with the forex option transaction;

(iii) The strike price;

(iv) The underlying retail forex transaction or underlying currency;

(v) The final exercise date of the forex option purchased or sold; and

(vi) The date the forex option transaction was executed.

(3) To each retail forex customer engaging in forex option transactions, upon the expiration or exercise of any option, a written confirmation statement thereof, which statement shall include the date of such occurrence, a description of the option involved, and, in the case of exercise, the details of the retail forex or physical currency position which resulted therefrom including, if applicable, the final trading date of the retail forex transaction underlying the option.

(c) Notwithstanding the provisions of paragraphs (b)(1) through (3) of this section, a retail forex transaction that is caused to be executed for a pooled investment vehicle that engages in retail forex transactions need be confirmed only to the operator of such pooled investment vehicle.

(d) *Controlled accounts.* With respect to any account controlled by any person other than the retail forex customer for whom such account is carried, each FDIC-supervised insured depository institution shall promptly furnish in writing to such other person the information required by paragraphs (a) and (b) of this section.

(e) *Introduced accounts.* Each statement provided pursuant to the provisions of this section must, if applicable, show that the account for which the FDIC-supervised insured depository institution was introduced by an introducing broker and the name of the introducing broker.

### § 349.11 Unlawful representations.

(a) *No implication or representation of limiting losses.* No FDIC-supervised insured depository institution engaged in retail foreign exchange transactions or its IAPs may imply or represent that it will, with respect to any retail customer forex account, for or on behalf of any person:

(1) Guarantee such person or account against loss;

(2) Limit the loss of such person or account; or

(3) Not call for or attempt to collect margin as established for retail forex customers.

(b) *No implication of representation of engaging in prohibited acts.* No FDIC-supervised insured depository institution or its IAPs may in any way imply or represent that it will engage in any of the acts or practices described in paragraph (a) of this section.

(c) *No Federal government endorsement.* No FDIC-supervised insured depository institution or its IAPs may represent or imply in any manner whatsoever that any retail forex transaction or retail forex product has been sponsored, recommended, or approved by the FDIC, the Federal government, or any agency thereof.

(d) *Assuming or sharing of liability from bank error.* This section shall not be construed to prevent an FDIC-supervised insured depository institution from assuming or sharing in the losses resulting from the FDIC-supervised insured depository institution's error or mishandling of a retail forex transaction.

(e) *Certain guaranties unaffected.* This section shall not affect any guarantee entered into prior to the effective date of this part, but this section shall apply to any extension, modification or renewal thereof entered into after such date.

### § 349.12 Authorization to trade.

(a) *Specific authorization required.* No FDIC-supervised insured depository institution may directly or indirectly effect a retail forex transaction for the account of any retail forex customer unless, before the transaction occurs, the retail forex customer specifically authorized the FDIC-supervised insured depository institution to effect the retail forex transaction.

(b) Requirements for specific authorization. A retail forex transaction is ''specifically authorized'' for purposes of this section if the retail forex customer specifies:

(1) The precise retail forex transaction to be effected;

(2) The exact amount of the foreign currency to be purchased or sold; and

(3) In the case of an option, the identity of the foreign currency or contract that underlies the option.

**§ 349.13 Trading and operational standards.**

(a) *Internal rules, procedures, and controls required.* An FDIC-supervised insured depository institution engaging in retail forex transactions shall establish and implement internal policies, procedures, and controls designed, at a minimum, to:

(1) Ensure, to the extent reasonable, that each order received from a retail forex transaction that is executable at or near the price that the FDIC-supervised insured depository institution has quoted to the retail forex customer is entered for execution before any order in any retail forex transaction for

(i) A any proprietary account;

(ii) An account in which a related person has an interest, or any account for which such a related person may originate orders without the prior specific consent of the account owner if the related person has gained knowledge of the retail forex customer's order prior to the transmission of an order for a proprietary account;

(iii) an account in which such a related person has an interest, if the related person has gained knowledge of the retail forex customer's order prior to the transmission of an order for a proprietary account; or

(iv) an account in which such a related person may originate orders without the prior specific consent of the account owner if the related person has gained knowledge of the retail forex customer's order prior to the transmission of an order for a proprietary account.

(2) Prevent FDIC-supervised insured depository institution related persons from placing orders, directly or indirectly, with another person in a manner designed to circumvent the provisions of paragraph (a)(1) of this section;

(3) Fairly and objectively establish settlement prices for retail forex transactions; and

(b) *Disclosure of retail forex transactions.* No FDIC-supervised insured depository institution engaging in retail forex transactions may disclose that an order of another person is being held by the FDIC-supervised insured depository institution, unless the disclosure is necessary to the effective execution of such order or the disclosure is made at the request of the FDIC.

(c) *Handling of retail forex accounts of related persons of retail forex counterparties.* No FDIC-supervised insured depository institution engaging in retail forex transactions may knowingly handle the retail forex account of an employee of another retail forex counterparty's retail forex business unless the FDIC-supervised insured depository institution:

(1) Receives written authorization from a person designated by the other retail forex counterparty with responsibility for the surveillance over the account pursuant to paragraph (a)(2) of this section;

(2) Prepares immediately upon receipt of an order for the account a written record of the order, including the account identification and order number, and records thereon to the nearest minute, by time-stamp or other timing device, the date and time the order is received; and

(3) Transmits on a regular basis to the other retail forex counterparty copies of all statements for the account and of all written records prepared upon the receipt of orders for such account pursuant to paragraph (a)(2) of this section.

(d) *Related person of FDIC-supervised insured depository institution establishing account at another retail forex counterparty.* No related person of an FDIC-supervised insured depository institution working in the institution's retail forex business may have an account, directly or indirectly, with another retail forex counterparty unless the other retail forex counterparty:

(1) Receives written authorization to open and maintain the an account from a person designated by the FDIC-supervised insured depository institution of which it is a related person with responsibility for the surveillance over the account pursuant to paragraph (a)(2) of this section; and

(2) Transmits on a regular basis to the FDIC-supervised insured depository institution copies of all statements for such account and of all written records prepared by the other retail forex counterparty upon receipt of orders for the account pursuant to paragraph (c)(2) of this section are transmitted on a regular basis to the retail forex counterparty of which it is a related person.

(e) *Prohibited trading practices.* No FDIC-supervised insured depository institution engaging in retail forex transactions may:

(1) Enter into a retail forex transaction, to be executed pursuant to a market or limit order at a price that is not at or near the price at which other retail forex customers, during that same time period, have executed retail forex transactions with the FDIC-supervised insured depository institution;

(2) Adjust or alter prices for a retail forex transaction after the transaction has been confirmed to the retail forex customer;

(3) Provide a retail forex customer a new bid price for a retail forex transaction that is higher than its previous bid without providing a new asked price that is also higher than its previous asked price by a similar amount;

(4) Provide a retail forex customer a new bid price for a retail forex transaction that is lower than its previous bid without providing a new asked price that is also lower than its previous asked price by a similar amount; or

(5) Establish a new position for a retail forex customer (except one that offsets an existing position for that retail forex customer) where the FDIC-supervised insured depository institution holds outstanding orders of other retail forex customers for the same currency pair at a comparable price.

**§ 349.14 Supervision.**

(a) *Supervision by the FDIC-supervised insured depository institution.* An FDIC-supervised insured depository institution engaging in retail forex transactions shall diligently supervise the handling by its officers, employees, and agents (or persons occupying a similar status or performing a similar function) of all retail forex accounts carried, operated, or advised by at the FDIC-supervised insured depository institution and all activities of its officers, employees, and agents (or persons occupying a similar status or performing a similar function) relating to its retail forex business.

(b) *Supervision by officers, employees, or agents.* An officer, employee, or agent of an FDIC-supervised insured depository institution must diligently supervise his or her subordinates' handling of all retail forex accounts at the FDIC-supervised insured depository institution and all the subordinates' activities relating to the FDIC-supervised insured depository institution's retail forex business.

**§ 349.15 Notice of transfers.**

(a) *Prior notice generally required.* Except as provided in paragraph (b) of this section, an FDIC-supervised insured depository institution must provide a retail forex customer with 30 days' prior notice of any assignment of any position or transfer of any account of the retail forex customer. The notice must include a statement that the retail forex customer is not required to accept the proposed assignment or transfer and may direct the FDIC-supervised insured depository institution to liquidate the positions of the retail forex customer or transfer the account to a retail forex

counterparty of the retail forex customer's selection.

(b) *Exceptions.* The requirements of paragraph (a) of this section shall not apply to transfers:

(1) Requested by the retail forex customer;

(2) Made by the Federal Deposit Insurance Corporation as receiver or conservator under the Federal Deposit Insurance Act; or

(3) Otherwise authorized by applicable law.

(c) *Obligations of transferee FDIC-supervised insured depository institution.* An FDIC-supervised insured depository institution to which retail forex accounts or positions are assigned or transferred under paragraph (a) of this section must provide to the affected retail forex customers the risk disclosure statements and forms of acknowledgment required by this part and receive the required signed acknowledgments within sixty days of such assignments or transfers. This requirement shall not apply if the FDIC-supervised insured depository institution has clear written evidence that the retail forex customer has received and acknowledged receipt of the required disclosure statements.

**§ 349.16 Customer dispute resolution.**

(a) *Voluntary submission of claims to dispute or settlement procedures.* No FDIC-supervised insured depository institution may enter into any agreement or understanding with a retail forex customer in which the customer agrees, prior to the time a claim or grievance arises, to submit such claim or grievance to any settlement procedure.

(b) *Election of forum.* (1) Within ten business days after receipt of notice from the retail forex customer that the customer intends to submit a claim to arbitration, the FDIC-supervised insured depository institution must provide the customer with a list of persons qualified in dispute resolution.

(2) The customer shall, within 45 days after receipt of such list, notify the FDIC-supervised insured depository institution of the person selected. The customer's failure to provide such notice shall give the FDIC-supervised insured depository institution the right to select a person from the list.

(c) *Enforceability.* A dispute settlement procedure may require parties using such procedure to agree, under applicable state law, submission agreement or otherwise, to be bound by an award rendered in the procedure, provided that the agreement to submit the claim or grievance to the voluntary procedure under paragraph (a) of this section or that agreement to submit the claim or grievance was made after the claim or grievance arose. Any award so rendered shall be enforceable in accordance with applicable law.

(d) *Time limits for submission of claims.* The dispute settlement procedure used by the parties shall not include any unreasonably short limitation period foreclosing submission of a customer's claims or grievances or counterclaims.

(e) *Counterclaims.* A procedure for the settlement of a retail forex customer's claims or grievances against an FDIC-supervised insured depository institution or employee thereof may permit the submission of a counterclaim in the procedure by a person against whom a claim or grievance is brought. Such a counterclaim may be permitted where it arises out of the transaction or occurrence that is the subject of the customer's claim or grievance and does not require for adjudication the presence of essential witnesses, parties, or third persons over which the settlement process lacks jurisdiction.

Dated at Washington, DC, this 6th of July 2011.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

**Robert E. Feldman,**

*Executive Secretary.*

[FR Doc. 2011–17396 Filed 7–11–11; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Docket No. FAA–2010–0987; Airspace Docket No. 10–ANM–14]**

## Establishment of Class E Airspace; Lincoln City, OR

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

**ACTION:** Final rule.

**SUMMARY:** This action establishes Class E airspace at Lincoln City, OR, to accommodate aircraft using a new Area Navigation (RNAV) Global Positioning System (GPS) standard instrument approach procedures at Samaritan North Lincoln Hospital Heliport. This action also corrects the name of the city were the Heliport is located. This improves the safety and management of Instrument Flight Rules (IFR) operations.

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

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

**SUPPLEMENTARY INFORMATION:**

### History

On April 15, 2011, the FAA published in the **Federal Register** a notice of proposed rulemaking to establish controlled airspace at Lincoln City, OR (76 FR 21268). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Subsequent to publication, the FAA found the name of the town was listed incorrectly. This action makes that correction. With the exception of editorial changes, and the changes described above, this rule is the same as that proposed in the NPRM.

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

### The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 71 by establishing Class E airspace extending upward from 700 feet above the surface, at Samaritan North Lincoln Hospital Heliport, Lincoln City, OR, to accommodate IFR aircraft executing new RNAV (GPS) standard instrument approach procedures at the heliport. This action is necessary for the safety and management of IFR operations. This action also makes a correction in the town name, from Lincoln, OR, to Lincoln City, OR.

The FAA has determined this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it

is certified this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, section 106 discusses the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes controlled airspace at Samaritan North Lincoln Hospital Heliport, Lincoln City, OR.

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

Airspace, Incorporation by reference, Navigation (air).

**Adoption of the Amendment**

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

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

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

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

**§ 71.1 [Amended]**

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

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

* * * * *

**ANM OR E5 Lincoln City, OR [New]**

Samaritan North Lincoln Hospital Heliport, OR

(Lat. 44°59′11″ N., long. 123°59′39″ W.)

That airspace extending upward from 700 feet above the surface within 3-mile radius of Samaritan North Lincoln Hospital Heliport.

Issued in Seattle, Washington, on June 30, 2011.

**Christine Mellon,**

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

[FR Doc. 2011–17202 Filed 7–11–11; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 121

**[Docket No.: FAA–2002–11301; Amendment No. 121–315]**

**RIN 2120–AH14**

## Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities; Final Regulatory Flexibility Determination

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

**ACTION:** Final rule.

**SUMMARY:** On January 10, 2006, the FAA issued a final rule to require that each person who performs a safety-sensitive aviation function directly for an employer, including contractors and subcontractors, is subject to drug and alcohol testing. This document announces the completion and availability of the final regulatory flexibility certification for this final rule. The rule will not have a significant economic impact on a substantial number of small entities.

**DATES:** Effective July 7, 2011.

**FOR FURTHER INFORMATION CONTACT:** Nicole Nance, Office of Aviation Policy and Plans, APO–300, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–3311; e-mail *nicole.nance@faa.gov.* For legal questions concerning this document, contact Anne Bechdolt, Regulations Division, AGC–220, Office of the Chief Counsel, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–7230; e-mail *anne.bechdolt@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

**Background**

On February 28, 2002, the FAA issued a notice of proposed rulemaking seeking to revise the drug and alcohol testing regulations by amending the definition of employee (67 FR 9366, 9377, Feb. 28, 2002). The FAA action addressed those individuals performing safety-sensitive functions under contract who may not have been subject to testing under the drug and alcohol testing regulations established in 1988 and 1994, respectively. Upon review of comments, the FAA, in 2004, issued a supplemental notice of proposed rulemaking to seek comment regarding how small entities would be impacted by this rule (69 FR 27980, May 17, 2004). From the comments received the FAA certified under 5 U.S.C. 605(b) that the rule would not have a significant impact on a substantial number of small entities.

On January 10, 2006, the FAA issued the final rule (71 FR 1666). This rule requires that each person who performs a safety-sensitive aviation function directly for an employer is subject to testing and that each person who performs a safety-sensitive function at any tier of a contract for that employer is also subject to testing. This requirement includes contractors and subcontractors. Contracting companies have two testing options: Option one is for the contracting company to obtain and implement its own FAA drug and alcohol (D&A) testing programs. Under this option, the company would subject the individuals to testing. The other option is for the regulated employer to maintain its own testing programs and subject the individual to testing under these programs. To establish a D&A program a company would need to develop and maintain testing, training, and annual reporting requirements.

To comply with the Regulatory Flexibility Analysis (RFA), and to evaluate the impact on small businesses, the FAA described and estimated the number of affected businesses and estimated the economic impact. In the certification for the final rule the FAA estimated that the costs were minimal, and that contractors would absorb some of these costs. In order to estimate the maximum impact of this regulation on regulated entities, the FAA assumed that all of the additional cost would be passed along to regulated employers. Since costs were minimal, the FAA again certified that the rule would not have a significant economic impact on a substantial number of small entities. 71 FR 1666, 1674 (Jan. 10, 2006)

The Aeronautical Repair Station Association, Inc., (ARSA) and other affected businesses challenged the final rule on several grounds, including the FAA's compliance with the Regulatory Flexibility Act. The entities argued that contractors and subcontractors were directly affected by the final rule, and in failing to consider them as part of the basis for the certification, the FAA failed to comply with the RFA. Upon review, the U.S. Court of Appeals for the

District of Columbia upheld ''the substance of the 2006 final rule'' and remanded ''for the limited purpose of conducting the analysis required under the RFA, treating the contractors and subcontractors as regulated entities.'' The Court found that contractors and subcontractors were directly affected by the final rule and that the FAA failed to comply with the RFA by not considering them in the analysis. To comply with the court's order, the FAA extended the regulatory flexibility analysis to include contractors and subcontractors and published the analysis for comment on March 8, 2011 (76 FR 12559). The FAA again certified that although the rule would affect a substantial number of small entities, the economic impact on these entities would not be significant.

The FAA received comments from the U.S. Small Business Administration's Office of Advocacy (SBA), Aeronautical Repair Station Association, Inc. (ARSA), Aviation Suppliers Association (ASA), Modification and Replacement Parts Association (MARPA), National Air Transportation Association (NATA), and four individuals. SBA noted that the March 2011 certification relied too heavily on the ARSA survey that was submitted in response to the analysis published for comment on August 24, 2005, as well as the SBA analysis of which entities may be impacted by this rule. ARSA, ASA, MARPA, and NATA also questioned the use of the ARSA survey and whether the FAA had attempted to verify, through other data sources, the information provided by ARSA and SBA to identify the subcontractors that would be impacted by this rule. ARSA asserted that there was no factual basis for the FAA's assumption that these entities employed, on average, 25 individuals, considering that 43% of the entities ARSA surveyed employed 11–50 individuals. SBA stated that the FAA needed to identify all regulated small entities that would be covered by this final rule and provide additional analysis on the size and revenue characteristics of these entities. The FAA has addressed these issues below.

SBA, ARSA, ASA, MARPA, and NATA also raised concerns that the source information for the projected wage, training, education, program development, and annual documentation costs was not provided. ASA and MARPA asserted that the cost estimates failed to account for travel costs for the employee to take the tests, as well as increased rates charged by contract companies for administering these programs, and testing that occurs after an accident. ARSA noted that the FAA should also consider the costs to change existing processes, conduct alcohol and drug testing background checks, as well as the revenue lost when the employee has to undergo testing. MARPA stated that the FAA underestimated the administrative costs of managing the program by assessing this cost based on the assumption that an administrative person on staff would oversee the program, rather than the costs of either outsourcing the administration of the program or assuming that a management employee would be assigned to administer the program.

Finally, ARSA, ASA, and MARPA assert that this final rule does have a significant economic impact. MARPA and ASA noted that the FAA's use of a 2% threshold of annual revenues exceeds SBA's 1% of annual revenues threshold for determining significant impact. ARSA asserts that if the FAA considers the profit margins of these entities, the impact is significant. The FAA has addressed these issues below.

Upon review of the comments and further analysis provided below, the FAA certifies under 5 U.S.C. 605(b) that this rule will not have a significant impact on a substantial number of small entities.

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation.'' To achieve this principle, the RFA requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.'' The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA. However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear. Based on the analysis below, the FAA certifies that this rule does not have a significant economic impact on a substantial number of small entities. While there are a substantial number of affected small entities, the compliance cost is not a significant economic cost. A full discussion follows.

**I. Basis for the Final Rule**

This final rule amends the FAA regulations governing drug and alcohol testing to clarify that each person who performs a safety-sensitive function for a regulated employer by contract, including by subcontract at any tier, is subject to testing. These amendments are necessary because in the 1990s, the FAA issued conflicting guidance about which contractors were subject to drug and alcohol testing. The FAA did not consider any alternatives to this rule because the rule was designed to clarify that the FAA intended that each person who performs a safety-sensitive function for a regulated employer by contract, including by subcontract at any tier, is subject to testing. The FAA specifically addressed this issue in the final rule 71 FR 1666 (January 10, 2006). The applicability of the drug and alcohol requirements to sub-contractors, including those not certificated by the FAA is the sole purpose of the rule. Accordingly, the agency determined in 2006 that no other alternative was available, a decision upheld by the court in the subsequent lawsuit. These matters were addressed by the FAA when publishing the final rule when we said:

> [T]he level of the contractual relationship should not limit the requirement for all safety-sensitive work to be performed by drug-free and alcohol-free employees. If individuals are performing safety-sensitive functions for a regulated employer, the individuals must be subject to testing, regardless of the tier of contract under which they are performing.
>
> It would be inconsistent with aviation safety for individuals performing maintenance work within the certificated repair station to be subject to testing, while individuals performing the same maintenance work under a subcontract would not be subject to drug and alcohol testing.''

71 FR 1670.

Additionally, the FAA expressly discussed comments that subcontractors that are not primarily aviation-related businesses should not be subject to testing. In the preamble to the final rule, the FAA rejected this premise, noting that ''[w]hen subcontractors choose to perform safety-sensitive functions for regulated employers, they are choosing

to comply with the FAA drug and alcohol testing regulations. The impact these subcontractors have on aviation safety is not related to whether they hold a repair station certificate. Instead, they have an impact because they actually perform safety-sensitive functions.'' 71 FR 1673. The FAA went on to note that the commenters provided no data to support the premise that non-certificated subcontractors would cease providing service to the aviation industry. Indeed, in the final regulatory evaluation, the data provided by the commenters showed the majority of such contractors would continue doing business with the aviation industry after the final rule became effective. *Id.*

For safety reasons, the FAA wanted to ensure that all persons performing safety-sensitive functions were tested. This remains the case today and as such, there are no alternatives to the final rule that could have been considered and implemented.

The final rule is promulgated under the authority described in 49 U.S.C. 45102, which charges the FAA with prescribing regulations to establish programs for drug and alcohol testing of employees performing safety-sensitive functions for air carriers and to take certificate or other action when an employee violates the testing regulations. The final rule does not duplicate or otherwise conflict with another provision of law. A description and an estimate of the number of small entities to which the rule will apply, as well as a description of the projected reporting, record keeping and other compliance costs, is provided below and forms the basis for the FAA's certification under 5 U.S.C. 605(b).

## II. Description of Small Entities Impacted by This Rule

The entities impacted by this rule are repair stations certificated under 14 CFR part 145, and their subcontractors. The size standards for determining whether these entities constitute small businesses vary and the FAA offers the following discussion to support the definition of a small business for this certification.

### *A. Size Standard*

The Small Business Administration (SBA) has established small business size standards pursuant to the Small Business Act (Act) (Pub. L. 85–236, as amended) and related legislative guidelines. The SBA classifies ''small'' businesses based on their employment or annual revenue as set forth in the North American Industrial Classification System (NAICS) classifications. *See* 13 CFR 121.201. Under NAICS 488190 ''Other Support Activities for Air Transport'', repair stations, which constitute some of the entities affected by this final rule, are defined as small businesses if they have annual revenues of $7 million or less. Subcontractors, conversely, overlap several industries and have multiple NAICS classifications. In attempting to identify all of the subcontractors impacted by this rule, the FAA examined the submitted list of 21 NAICS codes provided by SBA and ARSA. Using these NAICS codes, the definition of a small business for subcontractors could range, based on the number of employees alone, from 500 to 1,000 employees, or based on annual revenues of $7 million or less. The FAA reviewed all of the NAICS codes and notes that the SBA defines the average industry as having the following standards for a small business: 500 employees for most manufacturing and mining industries, and $7 million in average annual receipts for most non-manufacturing industries.[1] Given the variance in these NAICS codes, the FAA has determined that the appropriate definition for determining whether a subcontractor is a small business under this rule is to use the most conservative criteria set forth in NAICS classification. Thus, the FAA will classify a subcontractor as a small business if it employs 500 employees or fewer, or has annual revenues of $7 million or less. The FAA uses both criteria to analyze the impact on subcontractors.

### *B. Repair Stations Impacted by This Rule*

Certificate holders, such as part 121, 135 and 145 have operating certificates issued by the FAA, allowing the FAA to determine the number of certificate holders impacted by this rule. The FAA National Vital Information Subsystem (NVIS) Air Agency records indicate there are 4,105 part 145 certificated domestic repair stations. To determine how many of these repair stations would be classified as small business under NAICS 488180, the FAA reviewed a recent study completed by the U.S. Transportation Security Administration.[2]

In this study, TSA compiled both revenue and employment records from Dun & Bradstreet for approximately 2,276 domestic repair stations. From this total, they identified 2,123 repair stations that meet the small business size standard reflected in NAICS 488190. This analysis indicates that most repair stations are small businesses. Accepting the TSA percentage of small entities for domestic repair stations, the FAA has estimated that out of 4,105 domestic U.S. certificated repair stations, 3,829 are small businesses with revenues of $7 million or less. The FAA has determined that this rule would impact a substantial number of small business repair stations.

### *C. Subcontractors Impacted by This Rule*

After estimating the number of small entity repair stations, we now focus on describing subcontractors impacted by this rule. Many of the subcontracting companies impacted by this rule are not certificated by the FAA. Their primary function is not aviation related, but rather a business outside of aviation. Because these businesses are based on NAICS codes from other industries, the FAA could not easily determine the appropriate codes. The FAA first reviewed the comments submitted by SBA and ARSA in response to the Antidrug and Alcohol Misuse Prevention Programs Regulatory Evaluation including a preliminary list of 21 NAICS codes for suppliers, parts fabricators and metal finishers, and others that may perform safety sensitive repairs and would be considered a subcontractor under the rule. The FAA examined the submitted list of 21 NAICS codes to determine which activities would be covered by this rule. There was some duplication in the codes, reducing the actual number of codes to be examined. The results of this analysis are presented in Table 1.

In addition to the list of NAICS codes, ARSA also provided information on a Non-Certificated Maintenance Subcontractor (NCMS) Survey it conducted. Some of the information from the survey proved to be useful in determining the small business impact on subcontractors, particularly the responses to questions 1 (number of employees), 2 (annual revenue), 3 (an existing contract with a US air carrier to perform maintenance), 4 (type of work). These responses are used, in this analysis, to determine the characteristics of these companies.

The FAA finds it appropriate to start with the responses to question 4, which deals with the work-related functions of

[1] *http://www.sba.gov/content/summary-size-standards-industry.*

[2] Aircraft Repair Station Security (49 CFR Part 1520 and 1554). Regulatory and Economic Analysis: Transportation Security Administration Department of Homeland Security, October 15, 2009 [Docket No. TSA–2004–17131] *http://www.nbaa.org/ops/security/programs/repair-station/part-145-security-nprm-20091118.pdf.*

the respondents, as a snapshot of some of the types of companies that, would need to be included in this analysis. The FAA grouped the responses to question 4 into the NAICS codes that both ARSA and the SBA provided and the FAA was able to correlate 98 of the 134 survey respondents with these codes; these 98 are shown in Table 1 below. While there are discrepancies with regard to the count, we can validate 98 of the 134 responses. This shows the wide spectrum of businesses providing contracting support.

TABLE 1—SURVEY RESULTS—NAICS CODES AND WORK FUNCTIONS

| Number of NCMS | NAICS code | Work functions | Require D&A program? |
|---|---|---|---|
| 1 | 313311 | Fireproofing of fabrics | Y |
| 14 | 313320 | Metallizing (including plating) | S |
| 9 | 332322 | Manufacturing airframe parts (mostly sheet metal) | N |
| | | Manufacturing per approved drawing or data | N |
| | | Manufacturing small parts; some of which are used by part 121 operators | N |
| 23 | 332710 | Chemical milling (reduction of weight) | S |
| | | Machining | S |
| | | Machining and welding of ground support parts for planes | N |
| | | Machining of turbine engine components | S |
| | | Machining; chrome plating; anodize; metal finishing; shot peening | S |
| 3 | 332722 | Manufacturer of miniature turned parts. Screws and like | N |
| 2 | 332811 | Heat treating | Y |
| 1 | 332812 | Painting | Y |
| 8 | 332813 | Chrome plating; nickel plating (metal finishing) | S |
| | | Machining; chrome plating; anodize; metal finishing; shot peening | S |
| | | Metal finishing (grinding) (zinc plating) | S |
| | | Plating; precision grinding; non-destructive testing | S |
| 3 | 332999 | Die-cut parts—shims; washers; gaskets; etc | N |
| 1 | 334511 | Rebuild electro-mechanical switches for aviation use | N |
| 1 | 336412 | Overhauling of engine blocker doors | Y |
| 22 | 488190 | Minor maintenance | Y |
| | | Maintenance on 135 charter aircraft line | Y |
| | | Overhauling of engine blocker doors | Y |
| 5 | 541380 | Calibration and repair of test and measuring equipment | N |
| | | Hydrostatic testing | N |
| | | Inspection | N |
| | | Machining & fabrication of test fixtures & equipment used in repair processes | N |
| | | Non-destructive testing | N |
| 1 | 561740 | Cleaning seat covers | N |
| 4 | 811310 | Machining and welding of ground support parts for planes | N |
| | | Manufacturing & precision grinding and testing of various fuel & hydraulic/pneumatic valve assemblies. | N |

Table 1 also indicates whether a specific function would require a D&A program. The last column is either marked with ''Y'' meaning yes, ''N'' meaning no, and ''S'' meaning some in this grouping might need such a program, as this work function conceivably could mandate such a program. Companies that have work that is strictly manufacturing will not be required to comply with the D&A testing rules. Several companies mentioned in their survey responses that they do not perform maintenance, and would not be included among companies required to set up and implement D&A testing. For example, the 14 companies characterized as 313320, which involves metal finishing including plating, may need to conduct D&A testing if any of the work they perform is considered maintenance under 14 CFR part 43.

The responses to questions 1 and 2 address the number of employees and the annual revenue reported by the surveyed companies. These responses are helpful in establishing the type of impact that this program will have on these companies. Question 1 asked ''How many employees does your company have?'' Table 2 summarizes the responses provided by the ARSA survey. All but two of the responses are in the category of 750 or below. The two responses for ''1501+'' are outliers and, for computational purposes, can be ignored. Approximately 75 of the respondents stated that they employed between 1 and 50 employees, indicating that the majority of subcontracting companies are small entities.

TABLE 2—SURVEY RESULTS—EMPLOYEES BY COMPANY

| Response | Count | Percent |
|---|---|---|
| 1 to 10 | 43 | 32.09 |
| 11 to 50 | 58 | 43.28 |
| 51 to 100 | 10 | 7.46 |
| 101 to 500 | 18 | 13.43 |
| 501 to 750 | 3 | 2.24 |
| 751 to 1000 | 0 | 0.00 |
| 1001 to 1500 | 0 | 0.00 |

TABLE 2—SURVEY RESULTS—EMPLOYEES BY COMPANY—Continued

| Response | Count | Percent |
|---|---|---|
| 1501+ | 2 | 1.49 |
| Total | 134 | 100.00 |

Question 2 of the survey asked about the company's annual revenues; Table 3 summarizes the survey responses:

TABLE 3—SURVEY RESULTS—ANNUAL REVENUE BY COMPANY

| Response | Count | Percent |
|---|---|---|
| Under $750,000 | 43 | 32.09 |
| $750,000 to $1 million | 14 | 10.45 |
| $1 million to $2 million | 20 | 14.93 |
| $2 million to $6 million | 24 | 17.91 |
| $6 million to $10.5 million | 8 | 5.97 |
| $10.5 million to $21.5 million | 7 | 5.22 |
| $21.5 million to $25 million | 1 | 0.75 |

TABLE 3—SURVEY RESULTS—ANNUAL REVENUE BY COMPANY—Continued

| Response | Count | Percent |
|---|---|---|
| $25 million to $30 million | 4 | 2.99 |
| More than $30 million | 13 | 9.70 |
| Total | 134 | 100.00 |

Most of these companies reported average annual revenue of $7 million or less.

As noted above, given the fact that the contractors and subcontractors are not certificated entities and the variety of work that these contractors perform for repair stations, the FAA believes that this study represents only a fraction of the total number of NCMS that may be impacted by this rule. Given the SBA's average criteria for defining small business as an entity having either 500 employees or less, or having revenue of $7 million or less, depending on the NAICS code, and that most of the businesses in the ARSA survey satisfy these criteria, the FAA has determined that a substantial number of subcontractors will be small entities impacted by this rule.

**III. Economic Impact**

Having determined that both a substantial number of small business repair stations and subcontractors will be impacted by this rule, the next step is to estimate the economic impact on these entities. The FAA rule requires small businesses to administer random drug tests to those employees who perform safety-sensitive functions. A subcontractor company can obtain coverage under another established program, lowering the cost compared to implementing its own program. In response to SBA's concerns that the program costs were underestimated for subcontractors in the March 2011 certification, the FAA based costs on subcontractors initiating and then implementing their own programs. It is important to note that these costs are much higher than when repair stations or contractors at higher tiers absorb some of the cost of D&A testing for the smaller firms. Moreover, most repair stations have drug and alcohol programs and therefore would not experience a cost burden based on the amendments to this rule. However, to estimate the maximum impact of this regulation on these employers, the FAA assumes that all of the additional cost for D&A testing is absorbed by each NCMS. The costs include: (1) Program development and maintenance, (2) training and education, (3) testing, and (4) annual documentation. The assumptions and calculations are described below and represent the costs associated with a fully-approved DOT drug and alcohol testing program:

*General Cost and Salary Assumptions:*

Maintenance supervisor salary [3]—$39.35/hour
Maintenance employee salary [4]—$34.38/hour
Blended Wage [5]—$34.96/hour
Instructor salary [6]—$26.68/hour
Administrative employee [7]—$21.41/hour
1 Supervisor for every 8 employees
1 Instructor for every 20 employees

*Program Development and Maintenance*

Each subcontractor will have to devote resources to developing an antidrug and alcohol misuse prevention testing program. In addition, each of these subcontractors will have to spend time to produce information required for their registration and submit it to the FAA. At the FAA, this information will have to be processed, and entered into the appropriate database. The FAA estimates that development and maintenance of a drug program would require a minimum of 16 additional administrative hours at $21 per hour for a total of $336 per company per year. Data provided by the Office of Aerospace Medicine shows that most companies have administrative support staff administering the program, however, in response to comments from MARPA and ARSA, the FAA also estimated costs using a supervisor ($39.35/hour) as the responsible party. For a supervisor with a minimum of 16 hours, the FAA estimates that the development and maintenance of a drug program would be $629 per year. The FAA believes that the administrative burden on subcontractors will be less than or equal to those of small part 121- or 135-certificate holders. Moreover, to be conservative and not underestimate costs, the FAA used 16 hours of a supervisor's time for administering the program to compute startup program development costs.

*Training and Education*

Training costs are a combination of supervisor and employee training costs, plus the cost to establish and maintain a training program. For both the antidrug and alcohol misuse prevention programs, the employer will train supervisors to make reasonable cause/suspicion determinations. In addition, supervisors and employees will receive training on the effects and consequences of drug use on personal health, safety, and work environment, as well as the manifestations and behavioral cues that may indicate drug use and abuse. For supervisors, the FAA requires an initial two hours of training; an hour for the drug program and another hour for the alcohol program. For the initial training, adding the supervisor salary ($39.35) for 2 hours to the instructor salary ($26.68) for the same 2 hours of instruction sums to $132 per supervisor. The FAA also requires recurring supervisory training for the drug program. Although there is no time requirement for this training; the FAA expects that the recurring training will be similar to the initial training. Therefore, the FAA estimates that companies will provide an annual hourly refresher course for supervisors. The recurring annual training would be half the cost of the initial training at $66 per supervisor per year. However, the recurring training costs are weighted to include any additional initial supervisory training for an actual recurring cost of $73 per supervisor per year. To include the cost of initial training and the recurring training the FAA averaged these costs over the 10 years analyzed in the Regulatory Evaluation for this rule. The average training costs per year per supervisor is $84.

For employees, companies are only required to provide initial training explaining the program and expectations for employees; a refresher course is recommended but not required. Training for employees is an hour. Cost to train employees is approximately an hour of an employee's time at $34.38 per hour and an hour of the instructor's time ($26.68) for a total of $61.06 per employee per year.

Companies must also establish an education program that includes informational material, videos, etc. Training materials are generally an expense incurred during the start-up

[3] 49–1011 First-Line Supervisor/Managers of Mechanics, Installers, and Repairers; Bureau of Labor Statistics, *http://www.bls.gov*—In May 2009, the Employee Benefit Research Institute, using a Bureau of Labor Statistics Survey of employee benefits estimated the total 2009 benefit as a percentage of payroll at 30.2 percent; *http://www.ebri.org/pdf/publications/books/databook/DB.Chapter2003.pdf.*

[4] 49–3011 Aircraft Mechanics and Service Technicians; Bureau of Labor Statistics, *http://www.bls.gov.*

[5] Two of the costs described below, testing costs and employee training costs, involve all employees, both supervisors and non-supervisors. For these two sets of calculations, the FAA uses a weighted wage rate from the maintenance supervisor and maintenance employee salary that is applicable to all employees.

[6] 25–3099 Teachers and Instructors, All Other; Bureau of Labor Statistics, *http://www.bls.gov.*

[7] 43–0000 Office and Administrative Support Occupations; Bureau of Labor Statistics, *http://www.bls.gov.*

phase of a drug and alcohol testing program. Employers can buy a single package of materials, and/or a video, which will be used for both supervisors and employees. There is also an option to use the Internet and/or our Agency materials to provide this training. From information provided by the Office of Aerospace Medicine and the cost of training materials on several Web sites, the FAA estimates that companies could incur an upfront cost for training material of $199 to $400 per company.[8] Since companies reuse these videos, the costs for materials are actually spread out over several years. Spreading the material cost over the same 10 year period as above, the FAA estimates that companies will spend approximately $40 per company per year on training material.

*Testing Cost*

Drug and alcohol tests are required periodically for all employees performing safety sensitive functions. The test costs approximately $45 [9] or $35, respectively. Several commenters stated that testing costs range anywhere from $60–$95 because most businesses contract out the administration of the program, including the testing, which results in higher costs. Here the testing cost is smaller because it does not include outsourcing the administration of the program, rather the administration of the program is done internally and those costs are listed under program development, maintenance and annual documentation below. The test includes specimen collection, laboratory processing, and MRO (medical review officer) verification. Testing takes place during an employee's shift. This is time not worked but still paid by the company and is included as part of the testing cost. In the March 2011 certification the FAA estimated that the testing process would take approximately 2 hours. The FAA adopted this standard based on comments to the initial regulatory evaluation published for comment on August 24, 2005. Originally, the FAA estimated that it would only take 45 minutes to conduct these tests. The 45 minutes is composed of 30 minutes of total travel time, and 15 minutes for the drug test. Commenters asserted that this 45 minute timeframe failed to adequately account for travel time. In consideration of these comments, the FAA estimated in the certification published for comment in March 2011 that the total cost of testing is calculated by adding the 2-hour blended wage paid to the employee to the cost of the test. Thus, the total cost of a drug test, which includes the 2-hour testing process with the employee's labor wage for this time as well as travel costs, sums to $113 per employee and $102 per employee for an alcohol testing. This is consistent with previous FAA methodology for determining labor costs attributable to a rule. In its comments to this certification, ARSA suggested that the FAA should not use the employee's wage but rather, should use the labor rate that the company would charge its customers to account for lost revenue while the test is being conducted. The difference between the wage rate and the labor rate is a transfer from the customer to the company and transfers are not to be included as compliance costs based on OMB guidance. Moreover, this is not included because companies are being compensated by their customers.

*Annual Documentation*

Each subcontractor has to periodically submit documentation. Subcontractors will be required to report or submit the following documents; training records, reasonable suspicion cases of drug and alcohol misuse, a positive drug or alcohol test, an employee's refusal to submit to a drug or alcohol test, post-accident alcohol tests, and if a post-accident alcohol test is not promptly administered documentation stating the reasoning behind the delay. The FAA estimates that it will cost [10] $1.29 to report each training record, to document each reasonable suspicious case, or to submit every rationale behind tests not being promptly administered. Notification of a positive drug or alcohol test or an employee's refusal to be tested is estimated to take 0.25 administrative hours at an hourly rate of $21 totaling roughly $5 per notification. The FAA projects that these documents will be submitted annually, but each company on average only submits a certain number of reports. Using this average, documentation cost is estimated at $50 per company for the first year and $4.50 per company for subsequent years.

As stated above, for this rule the FAA defines a small business as a company having 500 employees or fewer, or having revenue of $7 million or less. To determine if there would be a significant economic impact on small businesses, the FAA estimated the cost for what is believed to be one of the smallest companies under this definition: A company with 2 employees and 1 supervisor. The FAA summed the cost information provided above for testing, training and education, program maintenance and development, and annual documentation for a total cost of $2280er year. Detailed information on how this number was calculated is provided below.

**2 Employees and Annual Revenue Under $750,000**

*Cost of Drug Testing Program*

$113 Testing Cost × 2 Employees = $226
$84 Supervisor Training × 1 Supervisors = $84
$61 Employee Training × 2 Employees = $122
$40 per Company for Training Material
$629 Program Development per Company
+ $50 for Annual Documentation per Company
Total Cost = $1,151 per Company

*Cost of Alcohol Testing Program*

$102 Testing Cost × 2 Employees = $204
$84 Supervisor Training × 1 Supervisors = $84
$61 Employee Training × 2 Employees = $122
$40 per Company for Training Material
$629 Program Development per Company
+$50 for Annual Documentation per Company
Total Cost = $1,129 per Company

Per SBA guidance, ''in the absence of statutory specificity, what is significant or substantial will vary depending on the problem being addressed, the rule's requirements, and the preliminary assessment of the rule's impact. The agency is in the best position to gauge the small entity impacts of its regulations. Thus, Advocacy relies on legislative history of the RFA for general guidance in defining these terms.'' [11] Historically, the FAA uses costs equal to or exceeding 2 percent of annual revenue as a measure of a significant economic impact. For a $2,280 cost to be a significant economic impact, a company would need to have annual revenues of less than $103,000. Given the wages of a supervisor and two employees, these companies would need revenue substantially higher than

[8] *https://secure2.airbase1.com/faadrug/results.asp.*

[9] The source for the information on the drug and alcohol tests is the Office of Drug and Alcohol Policy and Compliance, in the Office of the Secretary of Transportation. This cost covers, among other things, collection of specimens, reporting, recordkeeping, and chain-of-custody procedures, as well as the cost of the technician.

[10] The FAA and the other DOT modes are directed by DOT to price record creation at $1.145, record filing at $0.118, and record storage at $0.0228 for all documents related to the alcohol misuse prevention program and the antidrug program.

[11] Report on the Regulatory Flexibility Act, FY 2010; *http://www.sba.gov/sites/default/files/files/10regflx.pdf.*

$100,000 to stay in business. ARSA maintains that measuring the impact on small businesses based on annual revenues is not appropriate. ARSA asserts that the FAA should measure economic impact based on profits. The FAA has reviewed ARSA's suggestion and determined that it is not appropriate for this analysis. Use of annual revenues is consistent with the SBA's measure of the impact on small businesses. See 13 CFR 121.106; 121.201. Thus, based on the projected costs for the smallest of entities that could be affected by this final rule, the FAA concludes no firm would incur a significant economic impact. Accordingly, although a substantial number of small businesses are impacted by this rule, because the economic impact is not significant, under 5 U.S.C. 605(b), I certify, as the FAA Administrator, that this rule will not have a significant economic impact on a substantial number of small entities.

Issued in Washington, DC, on July 7, 2011.

**J. Randolph Babbitt,**

*Administrator, Federal Aviation Administration.*

[FR Doc. 2011–17472 Filed 7–7–11; 4:15 pm]

**BILLING CODE P**

## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

### 15 CFR Part 748

**[Docket No. 110413240–1255–02]**

**RIN 0694–AF23**

## Technical Amendment to the Authorization Validated End-User Regulations of the Export Administration Regulations

**AGENCY:** Bureau of Industry and Security, Commerce.

**ACTION:** Final rule.

**SUMMARY:** In this rule, the Bureau of Industry and Security (BIS) amends the Export Administration Regulations (EAR), Supplement No. 7 to Part 748—Authorization Validated End-User (VEU): List of Validated End-Users, Respective Items Eligible for Export, Reexport and Transfer, and Eligible Destinations—to add a column that lists **Federal Register** citations for the respective entries. This rule does not make any substantive changes to Supplement No. 7 or elsewhere in the EAR.

**DATES:** This rule is effective July 12, 2011.

**FOR FURTHER INFORMATION CONTACT:** Karen Nies-Vogel, Chair, End-User Review Committee, Bureau of Industry and Security, U.S. Department of Commerce, 14th Street & Pennsylvania Avenue, NW., Washington, DC 20230; by *telephone:* (202) 482–5991, *fax:* (202) 482–3911, or *e-mail: ERC@bis.doc.gov*.

**SUPPLEMENTARY INFORMATION:**

### Background

*Authorization Validated End-User (VEU)*

BIS amended the EAR in a final rule on June 19, 2007 (72 FR 33646), creating a new authorization for ''validated end-users'' (VEUs) located in eligible destinations to which eligible items may be exported, reexported, or transferred (in-country) under a general authorization instead of a license, in conformance with section 748.15 of the EAR.

VEUs may obtain eligible items that are on the Commerce Control List, set forth in Supplement No. 1 to Part 774 of the EAR, without having to wait for their suppliers to obtain export licenses from BIS. Eligible items may include commodities, software, and technology, except those controlled for missile technology or crime control reasons.

The VEUs listed in Supplement No. 7 to Part 748 of the EAR were reviewed and approved by the U.S. Government in accordance with the provisions of section 748.15 and Supplement Nos. 8 and 9 to Part 748 of the EAR. The End-User Review Committee (ERC), composed of representatives from the Departments of State, Defense, Energy and Commerce, and other agencies, as appropriate, is responsible for administering the VEU program. A unanimous vote by the ERC is required to authorize VEU status for a candidate or to add eligible items to an existing authorization. Majority vote of the ERC is required to remove VEU authorization or to remove eligible items from an existing authorization.

In addition to U.S. exporters, Authorization VEU may be used in accordance with the provisions of the EAR by foreign reexporters and by persons transferring in-country, and it does not have an expiration date. VEUs are subject to regular reviews, based on information available to the United States government, to ensure that items shipped under Authorization VEU are used for civilian purposes. In addition, VEUs are subject to on-site reviews as warranted.

As of the date of this rule, pursuant to section 748.15(b) of the EAR, VEUs are only located in the PRC and India.

*Amendment to Supplement No.7 to Part 748 of the EAR*

In this final rule, BIS amends the EAR, Supplement No.7 to Part 748 Authorization Validated End-User (VEU): List of Validated End-Users, Respective Items Eligible for Export, Reexport and Transfer, and Eligible Destinations to add a column that lists **Federal Register** citations for the respective entries. This rule does not make any substantive changes to Supplement No.7 or elsewhere in the EAR.

The **Federal Register** citation that appears first for each VEU in the new column added to Supplement No. 7 indicates the initial date on which the authorization for that listed VEU and its respective list of approved ''Eligible Items'' and ''Eligible Destinations'' were published in the **Federal Register** and became effective. Subsequent citations indicate the dates on which amendments to a VEU's authorization were published in the **Federal Register** and became effective.

Since August 21, 2001, the Export Administration Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. p. 783 (2002)), as extended most recently by the Notice of August 16, 2010 (75 FR 50681, August 16, 2010), has continued the EAR in effect under the International Emergency Economic Powers Act. BIS continues to carry out the provisions of the Act, as appropriate and to the extent permitted by law, pursuant to Executive Order 13222.

### Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). 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 determined to be not significant for purposes of Executive Order 12866.

2. Notwithstanding any other provisions of law, no person is required to respond to nor be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) (PRA), unless that collection of

information displays a currently valid Office of Management and Budget (OMB) Control Number. This rule does not involve a collection of information, and, therefore, does not implicate requirements of the PRA.

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

4. The Department finds that there is good cause under 5 U.S.C. 553(b)(A) and (B) to waive the provisions of the Administrative Procedure Act (APA) requiring prior notice and the opportunity for public comment because they are unnecessary. This rule is procedural, which is exempted from the notice and comment requirements of the APA. This rule only adds a column to the existing Supplement No. 7 to Part 748 of the EAR for purposes of providing **Federal Register** citations for entries in the Supplement to the public. Because these revisions are not substantive changes, it is unnecessary to provide notice and opportunity for public comment. In addition, the 30-day delay in effectiveness required by 5 U.S.C. 553(d) is not applicable because this rule is not a substantive rule. Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this final rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under the APA or by any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Therefore, this regulation is issued in final form.

**List of Subjects in 15 CFR Part 748**

Administrative practice and procedure, Exports, Reporting and recordkeeping requirements.

Accordingly, part 748 of the Export Administration Regulations (15 CFR parts 730–774) is amended as follows:

## PART 748—[AMENDED]

■ 1. The authority citation for 15 CFR part 748 continues to read as follows:

**Authority:** 50 U.S.C. app. 2401 *et seq.;* 50 U.S.C. 1701 *et seq.;* E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp. p 228; E,O, 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 12, 2010 (75 FR 50681 (August 16, 2010),

■ 2. Supplement No. 7 to Part 748 is revised to read as follows:

AUTHORIZATION VALIDATED END-USER (VEU): LIST OF VALIDATED END-USERS, RESPECTIVE ITEMS ELIGIBLE FOR EXPORT, REEXPORT AND TRANSFER, AND ELIGIBLE DESTINATIONS

| Country | Validated end-user | Eligible items (by ECCN) | Eligible destination | **Federal Register** citation |
|---|---|---|---|---|
| China (People's Republic of). | Advanced Micro Devices China, Inc. | 3D002, 3D003, 3E001 (limited to ''technology'' for items classified under 3C002 and 3C004 and ''technology'' for use during the International Technology Roadmap for Semiconductors (ITRS) process for items classified under ECCNs 3B001 and 3B002), 3E002 (limited to ''technology'' for use during the ITRS process for items classified under ECCNs 3B001 and 3B002), 3E003.e (limited to the ''development'' and ''production'' of integrated circuits for commercial applications), 4D001, 4D002, 4D003 and 4E001 (limited to the ''development'' of products under ECCN 4A003). | AMD Technologies (China) Co., Ltd., No. 88, Su Tong Road, Suzhou, China 215021.<br>Advanced Micro Devices (Shanghai) Co., Ltd., Buildings 46, 47, 48 & 49, River Front Harbor, Zhangjiang Hi-Tech Park, 1387 Zhangdong Rd., Pudong, Shanghai, 201203.<br>AMD Technology Development (Beijing) Co., Ltd., 18F, North Building, Raycom Infotech, Park Tower C, No. 2 Science Institute South Rd., Zhong Guan Cun, Haidian District, Beijing, China 100190. | 75 FR 25763, 5/10/10. 76 FR 2802, 1/18/11. |
| | Applied Materials (China), Inc. | 2B006.b, 2B230, 2B350.g.3, 2B350.i, 3B001.b, 3B001.c, 3B001.d, 3B001.e, 3B001.f, 3C001, 3C002, 3D002 (limited to ''software'' specially designed for the ''use'' of stored program controlled items classified under ECCN 3B001) 2B006.b, 2B230, 2B350.g.3, 2B350.i, 3B001.b, 3B001.c, 3B001.d, 3B001.e, 3B001.f, 3C001, 3C002, 3D002 (limited to ''software'' specially designed for the ''use'' of stored program controlled items classified under ECCN 3B001), and 3E001 (limited to ''technology'' according to the General Technology Note for the ''development'' or ''production'' of items controlled by ECCN 3B001). | Applied Materials South East Asia Pte. Ltd.—Shanghai Depot c/o Shanghai Applied Materials Technical Service Center No. 2667 Zuchongzhi Road, Shanghai, China 201203.<br>Applied Materials South East Asia Pte. Ltd.—Beijing Depot c/o Beijing Applied Materials Technical Service Center No. 1 North Di Sheng Street, BDA Beijing, China 100176.<br>Applied Materials South East Asia Pte. Ltd.—Wuxi Depot c/o Sinotrans Jiangsu Fuchang Logistics Co., Ltd. 1 Xi Qin Road, Wuxi Export Processing Zone Wuxi, Jiangsu, China 214028.<br>Applied Materials (China), Inc.—Shanghai Depot No. 2667, Zuchongzhi Road Shanghai, China 201203.<br>Applied Materials South East Asia Pte. Ltd.—Wuhan Depot c/o Wuhan Optics Valley Import & Export Co., Ltd. No. 101 Guanggu Road East Lake High-Tec Development Zone Wuhan, Hubei, China 430074.<br>Applied Materials (China), Inc.—Beijing Depot No. 1 North Di Sheng Street, BDA Beijing, China 100176.<br>Applied Materials (Xi'an) Ltd. No. 28 Xin Xi Ave., Xi'an High Tech Park Export Processing Zone Xi'an, Shaanxi, China 710075. | 72 FR 59164, 10/19/07. 74 FR 19382, 4/29/09. 75 FR 27185, 5/14/10. |

AUTHORIZATION VALIDATED END-USER (VEU): LIST OF VALIDATED END-USERS, RESPECTIVE ITEMS ELIGIBLE FOR EXPORT, REEXPORT AND TRANSFER, AND ELIGIBLE DESTINATIONS—Continued

| Country | Validated end-user | Eligible items (by ECCN) | Eligible destination | **Federal Register** citation |
|---|---|---|---|---|
| | Boeing Tianjin Composites Co. Ltd. | 1A002.a; 1B001.f; 1C010.b; 1C010.e; 1D001 (limited to ''software'' specially designed or modified for the ''development'', ''production'' or ''use'' of equipment controlled by 1B001.f) 1E001 (limited to ''technology'' according to the General Technology Note for the ''development'' or ''production'' of items controlled by 1A002.a, 1B001.f, 1C010.b & .e, and 2B001.a); 2B001.b.2 (limited to machine tools with accuracies no better than (i.e., less than) 13 microns); 2B001.e; 2D001 (limited to ''software,'' other than that controlled by 2D002, specially designed or modified for the ''development'', ''production'' or ''use'' of equipment controlled by 2B001.b.2 and 2B001.e); 2D002 (limited to ''software'' for electronic devices, even when residing in an electronic device or system, enabling such devices or systems to function as a ''numerical control'' unit, capable of coordinating simultaneously more than 4 axes for ''contouring control'' controlled by 2B001.b.2 and 2B001.e). | Boeing Tianjin Composites Co. Ltd., No. 4–388 Heibei Road, Tanggu Tianjin, China. | 72 FR 59164, 10/19/07. 74 FR 19382, 4/29/09. |
| | CSMC Technologies Corporation. | 1C350.c.3, 1C350.c.11, 2B230.a, 2B230.b, 2B350.f, 2B350.g, 2B350.h, 3B001.c.1.a, 3B001.c.2.a, 3B001.e 3B001.h (except for multilayer masks with a phase shift layer designed to produce ''space qualified'' semiconductor devices), 3C002.a, and 3C004. | CSMC Technologies Fab 1 Co., Ltd., 14 Liangxi Road, Wuxi, Jiangsu 214061, China.<br>CSMC, Technologies Fab 2 Co., Ltd., Block 86, 87, Wuxi National Hi-New Tech Industrial Development Zone, Wuxi, Jiangsu 214061, China.<br>Wuxi CR Semiconductor Wafers and Chips Co., Ltd., 14 Liangxi Road, Wuxi, Jiangsu 214061, China. | 76 FR 2802, 1/18/11. 76 FR 37634, 6/28/11. |
| | Grace Semiconductor Manufacturing Corporation. | 1C350.c.3, 1C350.d.7, 2B230, 2B350.d.2, 2B350.g.3, 2B350.i.4, 3B001.a.1, 3B001.b, 3B001.c, 3B001.d, 3B001.e, 3B001.f, 3B001.h, 3C002, 3C004, 5B002, and 5E002 (limited to production technology for integrated circuits controlled by ECCNs 5A002 or 5A992 that have been successfully reviewed under the encryption review process specified in sections 740.17(b)(2) or 740.17(b)(3) and 742.15 of the EAR; Note also the guidance on cryptographic interfaces (OCI) in section 740.17(b) of the EAR). | 1399 Zuchongzhi Road Zhangjiang Hi-Tech Park Shanghai, PR China 201203. | 75 FR 2435, 1/15/10. |
| | Hynix Semiconductor China Ltd. | 3B001.a, 3B001.b, 3B001.c, 3B001.d, 3B001.e, and 3B001.f. | Hynix Semiconductor China Ltd. Lot K7/K7–1, Export Processing Zone Wuxi, Jiangsu, PR China. | 75 FR 62462, 10/12/10. |
| | Hynix Semiconductor (Wuxi) Ltd. | 3B001.a, 3B001.b, 3B001.c, 3B001.d, 3B001.e, and 3B001.f. | Hynix Semiconductor (Wuxi) Ltd., Lot K7/K7–1, Export Processing Zone, Wuxi, Jiangsu, PR, China. | 75 FR 62462, 10/12/10. |
| | Lam Research Corporation. | 2B230, 2B350.c, 2B350.d, 2B350.g, 2B350.h, 2B350.i, 3B001.c, 3B001.e (items controlled under 3B001.c and 3B001.e are limited to parts and components), 3D001, 3D002 (limited to ''software'' specially designed for the ''use'' of stored program controlled items classified under ECCN 3B001), and 3E001 (limited to ''technology'' according to the General Technology Note for the ''development'' of equipment controlled by ECCN 3B001). | Lam Research (Shanghai) Service Co., 1st Floor, Area C, Hua Hong Science & Technology Park, 177 Bi Bo Road Zhangjiang Hi-Tech Park, Pudong, Shanghai, China 201203.<br>Lam Research Shanghai Co., Ltd., No. 1 Jilong Rd., Room 424–2, Waigaoqiao Free Trade Zone, Shanghai, China 200131.<br>Lam Research International Sarl (Shanghai TSS), c/o HMG Logistic (Shanghai), Co., Ltd., No. 55, West Shang Feng Road, Tangzhen, Pudong New Area, Shanghai, China 201203.<br>Lam Research Shanghai Co., Ltd., (Shanghai WGQ Bonded Warehouse), No. 55, Fei la Road, Waigaoqiao Free Trade Zone, Pudong New Area, Shanghai, China 200131.<br>Lam Research Co., Ltd. (Beijing Branch), Room 322 Dadi Mansion, No. 18 Hongda Beilu Beijing Economic & Technological Development Area, Beijing, China 100176. | 75 FR 62462, 10/12/10. |

AUTHORIZATION VALIDATED END-USER (VEU): LIST OF VALIDATED END-USERS, RESPECTIVE ITEMS ELIGIBLE FOR EXPORT, REEXPORT AND TRANSFER, AND ELIGIBLE DESTINATIONS—Continued

| Country | Validated end-user | Eligible items (by ECCN) | Eligible destination | Federal Register citation |
|---|---|---|---|---|
| | | | Lam Research Co., Ltd. (Wuxi Representative Office), 5E, Bldg. C International Science & Technology Park, #2 Taishan Road, WND, Wuxi, Jiangsu, China 214028.<br>Lam Research International Sarl (Wuxi EPZ Bonded Warehouse) c/o HMG WHL Logistic (Wuxi) Co., Ltd., F1, Area 4, No. 1, Plot J3, No. 5 Gaolang East Road, Export Processing Zone, Wuxi, China 214028.<br>Lam Research Co., Ltd. (Wuhan Representative Office), Room 1810, Guanggu International Building B, 456 Luoyu Road, East-Lake Hi-Tech Development Zone, Wuhan City, Hubei Province, China 430074.<br>Lam Research International Sarl (Wuhan TSS), c/o HMG Wuhan Logistic Co., Ltd., 1st—2nd Floor, No. 5 Building, Hua Shi Yuan Er Road, Optical Valley Industry Park, East-Lake Hi-Tech Development Zone, Wuhan City, Hubei Province, China 430223. | |
| | National Semiconductor Corporation. | 3A001.a.5.a.1; 3A001.a.5.a.2; 3A001.a.5.a.3; 3A001.a.5.a.4; 3A001.a.5.a.5; 3A001.a.5.b. | National Semiconductor Hong Kong Limited, Beijing Representative Office, Room 604, CN Resources Building, No. 8 Jianggumenbei A, Beijing, China 100005.<br>National Semiconductor Hong Kong Limited, Shanghai Representative Office, Room 903–905 Central Plaza, No. 227 Huangpi Road North, Shanghai, China 200003.<br>National Semiconductor Hong Kong Limited, Shenzhen Representative Office, Room 1709 Di Wang Commercial Centre, Shung Hing Square, 5002 Shenna Road East, Shenzhen, China 518008. | 72 FR 59164, 10/19/07. 72 FR 61512, 10/31/07. |
| | Semiconductor Manufacturing International Corporation. | 1C350.c.3; 1C350.d.7; 2B006.b.1; 2B230; 2B350.d.2; 2B350.g.3; 2B350.i.4; 3B001.a; 3B001.b; 3B001.c; 3B001.d; 3B001.e; 3B001.f; 3C001; 3C002; 3C004; 5B002; 5E002 (limited to ''technology'' according to the General Technology Note for the ''production'' of integrated circuits controlled by ECCN 5A002 that has been successfully reviewed under the encryption review process specified in §§ 740.17.b.2 or 740.17.b.3 and 742.15 of the EAR). | Semiconductor Manufacturing International (Shanghai) Corporation, 18 Zhang Jiang Rd., Pudong New Area, Shanghai, China 201203.<br>Semiconductor Manufacturing International (Tianjin) Corporation, 19 Xing Hua Avenue, Xi Qing Economic Development Area, Tianjin, China 300385.<br>Semiconductor Manufacturing International (Beijing) Corporation, No. 18 Wen Chang Road, Beijing Economic-Technological Development Area, Beijing, China 100176.<br>Semiconductor Manufacturing International (Chengdu) Corporation, Assembly and Testing (AT2) Facility, 8–8 Kexin Road, Export Processing Zone (West Area), Chengdu, China 611731. | 72 FR 59164, 10/19/07. 75 FR 67029, 11/1/10. |
| | Shanghai Hua Hong NEC Electronics Company, Ltd. | 1C350.c.3; 1C350.d.7; 2B230; 2B350.d.2; 2B350.g.3; 2B350.i.4; 3B001.c.2; 3C002; 3C004. | Headquarters and Fab. 1 of HHNEC, No. 1188 Chuan Qiao Rd., Pu Dong, Shanghai, China 201206.<br>Fab. 2 of HHNEC, No. 668 Guo Shou Jing Rd., Zhang Jiang High Tech Park, Pu Dong, Shanghai, China 201203. | 72 FR 59164, 10/19/07. |
| India | GE India | AIFACS Bldg., 1 Rafi Marg, New Delhi 110 001 India. | | 74 FR 31620, 7/2/09. 74 FR 68147, 12/23/09. |
| | | For GEITC:<br>1C002.a.1, 1C002.a.2, 1C002.b.1.a and 1C002.b.1.b, 1E001, 2E983, 9E003.a.1, 9E003.a.4, 9E003.a.5, 9E003.a.6, 9E003.a.8, and 9E003.c. | GE India Technology Centre Private Ltd. (GEITC) 122, EPIP, Phase II, Hoodi Village, Whitefield Road, Bangalore, Karnataka 560066 India. | |
| | | For BEC:<br>1C002.a.1, 1C002.a.2, 1C002.b.1.a, 1C002.b.1.b, 1E001, 9E003.a.1, 9E003.a.2, 9E003.a.4, 9E003.a.5, 9E003.a.6, 9E003.a.8, and 9E003.c. | Bangalore Engineering Centre (BEC), c/o GE India Technology Centre Private Ltd. (GEITC), 122, EPIP, Phase II, Hoodi Village, Whitefield Road, Bangalore, Karnataka 560066 India. | |

Dated: July 1, 2011.

**Matthew S. Borman,**

*Deputy Assistant Secretary for Export Administration.*

[FR Doc. 2011–17494 Filed 7–11–11; 8:45 am]

**BILLING CODE 3510–33–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### 21 CFR Part 520

**[Docket No. FDA–2011–N–0003]**

### Oral Dosage Form New Animal Drugs; Amprolium

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of an original abbreviated new animal drug application (ANADA) filed by Cross Vetpharm Group Ltd. The original ANADA provides for the use of amprolium soluble powder for the treatment of coccidiosis in chickens and turkeys.

**DATES:** This rule is effective July 12, 2011.

**FOR FURTHER INFORMATION CONTACT:** John K. Harshman, Center for Veterinary Medicine (HFV–170), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–276–8197, e-mail: *john.harshman@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:** Cross Vetpharm Group Ltd., Broomhill Rd., Tallaght, Dublin 24, Ireland, filed ANADA 200–488 for the use of AMPROMED–P (amprolium) for poultry, a water-soluble powder used for the treatment of coccidiosis in chickens and turkeys. Cross Vetpharm Group Ltd.'s AMPROMED–P for Poultry is approved as a generic copy of Huvepharma AD's AMPROL 128 (amprolium) 20% Soluble Powder, approved under NADA 33–165. The ANADA is approved as of May 23, 2011, and the regulations in 21 CFR 520.100 are amended to reflect the approval.

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

FDA has determined under 21 CFR 25.33 that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

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 520**

Animal drugs.

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 520 is amended as follows:

## PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 520 continues to read as follows:

**Authority:** 21 U.S.C. 360b.

■ 2. In § 520.100, paragraph (b)(4) is revised to read as follows:

**§ 520.100 Amprolium.**

* * * * *

(b) * * *

(4) No. 061623 for use of product described in paragraph (a)(2) of this section as in paragraphs (d)(1) and (d)(2) of this section.

* * * * *

Dated: June 30, 2011.

**Bernadette Dunham,**

*Director, Center for Veterinary Medicine.*

[FR Doc. 2011–17465 Filed 7–11–11; 8:45 am]

**BILLING CODE 4160–01–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 165

**[Docket No. USCG–2011–0507]**

**RIN 1625–AA00**

### Safety Zones; Fireworks Within the Sector Boston Captain of the Port Zone

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing temporary safety zones within the Sector Boston Captain of the Port (COTP) Zone for various fireworks displays. These safety zones are necessary to provide for the safety of life on navigable waters during these fireworks events. Entering into, transiting through, mooring or anchoring within these zones is prohibited unless authorized by the COTP or the designated on-scene representative.

**DATES:** This rule is effective in the CFR on July 12, 2011 through 11:59 p.m. September 9, 2011. This rule is effective with actual notice for purposes of enforcement beginning at 8:30 p.m. June 27, 2011.

**ADDRESSES:** Documents indicated in this preamble as being available in the docket are part of docket USCG–2011–0507 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–0507 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 MST1 David Labadie of the Waterways Management Division, U.S. Coast Guard Sector Boston; telephone 617–223–3010, e-mail *david.j.labadie@uscg.mil.* If you have questions on viewing material related to 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. The safety zones listed in this rule are associated with annual fireworks events. The Coast Guard intends to make these safety zones permanent regulations and has submitted a NPRM for submission to the **Federal Register** requesting public

comments. A delay in publication and the lengthy comment period associated with the process of rulemaking in the **Federal Register** does not allow time to publish a NPRM followed by a final rule as these events would occur before the rulemaking process was complete. The sponsors are unable to reschedule these events due to other activities being held in conjunction with the fireworks displays and the Fourth of July holiday. Many community members have made holiday plans based on these fireworks events, and changing the date would cause numerous cancelations and hurt small businesses. Rescheduling would not be a viable option because most event venues, entertainers and venders have fully booked summer schedules making rescheduling nearly impossible.

Due to the dangers posed by the pyrotechnics used in these fireworks displays, the safety zones are necessary to provide for the safety of event participants, spectator craft, and other vessels transiting the event areas. For the safety concerns noted, it is in the public interest to have these regulations in effect during the events.

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.** Any delay in the effective date of this rule would expose spectators, vessels and other property to the hazards associated with pyrotechnics used in the fireworks displays.

**Basis and Purpose**

The legal basis for the temporary rule is 33 U.S.C. 1226, 1231, 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 safety zones.

The safety zones are being issued to establish temporary regulated areas within the Sector Boston Captain of the Port (COTP) Zone for various fireworks displays.

**Discussion of Rule**

This temporary rule is necessary to ensure the safety of spectators, vessels and other property from the hazards associated with fireworks displays. The COTP Boston has determined that fireworks displays in close proximity to watercraft and waterfront structures pose a significant risk to public safety and property. Such hazards include obstructions to the waterway that may cause marine casualties and the explosive danger of fireworks and debris falling into the water that may cause death or serious bodily harm. Establishing safety zones around the locations of these fireworks events will help ensure the safety of spectators, vessels and other property and help minimize the associated risks.

The Coast Guard has implemented safety zones for past events and has not received public comments or concerns regarding the impact to waterway traffic from these events.

**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 safety zones will be of limited duration, are located in waterways that have no deep draft commercial traffic and are designed to avoid, to the extent possible, fishing and recreational boating traffic routes.

**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 would 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 safety zones during the enforcement periods stated for each event in the List of Subjects.

These safety zones will not have a significant economic impact on a substantial number of small entities because of the minimal amount of time in which the safety zones will be enforced and vessels will be able to transit around the safety zones. Before the effective periods, we will issue maritime advisories widely available to users of the waterway.

**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. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact MST1 David Labadie at the telephone number or e-mail address indicated under the **FOR FURTHER INFORMATION CONTACT** section of this notice.

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 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 that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction. This rule involves the establishment of safety zones. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

**List of Subjects in 33 CFR Part 165**

Marine safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

## PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

**Authority:** 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Public Law 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T01–0507 to read as follows:

**§ 165.T01–0507 Safety Zones; Fireworks within the Sector Boston Captain of the Port Zone.**

(a) *General.* Temporary safety zones are established for the fireworks display as follows:

(1) *Surfside Fireworks, Salisbury Beach, MA.*

(i) *Location.* All waters of the Atlantic Ocean near Salisbury Beach, MA from surface to bottom, within a 350-yard radius of the fireworks barge located at position 42°50.6′ N, 070°48.4′ W (NAD 83).

(ii) *Enforcement Period.* This safety zone will be enforced every Saturday evening from 9:30 p.m. through 10:30 p.m. during the effective period. This safety zone will also be enforced from 9:30 p.m. through 10:30 p.m. on Sunday July 3, 2011.

(2) *Weymouth Fireworks, Weymouth, MA.*

(i) *Location.* All waters of Weymouth Fore River, within a 350-yard radius of the fireworks launch site located at position 42°15.5′ N, 070°56.1′ W (NAD 83).

(ii) *Enforcement Period.* This safety zone will be enforced from 9 p.m. to 11 p.m. on July 3, 2011. In the case this event is rescheduled due to inclement weather, this safety zone will be enforced from 9 p.m. to 11 p.m. on July 9, 2011.

(3) *Lynn 4th of July Fireworks, Lynn, MA.*

(i) *Location.* All waters of Nahant Bay, within a 350-yard radius of the fireworks barge located at position 42°27.62′ N, 070°55.58′ W (NAD 83).

(ii) *Enforcement Period.* This safety zone will be enforced from 9 p.m. to 11 p.m. on July 3, 2011. In the case this event is rescheduled due to inclement weather, this safety zone will be enforced from 9 p.m. to 11 p.m. on July 5, 2011.

(4) *Marblehead 4th of July Fireworks, Marblehead, MA.*

(i) *Location.* All waters of Marblehead Harbor within a 350-yard radius of the fireworks launch site located at position 42°30.34′ N, 070°50.13′ W (NAD 83).

(ii) *Enforcement Period.* This safety zone will be enforced from 8:30 p.m. to 10 p.m. on July 4, 2011. In the case this event is rescheduled due to inclement weather, this safety zone will be enforced from 8:30 p.m. to 10 p.m. on July 5, 2011.

(5) *Beverly Farms 4th of July Celebration Fireworks, Beverly, MA.*

(i) *Location.* All waters of Manchester Bay within a 350-yard radius of the fireworks launch site near West Beach located at position 42°33.84′ N, 070°48.5′ W (NAD 83).

(ii) *Enforcement Period.* This safety zone will be enforced from 9 p.m. to 11 p.m. on July 3, 2011. In the case this event is rescheduled due to inclement weather, this safety zone will be enforced from 9 p.m. to 11 p.m. on July 5, 2011.

(6) *Boston Pops Fireworks Spectacular, Boston, MA.*

(i) *Location.* All waters of the Charles River within a 350-yard radius of the fireworks barges located in the vicinity of position 42°21.47′ N, 071°05.00′ W (NAD 83).

(ii) *Enforcement Period.* This safety zone will be enforced from 9 p.m. to 11 p.m. on July 4, 2011. In the case this event is rescheduled due to inclement weather, this safety zone will be enforced from 9 p.m. to 11 p.m. on July 5, 2011.

(7) *Town of Nahant Fireworks, Nahant, MA.*

(i) *Location.* All waters of Nahant Harbor within a 350-yard radius of the fireworks launch site on Bailey's Hill Park located at position 42°25.1′ N, 070°55.8′ W (NAD 83).

(ii) *Enforcement Period.* This safety zone will be enforced from 9 p.m. to 11 p.m. on July 4, 2011. In the case this event is rescheduled due to inclement weather, this safety zone will be enforced from 9 p.m. to 11 p.m. on July 5, 2011.

(8) *City of Salem Fireworks, Salem, MA.*

(i) *Location.* All waters of Salem Harbor, within a 350-yard radius of the fireworks launch site located on Derby Wharf at position 42°31.15′ N, 070°53.13′ W (NAD 83).

(ii) *Enforcement Period.* This safety zone will be enforced from 9 p.m. to 10 p.m. on July 4, 2011. In the case this event is rescheduled due to inclement weather, this safety zone will be enforced from 9 p.m. to 10 p.m. on July 5, 2011.

(9) *Plymouth 4th of July Celebration Fireworks, Plymouth, MA.*

(i) *Location.* All waters of Plymouth Harbor within a 350-yard radius of the fireworks launch site located at position 42°57.3′ N, 070°38.3′ W (NAD 83).

(ii) *Enforcement Period.* This safety zone will be enforced from 9 p.m. to 10 p.m. on July 4, 2011. In the case this event is rescheduled due to inclement weather, this safety zone will be enforced from 9 p.m. to 10 p.m. on July 5, 2011.

(10) *Beverly Homecoming Fireworks.*

(i) *Location.* All waters of Beverly Harbor within a 350-yard radius of the fireworks barge located at position 42°32.62′ N, 070°52.15′ W (NAD 83).

(ii) *Enforcement Period.* This safety zone will be enforced from 9 p.m. to 11 p.m. on August 7, 2011.

(11) *Hingham 4th of July Fireworks.*

(i) *Location.* All waters within a 350-yard radius of the beach on Button Island located at position 42°15.07′ N, 070°53.03′ W (NAD 83).

(ii) *Enforcement Period.* This safety zone will be enforced from 9:30 p.m. to 10:30 p.m. on July 2, 2011. In the case this event is rescheduled due to inclement weather, this safety zone will be enforced from 9:30 p.m. to 10:30 p.m. on July 9, 2011.

(12) *Gloucester July 4th Celebration Fireworks.*

(i) *Location.* All waters of Gloucester Harbor, Stage Fort Park, within a 350-yard radius of the fireworks launch site on the beach located at position 42°36.3′ N, 070°40.5′ W (NAD 83).

(ii) *Enforcement Period.* This safety zone will be enforced from 8 p.m. to 11 p.m. on July 3, 2011.

(13) *Gloucester Schooner Festival Fireworks.*

(i) *Location.* All waters of Gloucester Harbor within a 350-yard radius of the launch site on the beach located at position 42°36.3′ N, 070°40.5′ W (NAD 83).

(ii) *Enforcement Period.* This safety zone will be enforced from 7 p.m. to 11 p.m. on September 3, 2011. In the case this event is rescheduled due to inclement weather, this safety zone will be enforced from 7 p.m. to 11 p.m. on September 5, 2011.

(b) *Regulations.* (1) In accordance with the general regulations in § 165.23 of this part, entering into, transiting through, mooring or anchoring within these regulated areas is prohibited unless authorized by the Captain of the Port (COTP) Boston, or the designated on-scene representative.

(2) The ''on-scene representative'' is any Coast Guard commissioned, warrant, or petty officer who has been designated by the COTP Boston to act on his behalf. The on-scene representative will be aboard either a Coast Guard or Coast Guard Auxiliary vessel.

(3) Vessel operators desiring to enter or operate within the regulated areas shall contact the COTP or the designated on-scene representative via VHF channel 16 or 617–223–5750 (Sector Boston command center) to obtain permission to do so.

(4) Vessel operators given permission to enter or operate in the regulated areas must comply with all directions given to them by the Captain of the Port or the designated on-scene representative.

(c) *Effective Period.* This rule is effective in the CFR on July 12, 2011 through 11:59 p.m. September 9, 2011. This rule is effective with actual notice for purposes of enforcement beginning at 8:30 p.m., June 27, 2011.

Dated: June 27, 2011.

**N.E. Knapp,**

*Commander, U.S. Coast Guard, Acting Captain of the Port Sector Boston.*

[FR Doc. 2011–17393 Filed 7–11–11; 8:45 am]

**BILLING CODE 9110–04–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 180

**[EPA–HQ–OPP–2010–0327; FRL–8878–6]**

### Maneb; Tolerance Actions

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

**ACTION:** Final rule.

**SUMMARY:** EPA is revoking all the tolerances for the fungicide maneb with expiration/revocation dates that provide sufficient time to use existing stocks of the canceled registrations for the last food uses of maneb in the United States.

**DATES:** This regulation is effective July 12, 2011. Objections and requests for hearings must be received on or before September 12, 2011 and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

**ADDRESSES:** EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2010–0327. All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:** Joseph Nevola, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; *telephone number:* (703) 308–8037; *e-mail address: nevola.joseph@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this action apply to me?*

You may be potentially affected by this action if you are an agricultural

producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

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

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

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

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

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

Under the Federal Food, Drug, and Cosmetic Act (FFDCA) section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2010–0327 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before September 12, 2011. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit a copy of your non-CBI objection or hearing request, identified by docket ID number EPA–HQ–OPP–2010–0327, by one of the following methods:

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

## II. Background

*A. What action is the Agency taking?*

In the **Federal Register** of May 26, 2010 (75 FR 29475) (FRL–8826–2), EPA issued a proposal to revoke all the tolerances for residues of the fungicide maneb after receipt and approval of requests for voluntary cancellation by registrants of the last registrations for food uses of maneb in the United States. Also, the proposal provided a 60-day comment period which invited public comment for consideration and for support of tolerance retention under FFDCA standards.

In this final rule, EPA is revoking all the tolerances for the fungicide maneb, with delayed expiration/revocation dates in response to public comments requesting more time to use existing stocks of the canceled registrations. In addition, EPA had proposed in the May 26, 2010 issue of the **Federal Register** to remove the expired tolerance in 40 CFR 180.110(b) for maneb residues in or on walnut, and reserve that paragraph. However, EPA previously removed that expired tolerance and reserved that paragraph in a final rule published in the **Federal Register** of June 15, 2011 (76 FR 34883) (FRL–8875–4). Therefore, no further changes are being made to 40 CFR 180.110(b).

In response to the proposal published in the **Federal Register** of May 26, 2010 (75 FR 29475), EPA received comments during the 60-day public comment period, as follows:

*Comments.* Commenters from the Regional Vegetable Extension Agent with the University of Florida, the Pesticide Safety Education Program of Oklahoma State University, and two growers requested that maneb use be extended until exhaustion for pepper, lettuce, grapes grown for wine, and leafy vegetables. One commenter requested that maneb use on broccoli, cabbage, and lettuce be extended for 5 years. Most comments received from multiple individual growers and also from the Cranberry Institute, the Department of Plant and Environmental Protection Sciences, College of Tropical Agriculture and Human Resources of the University of Hawaii, Florida Fruit and Vegetable Association, Arizona Pest Management Center, California's Glenn County Department of Agriculture, California's Tehama County Department of Agriculture, and Colorado Department of Agriculture, requested that maneb use be extended (for use on commodities such as almond, broccoli, cabbage, celery, cranberry, eggplant, lettuce, onion, pepper, potato, and tomato) and for timeframes ranging from a few months to over 2 years; *i.e.,* the end of 2012.

*Agency response.* In the **Federal Register** of May 26, 2010 (75 FR 29475) (FRL–8826–2), EPA proposed to revoke the maneb tolerances on the date of final rule publication in the **Federal Register**, which the Agency expected to occur in 2010. Based on the comments received, the Agency agrees that there is a need for more time to exhaust existing stocks of maneb. Therefore, EPA is revoking the tolerances for maneb in 40 CFR 180.110 with the expiration/revocation dates of December 31, 2012. The Agency believes the extended time is sufficient and consistent with the general outlook of the public comments received.

*B. What is the Agency's authority for taking this action?*

EPA may issue a regulation revoking tolerances under FFDCA section 408(e). EPA's general practice is to revoke tolerances for residues of pesticide active ingredients on crops for which the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) registrations no longer exist and on which the pesticide may therefore no longer be used in the United States. EPA has historically been concerned that retention of tolerances that are not necessary to cover residues in or on legally treated foods may encourage misuse of pesticides within the United States. Nonetheless, EPA will establish and maintain tolerances even when corresponding domestic uses are canceled if the tolerances, which EPA refers to as ''import tolerances,'' are necessary to allow importation into the United States of food containing such pesticide residues. However, where there are no imported commodities that

require these import tolerances, the Agency believes it is appropriate to revoke tolerances for unregistered pesticides in order to prevent potential misuse.

*C. When do these actions become effective?*

As noted in the **DATES** section, this regulation is effective on the date of the publication in the **Federal Register**. In this final rule, EPA is revoking all the maneb tolerances with expiration/revocation dates of December 31, 2012. Based on the comments received during the 60-day public comment period, the Agency believes that the expiration/revocation dates allow users to exhaust existing stocks and allow sufficient time for passage of treated commodities through the channels of trade.

Any commodities listed in the regulatory text of this document that are treated with the pesticides subject to this final rule, and that are in the channels of trade following the tolerance revocations, shall be subject to FFDCA section 408(1)(5), as established by the Food Quality Protection Act (FQPA). Under this unit, any residues of these pesticides in or on such food shall not render the food adulterated so long as it is shown to the satisfaction of the Food and Drug Administration that:

1. The residue is present as the result of an application or use of the pesticide at a time and in a manner that was lawful under FIFRA.

2. The residue does not exceed the level that was authorized at the time of the application or use to be present on the food under a tolerance or exemption from tolerance. Evidence to show that food was lawfully treated may include records that verify the dates that the pesticide was applied to such food.

**III. International Residue Limits**

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

The Codex has not established a MRL for maneb per se, but has MRLs for total dithiocarbamates (which includes the dithiocarbamate maneb), determined as carbon disulfide.

**IV. Statutory and Executive Order Reviews**

In this final rule, EPA revokes specific tolerances established under FFDCA section 408. The Office of Management and Budget (OMB) has exempted this type of action (*i.e.,* a tolerance revocation for which extraordinary circumstances do not exist) from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this rule has been exempted from review under Executive Order 12866 due to its lack of significance, this rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4). Nor does it require any special considerations as required by Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994); or OMB review or any other Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–13, section 12(d) (15 U.S.C. 272 note). Pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Agency previously assessed whether revocations of tolerances might significantly impact a substantial number of small entities and concluded that, as a general matter, these actions do not impose a significant economic impact on a substantial number of small entities. This analysis was published on December 17, 1997 (62 FR 66020) (FRL–5753–1), and was provided to the Chief Counsel for Advocacy of the Small Business Administration. Taking into account this analysis, and available information concerning the pesticides listed in this rule, the Agency hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities. In a memorandum dated May 25, 2001, EPA determined that eight conditions must all be satisfied in order for an import tolerance or tolerance exemption revocation to adversely affect a significant number of small entity importers, and that there is a negligible joint probability of all eight conditions holding simultaneously with respect to any particular revocation. (This Agency document is available in the docket of the proposed rule, as mentioned in Unit II.A.). Furthermore, for the pesticides named in this final rule, the Agency knows of no extraordinary circumstances that exist as to the present revocations that would change EPA's previous analysis. In addition, the Agency has determined that this action will not have a substantial direct effect on 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, entitled *Federalism* (64 FR 43255, August 10, 1999). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' This final rule directly regulates growers, food processors, food handlers, and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. For these same reasons, the Agency has determined that this rule does not have any ''tribal implications'' as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000). Executive Order 13175, requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal

implications'' is defined in the Executive order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.'' This rule will not have substantial direct effects on tribal governments, 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, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

**V. Congressional Review Act**

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

**List of Subjects in 40 CFR Part 180**

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

Dated: June 29, 2011.

**Steven Bradbury,**

*Director, Office of Pesticide Programs.*

Therefore, 40 CFR chapter I is amended as follows:

## PART 180—[AMENDED]

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

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

■ 2. Section 180.110 is amended by revising the table in paragraph (a) to read as follows:

**§ 180.110 Maneb; tolerances for residues.**

(a) * * *

| Commodity | Parts per million | Expiration/revocation date |
|---|---|---|
| Almond | 0.1 | 12/31/12 |
| Apple | 2 | 12/31/12 |
| Apricot | 10 | 12/31/12 |
| Banana (not more than 0.5 part per million shall be in the pulp after peel is removed and discarded (preharvest application only)) | 4 | 12/31/12 |
| Bean, dry, seed | 7 | 12/31/12 |
| Bean, succulent | 10 | 12/31/12 |
| Beet, sugar, tops | 45 | 12/31/12 |
| Broccoli | 10 | 12/31/12 |
| Brussels sprouts | 10 | 12/31/12 |
| Cabbage | 10 | 12/31/12 |
| Cabbage, Chinese, bok choy | 10 | 12/31/12 |
| Cabbage, Chinese, napa | 10 | 12/31/12 |
| Carrot, roots | 7 | 12/31/12 |
| Cauliflower | 10 | 12/31/12 |
| Celery | 5 | 12/31/12 |
| Collards | 10 | 12/31/12 |
| Corn, sweet, kernel plus cob with husks removed | 5 | 12/31/12 |
| Cranberry | 7 | 12/31/12 |
| Cucumber | 4 | 12/31/12 |
| Eggplant | 7 | 12/31/12 |
| Endive | 10 | 12/31/12 |
| Fig | 7 | 12/31/12 |
| Grape | 7 | 12/31/12 |
| Kale | 10 | 12/31/12 |
| Kohlrabi | 10 | 12/31/12 |
| Lettuce | 10 | 12/31/12 |
| Melon | 4 | 12/31/12 |
| Mustard greens | 10 | 12/31/12 |
| Nectarine | 10 | 12/31/12 |
| Onion | 7 | 12/31/12 |
| Papaya | 10 | 12/31/12 |
| Peach | 10 | 12/31/12 |
| Pepper | 7 | 12/31/12 |
| Potato | 0.1 | 12/31/12 |
| Pumpkin | 7 | 12/31/12 |
| Squash, summer | 4 | 12/31/12 |
| Squash, winter | 4 | 12/31/12 |
| Tomato | 4 | 12/31/12 |
| Turnip, greens | 10 | 12/31/12 |
| Turnip, roots | 7 | 12/31/12 |

* * * * *

[FR Doc. 2011–17365 Filed 7–11–11; 8:45 am]

BILLING CODE 6560–50–P

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

### 44 CFR Part 65

**[Docket ID FEMA–2011–0002]**

### Changes in Flood Elevation Determinations

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Final rule.

**SUMMARY:** Modified Base (1% annual-chance) Flood Elevations (BFEs) are finalized for the communities listed below. These modified BFEs will be used to calculate flood insurance premium rates for new buildings and their contents.

**DATES:** The effective dates for these modified BFEs are indicated on the following table and revise the Flood Insurance Rate Maps (FIRMs) in effect for the listed communities prior to this date.

**ADDRESSES:** The modified 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 of the modified BFEs for each community listed. These modified BFEs 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.

The modified BFEs are not listed for each community in this notice. However, this final rule includes the address of the Chief Executive Officer of the community where the modified BFE determinations are available for inspection.

The modified BFEs are made pursuant to section 206 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The modified BFEs are the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to qualify or to remain qualified for participation in the National Flood Insurance Program (NFIP).

These modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities.

These modified BFEs are used to meet the floodplain management requirements of the NFIP and also are used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in those buildings. The changes in BFEs are in accordance with 44 CFR 65.4.

*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, Federalism.

*Executive Order 12988, Civil Justice Reform.* This final rule meets the applicable standards of Executive Order 12988.

**List of Subjects in 44 CFR Part 65**

Flood insurance, Floodplains, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 65 is amended to read as follows:

## PART 65—[AMENDED]

■ 1. The authority citation for part 65 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.

**§ 65.4 [Amended]**

■ 2. The tables published under the authority of § 65.4 are amended as follows:

| State and county | Location and case No. | Date and name of newspaper where notice was published | Chief executive officer of community | Effective date of modification | Community No. |
|---|---|---|---|---|---|
| Alabama: | | | | | |
| Calhoun (FEMA Docket No.: B–1165). | City of Oxford (10–04–2692P). | October 22, 2010; October 29, 2010; *The Anniston Star.* | The Honorable Leon Smith, Mayor, City of Oxford, P.O. Box 3383, Oxford, AL 36203. | February 28, 2011 ..... | 010023 |
| Calhoun (FEMA Docket No.: B–1165). | Unincorporated areas of Calhoun County (10–04–2692P). | October 22, 2010; October 29, 2010; *The Anniston Star.* | Mr. James ''Pappy'' Dunn, Commissioner, Calhoun County, 1702 Noble Street, Suite 103, Anniston, AL 36201. | February 28, 2011 ..... | 010013 |
| Arizona: | | | | | |
| Pinal (FEMA Docket No.: B–1172). | City of Casa Grande (10–09–1532P). | November 12, 2010; November 19, 2010; *The Casa Grande Dispatch.* | The Honorable Robert M. Jackson, Mayor, City of Casa Grande, 510 East Florence Boulevard, Casa Grande, AZ 85122. | November 5, 2010 ..... | 040080 |
| Pinal (FEMA Docket No.: B–1172). | City of Maricopa (10–09–2020P). | November 4, 2010; November 11, 2010; *The Casa Grande Dispatch.* | The Honorable Anthony Smith, Mayor, City of Maricopa, 45145 West Madison Avenue, Maricopa, AZ 85139. | March 11, 2011 ..... | 040052 |

| State and county | Location and case No. | Date and name of newspaper where notice was published | Chief executive officer of community | Effective date of modification | Community No. |
|---|---|---|---|---|---|
| Pinal (FEMA Docket No.: B–1172). | Unincorporated areas of Pinal County (10–09–2020P). | November 4, 2010; November 11, 2010; *The Casa Grande Dispatch*. | Mr. Pete Rios, Chairman, Pinal County Board of Supervisors, P.O. Box, 827 Florence, AZ 85132. | March 11, 2011 ..... | 040077 |
| Yavapai (FEMA Docket No.: B–1172). | Unincorporated areas of Yavapai County (10–09–0470P). | November 10, 2010; November 17, 2010; *The Daily Courier*. | Ms. Carol Springer, Chair, Yavapai County Board of Supervisors, 1015 Fair Street Prescott, AZ 86305. | March 17, 2011 ..... | 040093 |
| California: Contra Costa (FEMA Docket No.: B–1177). | City of Oakley (10–09–3624P). | December 8, 2010; December 15, 2010; *The Contra Costa Times*. | The Honorable Jim Frazier Mayor, City of Oakley, 3231 Main Street Oakley, CA 94561. | December 24, 2010 ..... | 060766 |
| Colorado: Jefferson (FEMA Docket No.: B–1177). | City of Lakewood (11–08–0033P). | December 9, 2010; December 16, 2010; *The Golden Transcript*. | The Honorable Bob Murphy, Mayor, City of Lakewood, 480 South Allison Parkway, Lakewood, CO 80226. | December 6, 2010 ..... | 085075 |
| Florida: | | | | | |
| Clay (FEMA Docket No.: B–1177). | Unincorporated areas of Clay County (10–04–6297P). | December 17, 2010; December 24, 2010; *The Florida Times-Union*. | Mr. Travis Cummings, Chairman, Clay County Board of Commissioners, P.O. Box 1366, Green Cove Springs, FL 32043. | December 9, 2010 ..... | 120064 |
| Duval (FEMA Docket No.: B–1177). | City of Jacksonville (10–04–6297P). | December 17, 2010; December 24, 2010; *The Florida Times-Union*. | The Honorable John Peyton, Mayor, City of Jacksonville, 117 West Duval Street, Suite 400 Jacksonville, FL 32202. | December 9, 2010 ..... | 120077 |
| Leon (FEMA Docket No.: B–1172). | Unincorporated areas of Leon County (10–04–8400P). | October 29, 2010; November 5, 2010; *The Tallahassee Democrat*. | Mr. John E. Dailey, Chairman, Leon County Board of Commissioners, 301 South Monroe Street, Tallahassee, FL 32301. | March 7, 2011 ..... | 120143 |
| Okaloosa (FEMA Docket No.: B–1172). | Unincorporated areas of Okaloosa County (10–04–8273P). | November 16, 2010; November 23, 2010; *The Northwest Florida Daily News*. | Mr. James Campbell, Chairman, Okaloosa County Board of Commissioners, 1804 Lewis Turner Boulevard, Suite 100, Fort Walton Beach, FL 32547. | November 8, 2010 ..... | 120173 |
| Georgia: | | | | | |
| Barrow (FEMA Docket No.: B–1165). | Unincorporated areas of Barrow County (10–04–4322P). | October 20, 2010; October 27, 2010; *The Barrow County News*. | Mr. Daniel Yearwood, Jr., Chairman, Barrow County Board of Commissioners, 233 East Broad Street, Winder, GA 30680. | February 24, 2011 ..... | 130497 |
| Bryan (FEMA Docket No.: B–1172). | City of Richmond Hill (10–04–6327P). | November 3, 2010; November 10, 2010; *The Bryan County News*. | The Honorable E. Harold, Fowler Mayor, City of Richmond Hill, P.O. Box 250, Richmond Hill, GA 31324. | March 10, 2011 ..... | 130018 |
| Tift (FEMA Docket No.: B–1172). | City of Tifton (09–04–7386P). | November 19, 2010; November 26, 2010; *The Tifton Gazette*. | The Honorable J. G. Cater, Jr., Mayor, City of Tifton, P.O. Box 229, Tifton, GA 31793. | March 28, 2011 ..... | 130171 |
| Tift (FEMA Docket No.: B–1172). | Unincorporated areas of Tift County (09–04–7386P). | November 19, 2010; November 26, 2010; *The Tifton Gazette*. | Mr. Grady Thompson, Chairman, Tift County Commission, 225 North Tift Avenue, Tifton, GA 31794. | March 28, 2011 ..... | 130404 |
| Mississippi: DeSoto (FEMA Docket No.: B–1172). | City of Olive Branch (10–04–1806P). | November 2, 2010; November 9, 2010; *The DeSoto Times-Tribune*. | The Honorable Sam Rikard, Mayor, City of Olive Branch, 9200 Pigeon Roost Road, Olive Branch, MS 38654. | March 9, 2011 ..... | 280286 |
| North Carolina: | | | | | |
| Alamance (FEMA Docket No.: B–1172). | Unincorporated areas of Alamance County (10–04–6308P). | October 27, 2010; November 3, 2010; *The Times-News*. | Ms. Linda Massey, Chair, Alamance County Board of Commissioners, 124 West Elm Street, Graham, NC 27253. | March 3, 2011 ..... | 370001 |
| Mecklenburg (FEMA Docket No.: B–1172). | City of Charlotte (10–04–7369P). | October 29, 2010; November 5, 2010; *The Charlotte Observer*. | The Honorable Anthony Foxx, Mayor, City of Charlotte, 600 East 4th Street, 15th floor, Charlotte, NC 28202. | March 7, 2011 ..... | 370159 |
| Union (FEMA Docket No.: B–1172). | Unincorporated areas of Union County (10–04–7369P). | October 29, 2010; November 5, 2010; *The Enquirer-Journal*. | Mr. Jerry Simpson, Chairman, Union County Board of Commissioners, 500 North Main Street, Monroe, NC 28112. | March 7, 2011 ..... | 370234 |
| South Carolina: Dorchester (FEMA Docket No.: B–1177). | Unincorporated areas of Dorchester County (10–04–7426P). | November 3, 2010; November 10, 2010; *The Post and Courier*. | Mr. Larry Hargett, Chairman, Dorchester County Council, 201 Johnson Street, St. George, SC 29477. | March 10, 2011 ..... | 450068 |
| South Dakota: | | | | | |
| Lawrence (FEMA Docket No.: B–1172). | City of Spearfish (10–08–0269P). | November 10, 2010; November 17, 2010; *The Black Hills Pioneer*. | The Honorable Jerry Krambeck, Mayor, City of Spearfish, 625 North 5th Street Spearfish, SD 57783. | November 3, 2010 ..... | 460046 |
| Minnehaha (FEMA Docket No.: B–1172). | City of Brandon (10–08–0604P). | November 10, 2010; November 17, 2010; *The Argus Leader*. | The Honorable Larry Beesley, Mayor, City of Brandon, 304 Main Avenue, Brandon, SD 57005. | March 17, 2011 ..... | 460296 |
| Minnehaha (FEMA Docket No.: B–1172). | Unincorporated areas of Minnehaha County (10–08–0604P). | November 10, 2010; November 17, 2010; *The Argus Leader*. | Mr. Ken McFarland Chairman, Minnehaha County Board of Commissioners, 415 North Dakota Avenue, Sioux Falls, SD 57104. | March 17, 2011 ..... | 460057 |

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Dated: June 15, 2011

**Sandra K. Knight,**

*Deputy Federal Insurance and Mitigation Administrator, Mitigation, Department of Homeland Security, Federal Emergency Management Agency.*

[FR Doc. 2011–17451 Filed 7–11–11; 8:45 am]

**BILLING CODE 9110–12–P**

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 1

**[WC Docket No. 07–245, GN Docket No. 09–51; FCC 11–50]**

### Implementation of Section 224 of the Act; A National Broadband Plan for Our Future

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule; announcement of effective date.

**SUMMARY:** The Federal Communications Commission published a document in the Federal Register that contained new information collection requirements. The Office of Management and Budget (OMB) gave approval for these information requirements contained in the Commission's Report and Order and Order on Reconsideration, Implementation of Section 224 of the Act; A National Broadband Plan for Our Future.

**DATES:** The final rules published at 76 FR 26620, May 9, 2011, including 47 CFR 1.1420, 1.1422, and 1.1424, are effective on July 12, 2011.

**FOR FURTHER INFORMATION CONTACT:** Jonathan Reel, Competition Policy Division, Wireline Competition Bureau, at (202) 418–0637, or via the Internet at *Jonathan.Reel@fcc.gov.*

**SUPPLEMENTARY INFORMATION:** The Federal Communications Commission has received OMB approval for the rules contained in information collection OMB Control No: 3060–1151, Pole Attachment Access Rules. The information collection was adopted in the Report and Order and Order on Reconsideration, Implementation of Section 224 of the Act; A National Broadband Plan for Our Future in WC Docket No. 07–245, GN Docket No. 09–51, which appears at 76 FR 26620, May 9, 2011. The effective date of the rules adopted in that Order was published as June 8, 2011, except for 47 CFR 1.1420, 1.1422 and 1.1424, which contain information collection requirements that would not be effective until approved by the Office of Management and Budget. Through this document, the Commission announces that it has received this approval (OMB Control No. 3060–1151, *Expiration Date:* December 31, 2011), and that 47 CFR 1.1420, 1.1422, and 1.1424 are effective on July 12, 2011.

Pursuant to the Paperwork Reduction Act of 1995, Public Law 104–13, an agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. Notwithstanding any other provisions of law, no person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Questions concerning the OMB control numbers and expiration dates should be directed to Cathy Williams, Federal Communications Commission, (202) 418–2918, or via the Internet at *Cathy.Williams@fcc.gov.*

Federal Communications Commission.

**Bulah P. Wheeler,**

*Deputy Manager.*

[FR Doc. 2011–17369 Filed 7–11–11; 8:45 am]

**BILLING CODE 6712–01–P**

## OFFICE OF MANAGEMENT AND BUDGET

### Office of Federal Procurement Policy

### 48 CFR Parts 9901 and 9903

### Cost Accounting Standards: Change to the CAS Applicability Threshold for the Inflation Adjustment to the Truth in Negotiations Act Threshold

**AGENCY:** Cost Accounting Standards Board, Office of Federal Procurement Policy, Office of Management and Budget (OMB).

**ACTION:** Interim rule.

**SUMMARY:** The Office of Federal Procurement Policy (OFPP), Cost Accounting Standards (CAS) Board (Board), invites public comments concerning this interim rule revising the threshold for the application of CAS from ''$650,000'' to ''the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation.'' The change is being made because the CAS applicability threshold is statutorily tied to TINA. The TINA threshold for obtaining cost or pricing data was recently adjusted for inflation to $700,000 in the Federal Acquisition Regulation (FAR), as required by the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005. Until this interim change, the CAS applicability threshold was a stated dollar amount ($650,000) in the Code of Federal Regulations. This wording change will effectively revise the CAS threshold to $700,000 and cause future changes to the CAS applicability threshold to self-execute upon any changes to the TINA threshold as they are implemented in the FAR.

**DATES:** *Effective date:* August 11, 2011.

*Comment date:* Comments must be in writing and must be received by September 12, 2011.

**ADDRESSES:** All comments to this interim rule must be in writing. Electronic comments may be submitted in any one of three ways:

1. *Federal eRulemaking Portal:* Comments may be directly sent via *http://www.regulations.gov*—a Federal E-Government Web site that allows the public to find, review, and submit comments on documents that agencies have published in the **Federal Register** and that are open for comment. Simply type ''CAS–TINA Threshold'' (without quotation marks) in the Comment or Submission search box, click Go, and follow the instructions for submitting comments;

2. *E-mail:* Comments may be included in an e-mail message sent to *casb2@omb.eop.gov.* The comments may be submitted in the text of the e-mail message or as an attachment;

3. *Facsimile:* Comments may also be submitted via facsimile to (202) 395–5105; or

4. *Mail:* If you choose to submit your responses via regular mail, please mail them to: Office of Federal Procurement Policy, 725 17th Street, NW., Room 9013, Washington, DC 20503, ATTN: Raymond J. M. Wong. Due to delays caused by the screening and processing of mail, respondents are strongly encouraged to submit responses electronically.

Be sure to include your name, title, organization, postal address, telephone number, and e-mail address in the text of your public comment and reference ''CAS–TINA Threshold'' in the subject line irrespective of how you submit your comments. Comments received by the date specified above will be included as part of the official record. Comments delayed due to use of regular mail may not be considered.

Please note that all public comments received will be available in their entirety at *http://www.whitehouse.gov/omb/casb_index_public_comments/* and *http://www.regulations.gov* after the close of the comment period. Do not include any information whose disclosure you would object to.

**FOR FURTHER INFORMATION CONTACT:** Raymond J. M. Wong, Director, Cost Accounting Standards Board (telephone: 202–395–6805; e-mail: *Raymond_wong@omb.eop.gov*).

**SUPPLEMENTARY INFORMATION:**

**A. Regulatory Process**

Rules, Regulations and Standards issued by the Cost Accounting Standards Board (Board) are codified at 48 CFR chapter 99. The Office of Federal Procurement Policy (OFPP) Act, at 41 U.S.C. 1502(c) [formerly, 41 U.S.C. 422(g)], requires that the Board, prior to the establishment of any new or revised Cost Accounting Standard (CAS or Standard), complete a prescribed rulemaking process. The process generally consists of the following four steps:

1. Consult with interested persons concerning the advantages, disadvantages and improvements anticipated in the pricing and administration of Government contracts as a result of the adoption of a proposed Standard.

2. Promulgate an Advance Notice of Proposed Rulemaking (ANPRM).

3. Promulgate a Notice of Proposed Rulemaking (NPRM).

4. Promulgate a Final Rule.

The Board notes that the CAS applicability threshold in 48 CFR Chapter 99 (at 48 CFR 9901.306; 9903.201–1, .201–2, 201–3, and 201–4; and 9903.202–1) is not subject to the four-step process required by 41 U.S.C. 1502(c) [formerly, 41 U.S.C. 422(g)(1)] because it is not a Cost Accounting Standard. However, the Board elects to follow some of those requirements in the OFPP Act, at 41 U.S.C. 1502(c) [formerly, 41 U.S.C. 422(g)(1)], i.e., to consult with interested persons concerning the advantages, disadvantages, and improvements anticipated in the pricing and administration of Government contracts as a result of the adoption of any new or revised rule on the CAS applicability threshold, prior to its promulgation.

**B. Background and Summary**

The Office of Federal Procurement Policy (OFPP), Cost Accounting Standards Board (Board), is today releasing this interim rule to revise the Cost Accounting Standards (CAS) applicability threshold in 48 CFR chapter 99 from ''$650,000'' to ''the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation (41 U.S.C. 1908) and (41 U.S.C. 1502(b)(1)(B))'', because of a revision to the Truth in Negotiations Act (TINA) threshold for the submission of cost or pricing data as adjusted for inflation by section 807 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Pub. L. 108–375) as incorporated into Federal Acquisition Regulation (FAR) 15.403–4(a)(1) by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council on August 30, 2010 (at 75 FR 53129). By revising the CAS applicability threshold so that it directly references the FAR TINA threshold for the submission of cost or pricing data (rather than referencing a stated dollar amount), any future changes to the FAR TINA threshold will automatically apply to the CAS applicability threshold (thereby eliminating the need to revise this regulation to specify a different dollar amount).

*Statutory Requirement for Inflation Adjustment of TINA Thresholds*

Section 807 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Pub. L. 108–375) requires a periodic adjustment for inflation every five years to the acquisition related thresholds using the Consumer Price Index (CPI) for all urban consumers, except for the Davis-Bacon Act, Service Contract Act, and trade agreement thresholds. The threshold in TINA (10 U.S.C. 2306a(a)(1)(A)(i)) for the submission of cost or pricing data is one of the acquisition related thresholds adjusted for inflation by section 807. The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) published a final rule in the **Federal Register** on August 30, 2010 (75 FR 53129) amending the FAR to implement section 807, including the TINA threshold at FAR 15.403–4, Requiring cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. 3502 [formerly, 41 U.S.C. 254b]). This FAR final rule was effective October 1, 2010, and revised the TINA threshold from $650,000 to $700,000.

*Statutory Requirement for Threshold for CAS Applicability*

Section 26(f)(2(A) of the OFPP Act (41 U.S.C. 1502(b)(1)(B) [formerly, 41 U.S.C. 422(f)(2)(A)]) addresses the CAS applicability threshold. Section 822 of the 2006 National Defense Authorization Act (Pub. L. 109–163) amended 41 U.S.C. 1502(b)(1)(B) [formerly, 41 U.S.C. 422(f)(2)(A)] to tie the statutory CAS threshold to the threshold for compliance with the TINA requirement to submit cost or pricing data, as set forth in section 2306a(a)(1)(A)(i) of title 10, United States Code. The recent changes to the TINA threshold described above require identical changes to the CAS applicability threshold (i.e., from $650,000 to $700,000). To date, the CAS applicability threshold has been identified in the CAS Board rules as a stated dollar amount. To avoid repeated rulemakings in the future that would update the stated dollar amount, in order to keep the CAS applicability threshold tied to the TINA threshold, the Board is revising the CAS applicability threshold from a stated dollar amount (which has been ''$650,000'') to ''the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation (41 U.S.C. 1908 and 41 U.S.C. 1502(b)(1)(B)).'' This revision makes any future changes to the CAS applicability threshold self-executing upon any changes that the FAR makes to the TINA threshold. Thus, because the FAR's TINA threshold is now $700,000, the CAS applicability threshold under this interim rule will be $700,000.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act (44 U.S.C. chapter 35, Subtitle I) does not apply to this rulemaking because this rule imposes no additional paperwork burden on offerors, affected contractors and subcontractors, or members of the public which requires the approval of OMB under 44 U.S.C. 3501, *et seq.* The records required by this interim rule are those normally maintained by contractors and subcontractors who claim reimbursement of costs under government contracts.

**D. Executive Order 12866, the Congressional Review Act, and the Regulatory Flexibility Act**

Because the affected contractors and subcontractors are those who are already subject to CAS but for the increase in the CAS applicability threshold, the economic impact of this interim rule on contractors and subcontractors is expected to be minor. As a result, the Board has determined that this interim rule will not result in the promulgation of an ''economically significant rule'' under the provisions of Executive Order 12866, and that a regulatory impact analysis will not be required. For the same reason, the Administrator of the Office of Information and Regulatory Affairs has determined that this interim rule is not a ''major rule'' under the Congressional Review Act, 5 U.S.C. Chapter 8. Finally, this interim rule does not have a significant effect on a substantial number of small entities because small businesses are exempt from the application of the Cost Accounting Standards. Therefore, this interim rule

does not require a regulatory flexibility analysis under the Regulatory Flexibility Act of 1980, 5 U.S.C. chapter 6.

**E. Public Comments to This Interim Rulemaking**

Interested persons are invited to provide input to this interim rule to revise the CAS applicability threshold from ''$650,000'' to ''the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation (41 U.S.C. 1908 and 41 U.S.C. 1502(b)(1)(B))'' as a result of the periodic statutory adjustment of the TINA threshold for inflation. Respondents are encouraged to identify, comment and provide information on any issues that they believe are important to the subject. All comments must be in writing, and submitted via facsimile, by e-mail, or by any other means as instructed in the **ADDRESSES** section.

**List of Subjects in 48 CFR Parts 9901 and 9903**

Government procurement, cost accounting standards.

**Daniel I. Gordon,**

*Chair, Cost Accounting Standards Boards.*

For the reasons set forth in this preamble, Chapter 99 of Title 48 of the Code of Federal Regulations is amended as set forth below:

## PART 9901—RULES AND PROCEDURES

■ 1. The authority citation for Part 9901 continues to read as follows:

**Authority:** Pub. L. 111–350, 124 Stat. 3677, 41 U.S.C. 1502.

■ 2. Revise section 9901.306 to read as follows:

**9901.306 Standards applicability.**

Cost Accounting Standards promulgated by the Board shall be mandatory for use by all executive agencies and by contractors and subcontractors in estimating, accumulating, and reporting costs in connection with pricing and administration of, and settlement of disputes concerning, all negotiated prime contract and subcontract procurements with the United States Government in excess of the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation (41 U.S.C. 1908 and 41 U.S.C. 1502(b)(1)(B)), other than contracts or subcontracts that have been exempted by the Board's regulations.

## PART 9903—CONTRACT COVERAGE

■ 3. The authority citation for Part 9903 continues to read as follows:

**Authority:** Pub. L. 111–350, 124 Stat. 3677, 41 U.S.C. 1502.

### Subpart 9903.2—CAS Program Requirements

■ 4. Section 9903.201–1 is amended by revising paragraph (b)(2) to read as follows:

**9903.201–1 CAS applicability.**

* * * * *

(b) * * *

(2) Negotiated contracts and subcontracts not in excess of the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation (41 U.S.C. 1908 and 41 U.S.C. 1502(b)(1)(B)). For purposes of this paragraph (b)(2), an order issued by one segment to another segment shall be treated as a subcontract.

* * * * *

■ 5. Section 9903.201–2 is amended by revising paragraphs (c)(3) and (5) to read as follows:

**9903.201–2 Types of CAS coverage.**

* * * * *

(c) * * *

(3) *Applicable standards.* Coverage for educational institutions requires that the business unit comply with all of the CAS specified in part 9905 that are in effect on the date of the contract award and with any CAS that become applicable because of later award of a CAS-covered contract. This coverage applies to business units that receive negotiated contracts in excess of the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation (41 U.S.C. 1908 and 41 U.S.C. 1502(b)(1)(B)), except for CAS-covered contracts awarded to FFRDCs operated by an educational institution.

* * * * *

(5) *Contract clauses.* The contract clause at 9903.201–4(e) shall be incorporated in each negotiated contract and subcontract awarded to an educational institution when the negotiated contract or subcontract price exceeds the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation (41 U.S.C. 1908 and 41 U.S.C. 1502(b)(1)(B)). For CAS-covered contracts awarded to an FFRDC operated by an educational institution, however, the full or modified CAS contract clause specified at 9903.201–4(a) or (c), as applicable, shall be incorporated.

* * * * *

■ 6. Section 9903.201–3 is amended in paragraph (a)(2) under the provision heading, ''Cost Accounting Standards Notices and Certification'', by revising the provision date and paragraph (a) of Part I of the provision to read as follows:

**9903.201–3 Solicitation provisions.**

* * * * *

**Cost Accounting Standards Notices and Certification (JUL 2011)**

* * * * *

*I. Disclosure Statement—Cost Accounting Practices and Certification*

(a) Any contract in excess of the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation (41 U.S.C. 1908 and 41 U.S.C. 1502(b)(1)(B)), resulting from this solicitation, except for those contracts which are exempt as specified in 9903.201–1.

* * * * *

■ 7. Section 9903.201–4 is amended:

■ a. In paragraph (a)(2) under the clause heading, ''Cost Accounting Standards'', by revising the clause date and paragraph (d) of the clause.

■ b. By revising paragraph (c)(1); and in paragraph (c)(2) under the clause heading ''Disclosure and Consistency of Cost Accounting Practices'', by revising the clause date and paragraph (d)(2) of the clause.

■ c. In paragraph (e)(2) under the clause heading, ''Cost Accounting Standards—Educational Institutions'', by revising the clause date and paragraph (d)(2) of the clause; and in paragraph (f)(2) under the clause heading, ''Cost Accounting Practices—Foreign Concerns'', by revising the clause date and paragraph (d)(2) of the clause .

**9903.201–4 Contract clauses.**

(a) * * *

(2) * * *

**Cost Accounting Standards (JUL 2011)**

* * * * *

(d) The contractor shall include in all negotiated subcontracts which the Contractor enters into, the substance of this clause, except paragraph (b), and shall require such inclusion in all other subcontracts, of any tier, including the obligation to comply with all CAS in effect on the subcontractor's award date or if the subcontractor has submitted cost or pricing data, on the date of final agreement on price as shown on the subcontractor's signed Certificate of Current Cost or Pricing Data. If the subcontract is awarded to a business unit which pursuant to 9903.201–2 is subject to other types of CAS coverage, the substance of the applicable clause set forth in 9903.201–4 shall be inserted. This requirement shall apply only to negotiated subcontracts in excess of the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation (41 U.S.C. 1908 and 41 U.S.C. 1502(b)(1)(B)), except that the requirement shall not apply to negotiated subcontracts otherwise exempt from the requirement to include a CAS clause as specified in 9903.201–1.

(End of clause)

* * * * *

(c) *Disclosure and Consistency of Cost Accounting Practices.* (1) The contracting officer shall insert the clause set forth below, Disclosure and Consistency of Cost Accounting Practices, in negotiated contracts when the contract amount is over the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation (41 U.S.C. 1908 and 41 U.S.C. 1502(b)(1)(B)), but less than $50 million, and the offeror certifies it is eligible for and elects to use modified CAS coverage (*see* 9903.201–2, unless the clause prescribed in paragraph (d) of this subsection is used).

(2) * * *

**Disclosure and Consistency of Cost Accounting Practices (JUL 2011)**

* * * * *

(d) * * *

(2) This requirement shall apply only to negotiated subcontracts in excess of the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation (41 U.S.C. 1908 and 41 U.S.C. 1502(b)(1)(B)).

* * * * *

(End of clause)

* * * * *

(e) * * *

(2) * * *

**Cost Accounting Standards—Education Institutions (JUL 2011)**

* * * * *

(d) * * *

(2) This requirement shall apply only to negotiated subcontracts in excess of the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation (41 U.S.C. 1908 and 41 U.S.C 1502(b)(1)B)).

* * * * *

(End of clause)

(f) * * *

(2) * * *

**Disclosure and Consistency of Cost Accounting Practices—Foreign Concerns (JUL 2011)**

* * * * *

(d) * * *

(2) This requirement shall apply only to negotiated subcontracts in excess of the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation (41 U.S.C. 1908 and 41 U.S.C. 1502(b)(1)(B)).

* * * * *

(End of clause)

* * * * *

■ 8. Section 9903.202–1 is amended by revising paragraphs (c) introductory text, (f)(2)(i), and (f)(3)(i) through (iii) to read as follows:

**§ 9903.202–1 General requirements.**

* * * * *

(c) When a Disclosure Statement is required, a separate Disclosure Statement must be submitted for each segment whose costs included in the total price of any CAS-covered contract or subcontract exceed the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation (41 U.S.C. 1908 and 41 U.S.C. 1502(b)(1)(B)) unless

* * * * *

(f) * * *

(2) * * *

(i) Any business unit of an educational institution that is selected to receive a CAS-covered contract or subcontract in excess of the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation (41 U.S.C. 1908 and 41 U.S.C. 1502(b)(1)(B)), and is part of a college or university location listed in Exhibit A of Office of Management and Budget (OMB) Circular A–21 shall submit a Disclosure Statement before award. A Disclosure Statement is not required; however, if the listed entity can demonstrate that the net amount of Federal contract and financial assistance awards received during its immediately preceding cost accounting period was less than $25 million.

* * * * *

(3) * * *

(i) For business units that are selected to receive a CAS-covered contract or subcontract in excess of the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation (41 U.S.C. 1908 and 41 U.S.C. 1502(b)(1)(B)), and are part of the first 20 college or university locations (*i.e.,* numbers 1 through 20) listed in Exhibit A of OMB Circular A–21, Disclosure Statements shall be submitted within six months after the date of contract award.

(ii) For business units that are selected to receive a CAS-covered contract or subcontract in excess of the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation (41 U.S.C. 1908 and 41 U.S.C. 1502(b)(1)(B)), and are part of a college or university location that is listed as one of the institutions numbered 21 through 50, in Exhibit A of OMB Circular A–21, Disclosure Statements shall be submitted during the six month period ending twelve months after the date of contract award.

(iii) For business units that are selected to receive a CAS-covered contract or subcontract in excess of the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation (41 U.S.C. 1908 and 41 U.S.C. 1502(b)(1)(B)), and are part of a college or university location that is listed as one of the institutions numbered 51 through 99, in Exhibit A of OMB Circular A–21, Disclosure Statements shall be submitted during the six month period ending eighteen months after the date of contract award.

* * * * *

[FR Doc. 2011–16846 Filed 7–11–11; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF TRANSPORTATION

### Pipeline and Hazardous Materials Safety Administration

### 49 CFR Part 190

**[Docket No. PHMSA–2011–0161]**

### Pipeline Safety; Enforcement Proceedings Involving an Informal Hearing

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA); DOT.

**ACTION:** General policy statement; informal hearing process.

**SUMMARY:** PHMSA is issuing this document to notify operators of natural gas and hazardous liquid pipeline facilities of the creation of a dedicated ''Presiding Official'' for informal pipeline enforcement hearings and the process operators can expect when requesting an informal hearing. Hearings in pipeline safety enforcement cases are conducted by a hearing officer in accordance with certain procedures designed to ensure a fair and impartial decision on the merits. This document explains those procedures and includes a description of the dedicated hearing officer's roles and responsibilities, the process for requesting a hearing, and the manner in which a case will proceed once a hearing has been requested.

**FOR FURTHER INFORMATION CONTACT:** Sherri Pappas, Deputy Chief Counsel, at 202–366–4400. Information about PHMSA may be found at *http://phmsa.dot.gov.*

**SUPPLEMENTARY INFORMATION:**

#### I. Background

The Federal safety statute and regulations for natural gas and hazardous liquid pipeline facilities provide a description of the enforcement authority and sanctions exercised by the Associate Administrator for achieving and maintaining pipeline safety. Pursuant to chapter 601 of Title 49, United States Code, after notice and an opportunity for a hearing, the Associate Administrator may order an operator of a pipeline facility to take necessary corrective action, including revisions to

its procedures, and may assess a civil penalty for a violation of a pipeline safety regulation or order (49 U.S.C. 60108(a), 60112, 60117(l), 60118(b), and 60122). The regulations also prescribe the procedures governing the exercise of that authority and the imposition of those sanctions. In general, subpart B of 49 CFR part 190 (190.201–190.239) provides an opportunity for a pipeline operator to submit a written answer and/or request a hearing prior to the issuance of any order that makes a finding of violation, assesses a civil penalty, or requires corrective measures to be taken.

Effective immediately, and to the extent practical, all timely requested hearings will be held before the designated hearing officer or ''Presiding Official'' within PHMSA.

**II. Hearing Officer**

The person within PHMSA who conducts hearings relating to civil penalty assessments, compliance orders, or safety orders is the designated hearing officer. The person is a senior attorney within the Office of Chief Counsel, on the staff of the Deputy Chief Counsel. To ensure the fairness and impartiality of the proceeding, the hearing officer is outside the line of authority of the Associate Administrator as well as any staff involved in the investigation and prosecution of the enforcement case. The dedicated hearing officer is not engaged personally in any investigative or prosecutorial functions with regard to enforcement matters, such as preparation of notices of probable violation relating to civil penalty assessments and compliance orders, and notices relating to corrective action orders and safety orders.

The roles and responsibilities of the hearing officer are consistent with current statutory and regulatory authority. They include scheduling the hearing, holding pre-hearing conferences as necessary, disposing of procedural requests or similar matters, regulating the course of the hearing, ensuring an opportunity for a full and complete record to be established, making a recommended decision in the matter, and taking any other authorized action where appropriate.

**III. Separation of Functions**

Formerly, hearings were held before several different attorneys from the Office of Chief Counsel and were assigned to an attorney who had no role in the investigation and prosecution of the case being heard. Now, all hearings will be held, to the extent practical, before the designated hearing officer, who will have no role in the investigation and prosecution of any enforcement cases.

To ensure the impartiality and fairness of the decision-making process, a hearing officer is (and has been) held to certain standards regarding ''ex parte'' communications. An ex parte communication is any informal communication between a party in a pending case and the hearing officer regarding an issue in that case, occurring outside the presence of the other parties and without notice and opportunity for all parties to provide comment or rebuttal. If an enforcement case is pending before a hearing officer, ex parte communications with the hearing officer are not permitted by the operator, its counsel, or agency staff involved in the investigation and prosecution of the case. This applies to communications regarding information, facts, and arguments regarding an issue in the case, but not routine administrative matters, such as scheduling the hearing or providing clarification about the enforcement process. This restriction also does not apply to communications between the parties themselves.

In addition, an individual engaged in the performance of investigative or prosecuting functions for the agency in a case may not, in that or a factually related case, participate in the attorney's recommended decision, but may participate at the hearing as a witness or counsel and submit a recommendation pursuant to § 190.213(b)(4).

**IV. Requesting a Hearing**

Section 190.209 provides that upon receipt of a notice of probable violation, proposed civil penalty, or proposed compliance order, an operator may respond within 30 days by paying the proposed penalty, agreeing to the proposed compliance order, submitting written information in answer to the notice, or requesting a hearing. Sections 190.233 and 190.239 also provide for responding to a notice of proposed corrective action order or notice of proposed safety order, including the option of requesting a hearing.

Pursuant to § 190.211, any request for a hearing must be accompanied by a statement of the issues that the respondent intends to raise at the hearing. The issues may relate to the allegations in the notice, proposed corrective actions, or the proposed civil penalty amount. The request should also indicate whether or not the operator will be represented by counsel at the hearing.

The right to a hearing is waived if not requested within 30 days of receipt of the notice. An operator that submits a written response without specifically requesting a hearing will be deemed to have waived the right to a hearing, but the written material timely submitted will be fully considered in the rendering of a decision in the matter. An operator that requests only to ''reserve its right to a hearing'' will be subject to the scheduling of a hearing unless the hearing request is withdrawn.

**V. Pre-Hearing Matters**

Within a reasonable time after the request for a hearing, the hearing officer will ensure that the respondent has an opportunity to review all materials in the enforcement record pertinent to the issues to be determined. The enforcement record includes the notice and the violation report with exhibits that are comprised of documents gathered during the inspection and any other information included by the inspector that is relevant to the allegations.

The hearing officer will schedule the hearing, provide written confirmation to the parties of the date, time and location, and request a list of anticipated attendees. The hearing officer will also instruct parties that all documents, evidence, or exhibits in support of the case should be exchanged by furnishing a copy to all parties and submitted at least ten days prior to the hearing. Any party intending to introduce documents, evidence, or exhibits during the hearing will also be directed to furnish copies to all parties.

The hearing officer will address all procedural matters, including but not limited to, motions for extensions of time, stipulations in lieu of a hearing on particular issues, or withdrawal of a hearing request. The hearing officer may direct that a request contain sufficient detail, be specific as to the reason(s) for the request, and be served on the appropriate PHMSA regional office.

**VI. Hearing**

All hearings are held in accordance with § 190.211 and are conducted in an informal manner. The informal nature of the hearing alleviates the need for the parties to strictly comply with formal rules of evidence and rules of procedures. While the hearings are not ''formal,'' the hearing officer will take appropriate actions to maintain an appropriate level of fairness and efficiency during the proceeding. In addition, and with the assistance of the parties, the hearing officer will ensure the hearing is conducted cordially and that the parties maintain proper decorum at all times.

Hearings are currently held either telephonically or in person. They may

also be held by video teleconference in the future. During the hearing, the operator can expect the region issuing the notice to introduce the allegations and provide an explanation as to the evidence gathered in support. The operator will then have the opportunity to present its own information, facts, evidence, explanations, and arguments in response. The operator may submit any material relevant to the issues under consideration, and may call witnesses on its behalf and examine the evidence and witnesses presented by the region. At the close of the operator's presentation, the hearing officer may allow the presentation of any rebuttal information by the region, and respondents may then respond to that information.

The hearing officer ensures that all parties have an ample opportunity to present their position and supporting evidence, and will end discussion on a topic only once it is clear that all the issues have been fully examined. Questions may be asked by the hearing officer during either party's presentations. In addition, the informal nature of the proceeding allows the parties to ask questions of one another, although parameters may be established to ensure the parties have sufficient uninterrupted time to make their presentations. The hearing officer ensures that discussion stays focused on the relevant and determinative matters in the case and avoids allowing tangential issues to become a distraction. The hearing will last as long as necessary to ensure the parties have ample opportunity to present their case, although the hearing officer will attempt to accommodate the parties' schedules to the extent practicable.

Written materials and evidence presented at the hearing will be collected by the hearing officer for insertion into the record. Hearings are not recorded and are not transcribed, but if requested in advance of the hearing, the respondent may make arrangements for the hearing to be transcribed at its own expense, provided that a copy of the final transcript is submitted for the record. The hearing officer may take notes, including electronic notes and recordings during the hearing, but such personal notes are not part of the official record or maintained by the agency.

At the close of the hearing, the respondent may request an opportunity to submit further written material for inclusion in the record. The hearing officer will allow a reasonable time for the submission of the material, but if the material is not submitted within the time prescribed, the case will proceed to final action without the material.

### VII. After the Hearing

If post-hearing documents contain new evidence or new arguments, the hearing officer will provide written notification to all parties and direct the parties to respond within a certain amount of time. The hearing officer may also request that additional documents be submitted after the hearing, if necessary, to fully develop the record.

The hearing officer will ensure that all material submitted before and during the hearing is placed in the record. At this stage, the record will include the notice, violation report, written statements by the parties, evidence submitted, list of hearing attendees, any hearing transcript, and any other pre-hearing or post-hearing documents submitted by the parties.

Upon the close of a hearing and receipt of all post-hearing submissions, the hearing officer will prepare a recommended decision to be issued by the Associate Administrator. The restriction on ex parte communications discussed above is especially applicable at this stage of the proceeding, and the hearing officer will not engage in such discussions or communications regarding the case with anyone involved in the prosecution or defense of the notice. The hearing officer's recommended decision may be reviewed by the Deputy Chief Counsel and staff of the Associate Administrator prior to issuance by the Associate Administrator.

Upon signature of the decision by the Associate Administrator, PHMSA will serve the decision upon the respondent and the applicable region in accordance with § 190.5. Decisions by the Associate Administrator are also made publicly available on the PHMSA Enforcement Transparency Web site.

Issued in Washington, DC, on July 1, 2011.

**Bizunesh Scott,**

*Chief Counsel.*

**Jeffrey D. Wiese,**

*Associate Administrator for Pipeline Safety.*

[FR Doc. 2011–17231 Filed 7–11–11; 8:45 am]

**BILLING CODE 4910–60–P**

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 224

**[Docket No. 0906221082–0484–03]**

**RIN 0648–XQ03**

## Endangered and Threatened Wildlife and Plants; Endangered Status for the Largetooth Sawfish

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

**ACTION:** Final rule.

**SUMMARY:** We, NMFS, issue a final determination to list the largetooth sawfish (*Pristis perotteti*) as endangered under the Endangered Species Act (ESA) of 1973, as amended. We do not intend to propose to designate critical habitat for the species. We have reviewed the status of the species and conservation efforts being made to protect the species, considered public and peer review comments, and we have made our determination that the largetooth sawfish is in danger of extinction throughout its range, and should be listed as an endangered species, based on the best available scientific and commercial data.

**DATES:** This final rule is effective August 11, 2011.

**ADDRESSES:** Assistant Regional Administrator for Protected Resources, NMFS, Southeast Regional Office, 263 13th Avenue South, St. Petersburg, FL 33701–5505.

**FOR FURTHER INFORMATION CONTACT:** Shelley Norton, NMFS, Southeast Regional Office (727) 824–5312 or Dwayne Meadows, NMFS, Office of Protected Resources (301) 713–1401.

**SUPPLEMENTARY INFORMATION:**

### Background

On November 30, 1999, the Center for Marine Conservation (currently called Ocean Conservancy) petitioned us to list North American populations of largetooth and smalltooth sawfish as endangered under the ESA. While the smalltooth sawfish underwent a formal status review (56 FR 12959), on March 10, 2000, we determined the petitioner did not present substantial scientific or commercial information indicating that the petitioned action may be warranted for the largetooth sawfish (*Pristis perotteti*). Specifically, there was no evidence that a North American population of largetooth sawfish existed. The largetooth sawfish was,

however, maintained on the candidate species list and later transferred to the new Species of Concern list on April 15, 2004 (69 FR 19975).

On April 21, 2009, WildEarth Guardians petitioned the Secretary of Commerce to list the largetooth sawfish as endangered or threatened throughout its range and to designate critical habitat for this species. The petitioners also requested that we reconsider our previous March 10, 2000, negative finding on listing the North American population.

On July 29, 2009, we published a positive 90-day finding (74 FR 37671) announcing that the petition presented substantial scientific or commercial information indicating the petitioned action of listing the species may be warranted. We announced the initiation of a status review of the species and requested information to inform the agency's decision on whether to propose the species for ESA listing. Our Southeast Regional Office (SERO) issued two contracts in 2009 to the Florida Museum of Natural History to compile all confirmed records of largetooth sawfish in the U.S. and internationally. The status review (NMFS, 2010) was conducted by the Southeast Fisheries Science Center (SEFSC) and SERO staff. The status review is available electronically at *http://sero.nmfs.noaa.gov/pr/Largetoothsawfish.htm*. On May 7, 2010, we published a proposed rule (75 FR 25174) to list *Pristis perotteti* as an endangered species under the ESA. We solicited public comment on the proposed listing for 60 days. We did not hold a public hearing for the proposal.

**Listing Determinations Under the Endangered Species Act**

We are responsible for determining whether the largetooth sawfish is threatened or endangered under the ESA (16 U.S.C. 1531 *et seq.*). Section 4(b)(1)(A) of the ESA requires us to make listing determinations based solely on the best scientific and commercial data available after conducting a review of the status of the species and after taking into account efforts being made by any state or foreign nation to protect the species. We have followed a stepwise approach in making this listing determination. As the first of five steps (species determination, extinction risk assessment, threats assessment, protective efforts, status determination), we determined whether the largetooth sawfish is a ''species'' under the ESA. To be considered for listing under the ESA, a group of organisms must constitute a ''species,'' which is defined in section 3 of the ESA to include taxonomic species plus ''any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.''

Next we completed an extinction risk assessment to determine the status of the species, in particular whether it qualified for threatened or endangered status. Section 3 of the ESA defines an endangered species as ''any species which is in danger of extinction throughout all or a significant portion of its range'' and a threatened species as one ''which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' For our extinction risk analysis we follow the general procedure developed by Wainwright and Kope (1999).

In the third step, we assessed the threats affecting the species status. We did this by following the guidance in the ESA that requires us to determine whether any species is endangered or threatened due to any of the following five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence (section 4(a)(1)(A) through (E)). After analyzing the threats affecting the species, we re-evaluated the extinction status for the species to see if the status changed after the assessment of the five factors.

The fourth step involved an assessment of the efforts being made to protect the species to determine if these efforts are adequate to mitigate existing threats. We evaluated all conservation efforts using the criteria outlined in the joint NMFS and U.S. Fish and Wildlife Service (USFWS) Policy for Evaluating Conservation Efforts When Making Listing Decisions (PECE policy; 68 FR 15100; March 28, 2003) to determine their certainties of implementation and effectiveness. In the final step, we reassessed the preliminary extinction risk assessment conclusion from above to determine if the status of the species had changed based on the PECE analysis.

To evaluate the petitioner's request that we designate critical habitat for the species, we followed the provisions in the ESA and in our implementing regulations (50 CFR part 424). Of particular relevance in this case are provisions that we cannot designate critical habitat in ''foreign countries'' or areas outside of U.S. jurisdiction and that we shall not designate as critical habitat areas outside of the geographical area presently occupied by a species, unless ''a designation limited to its present range would be inadequate to ensure the conservation of the species'' (50 CFR 424.12). Furthermore, to designate unoccupied critical habitat, we must also determine that the specific area(s) outside the geographic area currently occupied by the species at the time it is listed are essential to the conservation of the species.

Section 4(b)(1)(B) of the ESA requires us to give consideration to species which: (1) Have been designated as requiring protection from unrestricted commerce by any foreign nation or pursuant to an international agreement; or (2) have been identified as in danger of extinction, or likely to become so within the foreseeable future, by any state agency or by any agency of a foreign nation.

**Largetooth Sawfish Natural History**

*Taxonomy*

All sawfishes belong to two Genera (*Pristis* and *Anoxypristis*) in the Family Pristidae of the Order Pristiformes, and are classified as rays (Superorder Batoidea). Sawfishes are distinguished from other rays by the long snout (rostrum) with teeth on either side. Using molecular phylogeny (mitochondrial and nuclear gene analysis) paired with morphological characters, Faria (2007) distinguished seven extant species in the Pristidae. Sawfishes are classified into three morphological groups based on rostrum characteristics: Largetooth, smalltooth, and knifetooth (Garman, 1913). Three species are currently classified in the largetooth ''group,'' namely *P. perotteti, P. microdon,* and *P. pristis,* though difficulties associated with taxonomic identification are known (Faria, 2007; Wiley *et al.,* 2008, Wueringer *et al.,* 2009).

*Pristis perotteti* has been referred to by other names throughout its range. For instance, it has been called *P. antiquorum* (as cited in Bigelow and Schroeder, 1953), *P. zephyreus* (Beebe and Tee-Van, 1941), *P. pristis* (McEachran and Fechhelm, 1998), or *P. microdon* (Garman, 1913; Fowler, 1941; Chirichigno and Cornejo, 2001; Vakily *et al.,* 2002). Some scientists consider the eastern Pacific populations to be part of the species *P. microdon* (Garman, 1913; Fowler, 1941; Chirichigno and Cornejo, 2001), while others consider the eastern Pacific populations to be *P. perotteti* (Jordan and Evermann, 1896; refs. in Beebe and

Tee-Van, 1941; Compagno and Cook, 1995; Camhi *et al.,* 1998; Cook *et al.,* 2005). The species are generally classified based upon location (i.e., *P. perotteti* occurs in the Atlantic, while *P. microdon* is in the Indo-Pacific), and there is some evidence that tooth counts may differ (Wueringer *et al.,* 2009). The conserved morphology of sawfishes makes identification difficult in some cases; most species are distinguished by the number of teeth on, and size of, the rostrum, placement of the first dorsal fin in relation to the pectoral fins, and shape of the lower lobe of the caudal fin. However, Faria (2007), used both mitochondrial and nuclear genes to investigate the population structure for all Pristidae. The results from his study indicate that the ''largetooth'' species *P. microdon* and *P. perotteti* are separate species, and that *P. microdon* occurs in the Pacific, based on their mitochondrial deoxyribonucleic acid sequencing data and differences in external morphology (e.g., rostrum length and horizontal length of the eye). Based on the available taxonomic information on *P. perotteti,* we have determined the species' range is the eastern and western Atlantic Ocean.

The rostral tooth count per side for *P. perotteti* ranges from 14 to 22, and the space between the two most posterior teeth is between 4.5 and 8.5 percent of rostrum standard length (Faria, 2007). The origin of the first dorsal fin is forward of the pelvic fin origin, and the lower lobe of the caudal fin is distinct at all maturity stages. The largest known specimen was a 275.6 in (700 cm) total length (TL) female captured in northern Brazilian waters (Almeida, 1999). The only other sawfish species that overlaps in range with *P. perotteti* is the smalltooth sawfish, *P. pectinata.* These species are differentiated by the number of teeth on the rostrum (22 to 29 per side for *P. pectinata* (Wiley *et al.,* 2008), and 14 to 22 per side for *P. perotteti* (Faria, 2007)), and the rostrum length of *P. pectinata* is shorter in relation to its body length.

*Habitat Use and Migration*

Largetooth sawfish are generally restricted to shallow coastal, estuarine, and fresh waters, although they have been found at depths of up to 400 ft (122 m) in Lake Nicaragua. Largetooth sawfish are often found in brackish water near river mouths and large bays, preferring partially enclosed waters, lying in deeper holes and on bottoms of mud or muddy sand (Bigelow and Schroeder, 1953). This species, like the smalltooth sawfish, is highly mangrove-associated (Burgess *et al.,* 2009). Juvenile smalltooth sawfish are commonly found close to shore on muddy or sandy bottoms (NMFS 2009); however they are commonly observed swimming near the surface in the wild and in aquaria (Cook *et al.,* 2005). Largetooth sawfish move across salinity gradients freely and appear to have more physiological tolerance of freshwater than smalltooth sawfish (Bigelow and Schroeder, 1953; Dahl, 1971; Thorson, 1974; 1976a; all as cited in Thorson, 1982a).

Though their habitats once overlapped in the northern Gulf of Mexico, the largetooth sawfish historically had a more southerly range than the smalltooth sawfish, with what appears to be a more narrow seasonal migration pattern. Mature largetooth sawfish seasonally ventured into waters as far north as U.S. waters of the Gulf of Mexico.

*Age and Growth*

There have been no formal studies examining the age and growth of the largetooth sawfish, though Thorson's (1982a) study of the Lake Nicaragua population estimated size at birth to be 30 in (75 cm) and an early juvenile growth rate of 13.8 to 15.7 in (35 to 40 cm)/year. Thorson (1982a) also estimated age of maturity to be 10 years and size at maturity 118 in (300 cm). Preliminary vertebral growth ring analysis has extrapolated largetooth sawfish (*P. microdon*) lifespan to an estimated maximum age of 51 years (Peverell, 2006), and we determined this to be our best available estimate of largetooth sawfish lifespan. Growth rates of captive sawfish in Colombia averaged 7.7 in (19.6 cm) per year (Bohoroquez, 2001).

*Reproductive Biology*

The reproductive method of sawfishes is most likely lecithotrophic viviparity; ova are internally fertilized, developing embryos receive nourishment from an external yolk sac, and the pups are born live after the yolk sac is absorbed. The only known reproductive study of largetooth sawfish was from Lake Nicaragua in the 1970s (Thorson, 1976a). This study found that litter size ranged from one to 13 pups, with an average of 7.3 pups per cycle. The gestation period was approximately 5 months, with a biennial reproductive cycle. After gestation, young are born between October and December (Oetinger, 1978). Thorson (1976a) also found that both ovaries appeared to be functional, though the left seemed to be larger and carry more ova. Parturition occurred in October and November and size at birth was between 28.7 and 31.5 in (73 and 80 cm) TL. Thorson (1976a) reported that the smallest gravid female was 120 in (305 cm) TL, and based on this and other observations, reported the size at maturity is estimated to be around 118 in (300 cm) TL. The life history of largetooth sawfish, like most elasmobranchs, is characterized by slow growth, late maturity, and low fecundity, which generally contributes to a low intrinsic rate of population increase.

Simpfendorfer (2000) estimated that largetooth sawfish in Lake Nicaragua had an intrinsic rate of increase (r) of 0.05 to 0.07 per year, with a population doubling time ($t_{x2}$) of 10.3 to 13.6 years. Intrinsic rates of increase below 0.1 are considered low, making species particularly vulnerable to population decline (Musick *et al.,* 2000). The results indicated that if effective conservation measures are put in place for the species and its habitats, recovery to levels with little risk of extinction will take many decades. Since Thorson (1973) hypothesized that many Lake Nicaragua sawfish may live their whole lives in the lake and Faria (2007) reported that the Lake Nicaragua sawfish may be a separate stock, the life history parameters estimated by Simpfendorfer (2000) may be unique to that subpopulation or stock.

*Diet and Feeding*

No published information is available that quantitatively describes the diet of largetooth sawfish. Bigelow and Schroeder (1953) reported that, in general, sawfish subsist on the most abundant small schooling fishes in the area, such as mullets and small clupeids. There is also some evidence of largetooth sawfish feeding on crustaceans and other small benthic organisms (Bigelow and Schroeder, 1953). In these cases, the rostrum may be used to stir up the bottom sediments to locate prey, and in the case of fish predation, the rostrum may be used to stun or wound the fish in a slashing movement (Bigelow and Schroeder, 1953).

*Predation*

While there is potential for competition between *P. perotteti* and *P. pectinata* due to their overlap in range and habitat types, there is no data to support this, and differences in patterns of habitat use and salinity tolerance may adequately partition the niches of these species. Thorson (1970) speculated that the Lake Nicaragua population may have also competed with the bull shark, *Carcharhinus leucas,* as both were quite prevalent (Thorson, 1970); however, both species have since declined to the point of near extirpation. A *Pristis*

species has been documented within the stomach of a bottlenose dolphin near Bermuda (Bigelow and Schroeder, 1953), in the stomach of a bull shark (*C. leucas)* in Australia (Thorburn *et al.,* 2004), and a juvenile smalltooth sawfish was captured with fresh bite marks from what appears to be a bull shark (Tonya Wiley, pers. comm., 2009). The International Union for Conservation of Nature (IUCN) Red List for the largetooth sawfish also states that crocodiles prey on the species (Charvet-Almeida *et al.,* 2007).

*Distribution and Abundance*

Historically, *P. perotteti* are thought to inhabit warm temperate to tropical marine waters in the eastern and western Atlantic and Caribbean. In the western Atlantic, *P. perotteti* occurred from the Caribbean and Gulf of Mexico south through Brazil, and in the United States, largetooth sawfish were reported in the Gulf of Mexico, mainly along the Texas coast and east into Florida waters (Burgess and Curtis, 2003; Burgess *et al.,* 2009). Burgess *et al.* (2009) also state that, based on the evidence, the species rarely occurred in Florida waters and that nearly all records of largetooth sawfish encountered in U.S. waters were limited to the Texas coast. In the eastern Atlantic, *P. perotteti* historically occurred from Spain through Angola.

Currently, *P. perotteti* are thought to primarily occur in freshwater habitats in Central (includes Mexico) and South America and West Africa. In Atlantic drainages, largetooth sawfish have been found in freshwater at least 833 miles (1,340 km) from the ocean in the Amazon River system (Manacapuru, Brazil), as well as in Lake Nicaragua and the San Juan River; the Rio Coco, on the border of Nicaragua and Honduras; Rio Patuca, Honduras; Lago de Izabal, Rio Motagua, and Rio Dulce, Guatemala; the Belize River, Belize; Mexican streams that flow into the Gulf of Mexico; Las Lagunas Del Tortuguero, Rio Parismina, Rio Pacuare, and Rio Matina, Costa Rica; Rio San Juan and the Magdalena River, Colombia; the Falm River in Mali and Senegal; the Saloum River, Senegal; coastal rivers in Gambia; and the Geba River, Guinea-Bissau (Thorson, 1974; 1982b; Castro-Aguirre, 1978 as cited in Thorson, 1982b; Compagno and Cook, 1995; C. Scharpf and M. McDavitt, pers. comm., as cited in Cook *et al.,* 2005).

*The United States*

Although the first confirmed record of a U.S. largetooth sawfish was from ''the Gulf of Mexico'' in 1878 (Burgess *et al.,* 2009), they were likely present prior to this time period. Sawfish encounters were reported in the entire Gulf of Mexico in early popular literature of the late 1800s but the similarities between the smalltooth and largetooth sawfishes limited the ability of non-specialists to discriminate between the two species. Because of this, there is no conclusive data available for largetooth sawfish abundance before fishing and other anthropogenic pressures began to affect their distribution. Recreational fishers in Texas began targeting prize fishes, including large elasmobranchs such as sawfishes, in the 1930s. Photographs taken of these catches were favored in the print media, allowing Burgess *et al.* (2009), to identify 33 largetooth sawfish in Texas.

Though reported in the United States, it appears that *P. perotteti* was never as abundant as *P. pectinata,* with approximately 39 confirmed records (33 in Texas) from 1910 through 1961, and no confirmed sightings in the years since (Burgess *et al.,* 2009). A 1963 newspaper article reporting a shrimp trawler off the coast of Texas taking a ''broadbill sawfish'' may refer to a largetooth sawfish (Burgess *et al.,* 2009). One specimen was reported between 1916 and 1919 in Louisiana. The capture location and identification as a largetooth sawfish species ''presumably from Alabama'' was catalogued at the University of Alabama but could not be verified (Burgess *et al.,* 2009). Four individuals from Florida were noted between 1910 and 1960 (Burgess *et al.,* 2009). Two of the reports in Florida were identified by elasmobranch researcher Stewart Springer by rostral tooth counts: One from Key West (1941) and another from Port Salerno (Baughman, 1943; Bigelow and Schroeder, 1953). Port Salerno is on the east coast of Florida, making this capture the only reported largetooth sawfish outside of the Gulf of Mexico in the United States. Another specimen from south Florida was collected by the American Museum of Natural History in 1910. The final record for *P. perotteti* in Florida was recorded in the Springer and Woodburn (1960) study of Tampa Bay fishes. The dried specimen was on display at the Sea-Orama in the City of Clearwater Beach, but the identification was not verified, and the size of the specimen (Burgess *et al.,* 2009) was much smaller than any other individual captured in U.S. waters. With this exception, all largetooth sawfish captured in the U.S. were 14 feet (4.3 m) in length or larger.

In Texas, largetooth sawfish were primarily found in three regions: Padre Island-Laguna Madre, Corpus Christi-Port Aransas, and Galveston-Freeport (Burgess *et al.,* 2009). Most were caught from 1929 through 1957, though some records may have been duplicated (Baughman, 1943). Ten largetooth sawfish were encountered in the Corpus Christi-Port Aransas region, from 1917 to 1961, though again duplication of records is possible. The highest number of records is from the northeast Texas coast (Galveston) and the lowest number from near the Texas-Mexico border (Padre Island), corresponding to the historical freshwater inflow patterns of the region (Longley, 1994). That is, sighting frequency is positively correlated with higher freshwater flow discharge. While it is likely that the freshwater affinity of this species, especially in comparison to the smalltooth sawfish, attracted the largetooth sawfish to these high outflow areas, these numbers may also be an artifact of higher fishing effort or likelihood of reporting in that area.

Burgess *et al.* (2009) report captures of largetooth sawfish in Texas were primarily in shallow inshore waters and the majority (65 percent) of those captures noted were taken from fisheries using rod and reel gears. Additionally, shrimp nets (reported as shrimp seines, shrimp net, and shrimp trawls) are the gear type associated with approximately 25 percent of all captures. Where size data could be determined, all largetooth sawfish caught in Texas were greater than 16 ft (4.88 m) TL. Burgess *et al.* (2009) report all largetooth sawfish found in U.S. waters were large (>14 ft (4.3 m)) and were primarily encountered during periods of warm water (May through October), suggesting that adults of this species mainly utilized Texas waters in the summer (but data on month of capture only exist for 10 records). The last confirmed record of *P. perotteti* in U.S. waters was from Port Aransas, Texas on June 24, 1961. The last records for other Gulf of Mexico states include Florida in 1941 and Louisiana in 1917. No records of largetooth sawfish were found from Mississippi, and, as stated previously, the one Alabama specimen could not be verified.

*The Caribbean, Central America, and Northern South America*

Only 33 confirmed records of *P. perotteti* exist for this region outside of Costa Rica and Nicaragua (Burgess *et al.,* 2009). The lack of data likely stems from several factors, including confusion or ambiguity of identification with smalltooth sawfish and the lack of scientific surveys and popular reports during the time of highest abundance. In total, 5 largetooth sawfish records were from Mexico, 5 from Guatemala, 1 from Honduras, 483 from Nicaragua, 37 from Costa Rica, 7 from Colombia, 6 from

Venezuela, 1 from Guyana, 5 from Suriname, 1 from French Guiana, and 1 from Trinidad. Length data was not available for most of these specimens.

Of the known Mexican largetooth sawfish, four were from the southwestern Gulf of Mexico (Tamaulipas, Veracruz, Tabasco, and Campeche), while one was captured at the northeastern tip of the Yucatan Peninsula (Quintana Roo). The mature (17.7 ft (5.4 m in total length), 1764 lbs (800 kg)) Yucatan individual was captured in 1997, which is the northernmost record in recent history. It appears that the last records in the Mexican Gulf of Mexico were prior to 1978, and Caribbean records are very sparse.

No encounters could be substantiated in Belize (Burgess *et al.,* 2009). All five Guatemalan largetooth sawfish were from a survey of Lake Izabal between 1946 and 1947, and sawfishes were reported to be important inland fishes (Saunders *et al.,* 1950). Though reported by Thorson *et al.* (1966a; 1966b) to be common throughout the area, a claim which was mirrored by local fishers at the time, there are no recent reports of encounters with sawfishes in Guatemala. The lone largetooth sawfish reported from Honduras was acquired from that country, but the true origin of the rostrum and the date of capture could not be confirmed.

The vast majority of *P. perotteti* records from Costa Rica (34 of 37) and Nicaragua (397 of 483) stem from Thorson's (1982a; 1982b) years of work on the Lake Nicaragua-Rio San Juan system. The San Juan River originates at Lake Nicaragua and runs along the Nicaragua-Costa Rica border until it reaches the Caribbean slightly south of the Nicaraguan border; therefore, movement between the countries was likely. Sawfish were noted in Nicaragua as early as 1529 by a Spanish chronicler (Gill and Bransford, 1877). This species was also reported in Nicaragua by Meek (1907), Regan (1908), Marden (1944), Bigelow and Schroeder (1953), Hagberg (1968), and Baez (1980a; 1980b). A commercial fishery for the largetooth sawfish that began in earnest around 1970 quickly decimated the Lake Nicaragua population (Thorson, 1982a). Low-level sustenance fishing for this species was common before this time, but the Nicaraguan government helped to establish a processing plant in 1970, which processed and sold the meat, fins, and rostra in an efficient manner. In the 1970s, an American supermarket chain (A&P) produced advertisements in their Ohio, Pennsylvania, and Illinois chains which included ''Fish Features'' listing ''Sierra Steaks'' using the Spanish name for sawfish, *pez sierra,* as a fresh fish available in their stores (The Times Recorder, 1975). By 1981, Thorson (1982a) was unable to locate a single live specimen. Thorson (1982a) documented that within a decade the commercial largetooth sawfish fishery had removed the species from shallow water habitats within Lake Nicaragua. The species was relegated to deep water ''pockets'' remaining in Lake Nicaragua. Commercial fishing for largetooth sawfish in Lake Nicaragua was banned in 2006, but the species is still caught incidentally by fishers netting for other species (McDavitt, 2002). A Lake Nicaragua fisherman reported that he encounters a few sawfish annually (McDavitt, 2002). There are no known Nicaraguan records of the largetooth sawfish outside of the Lake Nicaragua-Rio San Juan-Rio Colorado system (Burgess *et al.,* 2009).

Bussing (2002) indicated that this species was known to inhabit the Rio Tempisque and tributaries of the San Juan basin in Costa Rica. Three occurrences in that river were found in internet searches, one being a 200 lb (90.7-kg) specimen caught recreationally (Burgess *et al.,* 2009). In Colombia, the Magdalena River estuary was the primary source for largetooth sawfish encounters from the 1940s (Miles, 1945), while other records originated from the Bahia de Cartagena and Isla de Salamanca (both marine), and Rio Sinu (freshwater) from the 1960s through the 1980s (Dahl, 1964; 1971; Frank and Rodriguez, 1976; Alvarez and Blanco, 1985). Scientists in the country reported that there have been no sightings of this species in Colombia for about 10 years (Burgess *et al.,* 2009).

Though thought to have once been abundant in some areas of Venezuela (Cervignon, 1966a; 1966b), the last of the four confirmed records of *P. perotteti* from that country was from 1962. The single records from Guyana, French Guiana, and Trinidad appear to be from the late 1800s and early 1900s. Of the five Suriname accounts, the latest was collected in 1962.

*Brazil*

The largetooth sawfish was assessed as critically endangered in Brazil by Charvet-Almeida and Faria (2008). A total of 139 reports are available for this species (Burgess *et al.,* 2009), some from as recently as 2009. Most of the records for which location is known originated in the state of Amazonas (12), which encompasses the middle section of the Amazon River basin along with the confluence of the Rio Negro and Rio Solimoes (in the state of Manaus). The other known locations are from the states of Rio Grande do Norte, Sergipe, Bahia, Espirito Santo, Rio de Janeiro, and Sao Paulo (1 record each), Para (7 records), and Maranhao (3 records). A few more reports were reported in Maranhao (email from Patricia Charvet-Almeida to Shelley Norton, 2010). Para contains the estuary and lower reaches of the Amazon River, and Maranhao is just southeast of Para. Anectodal reports from fishers indicate that they are also caught in Amapa, which is the northernmost state in Brazil (Charvet-Almeida and Faria, 2008).

The Amazon River basin and adjacent waters are traditionally the most abundant known area for largetooth sawfish in Brazil (Bates, 1964; Marlier, 1967; Furneau, 1969); however, scientific collection and fisheries data for this region are very limited, both historically and recently. Sawfishes are captured as bycatch in artisanal and commercial fisheries in northern Brazil (Charvet-Almeida, 2002). Most historic records of largetooth sawfish in the Amazon River (Amazonia) predate 1974. Known lengths ranged from 4.9 to 8.2 ft (1.5 to 2.5 m) in total length. Mathew McDavitt (pers. comm., 2010) notes there is anecdotal evidence that *P. perotteti* is currently being targeted in Brazil for the lucrative Chinese shark fin trade. A recent popular guide in China for dried seafood products provides descriptions of a dozen or so popular shark fin categories. Based on photographs and descriptions, the category *huang jiao* (literally: ''yellow-glue'') comes from sawfishes, the trade name deriving from its beige color and the especially copious gelatine it produces when cooked. This Chinese dried seafood book gives the current sources for *huang jiao* fin, noting that the supply from Brazil is favored nowadays due to its comparatively large size.

The Brazilian sawfish populations, which include both *P. perotteti* and *P. pectinata,* are found in this region, but are almost exclusively of the largetooth species, are presumably large and abundant compared to those captured in other localities, due to the fact that sawfishes have not yet been extirpated in Brazilian waters to the extent that they have been elsewhere. Presumably both species are caught and sold. No quantification of the exact species or number of captured or sold sawfishes is currently available, though Charvet-Almeida and Faria (2008) reported that as many as 1500 small and medium rostra and 180 large rostra were sold each year in Para alone.

The two most recent largetooth records in Brazil were from Maranhao, one caught by a fisher in 1998 and another in 2009. The latter was a gravid

female estimated to be 7 m TL (Burgess *et al.,* 2009). Earlier reports of largetooth sawfish in Maranhao were mostly from the 1980s and 90s (Lessa, 1986; Martins-Juras *et al.,* 1987; Stride and Batista, 1992; Menni and Lessa, 1998; and Lessa *et al.,* 1999). Sawfish are likely caught incidentally by shark fishers in this state and landed for their saws (Almeida *et al.,* 2006).

Records of largetooth sawfish in each of the states south of Maranhao are limited to one each, and the dates of capture are largely unknown, though most appear to be from the nineteenth century. An archeological site in Sao Paulo yielded tooled *P. perotteti* rostral teeth, though whether they came from locally caught animals, or were traded from the north is unknown. Charvet-Almeida and Faria (2008) concluded that largetooth sawfish are most likely extirpated in most of the states south of Maranhao.

*West Coast of Africa*

Historical records indicate that largetooth sawfish were once relatively common in the coastal estuaries of West Africa. Verified records exist from Senegal (1841 to 1902), Gambia (1885 to 1909), Guinea-Bissau (1912), Republic of Guinea (1965), Sierra Leone (date unknown), Liberia (1927), Cote d'Ivoire (1881 to 1923), Congo (1951 to 1958), Democratic Republic of the Congo (1951 to 1959), and Angola (1951) (Burgess *et al.,* 2009). Most records, however, lacked species identification and locality data and may have been confused taxonomically with other sawfish species that also occur in the area. Unpublished notes from a 1950s survey detail 12 *P. perotteti* from Mauritania, Senegal, Guinea, Cote d'Ivoire, and Nigeria, ranging in size from 35 through 276 in (89 through 700 cm) in total length (Burgess *et al.,* 2009).

A more recent status review by Ballouard *et al.* (2006) reported that sawfishes, including the largetooth sawfish, were once common from Mauritania to the Republic of Guinea, but are now rarely captured or encountered. According to this report, the range of sawfishes has decreased to the Bissagos Archipelago (Guinea Bissau). The most recent sawfish encounters outside Guinea Bissau were in the 1990s in Mauritania, Senegal, Gambia, and the Republic of Guinea. The most recent documented *P. perotteti* capture was from 2005 in Nord de Caravela (Guinea Bissau), along with anecdotal accounts from fishers of captures off of two islands in the same area (Burgess *et al.,* 2009).

**Summary and Abundance**

As documented above, the range of the largetooth sawfish has contracted significantly on both sides of the Atlantic. Although no time-series abundance data exists to quantify the extent of the decline of the species throughout its range, we believe that with the substantial number of commercial and recreational fisheries fishing along our U.S. coast, the uniqueness of the species morphology, and because media and internet sites are easily accessible to the public, largetooth sawfish encounters would be noteworthy and reported. Additionally, outreach efforts along the Gulf of Mexico coast in the U.S. for the smalltooth sawfish, which includes printed brochures and signage in local bait shops, marinas, and boat ramps on where and how to report sawfish encounters, should have increased the likelihood of reporting a largetooth sawfish encounter. Access to media and internet sites for reporting largetooth encounters outside the U.S. is most likely less common in some of the remote areas along the coasts of Central America, the Amazonian region of Brazil, and West Africa. Nevertheless, the apparent decrease of sightings over time suggests that the species has undergone severe declines in abundance throughout its range. Moreover, the decline in museum records, negative scientific survey results in the U.S. and Lake Nicaragua, and anecdotal reports from fisher people suggest the trend for the species is declining (Burgess *et al.,* 2009).

**Peer Review and Public Comment**

In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review establishing minimum standards for peer review. Similarly, a joint NMFS/FWS policy (59 FR 34270; July 1, 1994) requires us to solicit independent expert review from at least three qualified specialists, concurrent with the public comment period. We solicited peer review comments from four scientific peer reviewers. Public comments were received from five commenters. Three commenters supported our decision to list the species as endangered under the ESA, but none of the commenters or peer reviewers indicated they did not support the decision to list the species. Several of the commenters did not support our decision not to designate critical habitat. Two commenters provide information on the occurrence of the species within specific areas. The peer review and public comments are summarized below.

*Peer Review Comments*

*Comment 1:* General editorial peer review comments identified some errors in the lack of italicization of the species genus and species name.

*Response:* We have corrected these errors in the final rule.

*Comment 2:* No directed research for largetooth sawfish is ongoing in Texas, but Texas Parks and Wildlife Department (TPWD) is conducting surveys which could capture sawfish in Texas waters. TPWD has ongoing standardized fisheries independent and dependent monitoring programs in all of the bay systems and in the Gulf of Mexico along the Texas coastline for the last 35 years. The surveys are conducted using seines, trawls, and gill nets annually. All of the gears used have been found to capture sawfish. Only two sawfish have been recorded during the sampling and they were smalltooth sawfish.

*Response:* This supports the information in our files on the extirpation of the largetooth sawfish from Texas waters for decades. We have incorporated this information into our files.

*Comment 3:* TPWD classifies the smalltooth sawfish and largetooth sawfish as endangered or threatened animals and prohibits the killing or take of either species. TPWD also distributes ''Shark Identification and Regulations in Texas'' brochures that includes information on the prohibition of take of sawfish and also provides information on where to report an encounter. These brochures are distributed from TPWD Field Stations, Law Enforcement Offices, during outreach events, public meetings, public hearings, and upon request. In 2010, NMFS funded the TPWD with section 6 ESA funds to conduct outreach and educational events to promote reporting sawfish captures to the National Sawfish Encounter Database.

*Response:* Outreach efforts in Texas have been very successful and have resulted in the public reporting of smalltooth sawfish encounters to the National Sawfish Encounter Database, and the reporting of the location of curio saws of largetooth sawfish for the purposes of obtaining genetic information.

*Comment 4:* The largetooth sawfish will benefit from an endangered species listing, but critical habitat should not be designated or a recovery plan developed, unless the species returns to U.S. waters. Designating critical habitat or developing a recovery plan would be

arbitrary and capricious with little scientific merit.

*Response:* We do not propose to designate critical habitat. We will develop a recovery plan for the largetooth sawfish if we determine that sections 4(f)(1) and 4(a)(1)(A) of the ESA apply. Section 4(f)(1) of the ESA states that ''Recovery plans shall be developed unless such plans will not promote the conservation of the species * * *'' Section 4 (f)(1)(A) of the ESA also states ''Priority will be given to the maximum extent practicable, to those species that will most likely benefit from such plans * * *''

*Comment 5:* Several reviewers requested we designate critical habitat in foreign countries and one reviewer stated that we can determine the habitat capacity for the species in foreign countries.

*Response:* We do not have specific information on the habitat capacity for the largetooth sawfish in foreign countries and no law provides us with authority to designate critical habitat in foreign countries (50 CFR 424.12 (h)).

*Comment 6:* The Convention on International Trade of Endangered Species (CITES) does not include the U.S. in their described distribution of *P. perotteti* listing, it only includes Brazil, Colombia, El Salvador, Gambia, Guatemala, Guinea Bissau, Honduras, Mali, Nicaragua, Panama, and Senegal.

*Response:* The range information in CITES is consistent with the information in our files.

*Comment 7:* Hotspots exist for the species throughout its range. Conservation efforts should be made which include the development of regulations and the redirecting of law enforcement efforts in hotspot areas. Three potential hot spots are Costa Rica, Nicaragua, and Brazil. Additionally, a proposed dredging project in the San Juan River in Nicaragua was identified in a hotspot area that will modify water flow and natural habitats for largetooth and smalltooth sawfish in the area.

*Response:* NMFS agrees that Costa Rica, Nicaragua, and Brazil appear to be hotspots for the species. We cannot develop regulations or manage law enforcement efforts in foreign countries, but we can provide information to international sawfish researchers and government staff on potential conservation issues or threats to listed species. Prohibitions under section 9 of the ESA apply to all U.S. citizens and U.S. government actions, anywhere.

*Comment 8:* Although some biologists in Costa Rica believe the largetooth sawfish has been extirpated from the country, recent anecdotal information from fisherman indicate that sawfish (smalltooth or largetooth) are still present in the area.

*Response:* We do not have any information on recent reports of largetooth sawfish in Costa Rica, but we will follow-up with the reviewer to try to obtain more information on the recent reports.

*Comment 9:* A recommendation was made to advise local governments, universities, researchers, and non-governmental agencies to become more involved in promoting and funding scientific research throughout the range of the largetooth sawfish. The reviewer also provided a list of potential research efforts that should be considered.

*Response:* We will work with the IUCN Shark Specialist Group's newly formed Sawfish Conservation Committee, to develop a conservation strategy and plan for all sawfish species, foreign and domestic. The conservation plan should identify actions or research efforts necessary to conserve all species of sawfish.

*Comment 10:* A reviewer noted that mangrove areas are considered pupping grounds for *P. perotteti* but provided no data or references in support.

*Response:* We could not locate specific information on pupping grounds for *P. perotteti,* but we believe the species may use mangrove habitat for pupping, based on the information known on the use of mangrove habitats as nursery areas for *P. pectinata.*

*Comment 11:* Add information into the ''Age and Growth'' section from a paper written by Simpfendorfer (2000).

*Response:* Simpfendorfer (2000) provides population growth rate information which is included in the ''Reproductive Biology'' section. Growth rate information from captive sawfish in Colombia from Bohoroquez (2001) was added to the ''Age and Growth'' section.

*Comment 12:* A reviewer did not agree that there is doubt regarding the reproductive method for sawfish.

*Response:* No reproductive studies on *P. perotteti* exist in the literature so reproductive method is inferred from studies of closely related sawfishes.

*Comment 13:* Are foreign records of largetooth sawfish reports from museums or grey literature?

*Response:* The primary source of foreign records of *P. perotteti* comes from Burgess *et al.* (2009). Burgess *et al.* (2009) used various methods to gather information on the species including personal interviews, literature searches, historic newspaper and magazine searches, and interviews with scientists in museum curators in foreign countries.

*Comment 14:* A reviewer suggested we change the word ''few'' to ''many'' when we discuss the number of decades needed to recover *P. perotteti.*

*Response:* We agree, Simpfendorfer (2000), determined it will take several decades to recover the species and changed the text.

*Comment 15:* A reviewer requested additional citations throughout the document.

*Response:* The reviewer did not provide suggested citations to add to our document. Information is limited on *P. perotteti,* and we provided the applicable citations available on the species.

*Comment: 16:* Rostral teeth counts can overlap between *P. perotteti* and *P. pectinata.*

*Response:* We acknowledge that the rostral teeth counts can overlap between the species, both species can have 22 teeth per side.

*Comment 17:* A reviewer stated that, based on the limited fisheries data available on *P. perotteti,* that the statement that *P. perotteti* was never abundant in U.S. waters should be restated as ''never as abundant as *P. pectinata.''*

*Response:* We agree with the reviewer statement and changed the text in the final rule.

*Comment 18:* Guerillas and drug smugglers make it almost impossible to access some areas in Central and South America.

*Response:* We acknowledge that illegal activities may affect access to areas that support *P. perotteti* and recent information on the presence of the species in these areas may not be available.

*Comment 19:* NMFS does not need evidence of habitat loss throughout the species' range to say that habitat loss is a threat outside the U.S. The reviewer also notes that population growth is linked to a world-wide habitat problem that affects all coastal and estuarine species.

*Response:* We acknowledge that habitat loss is occurring throughout the species' entire range in the proposed and final rule in the ''The Present or Threatened Destruction, Modification, or Curtailment of its Habitat or Range'' section and we also recognize that habitat losses are occurring range-wide.

*Comment 20:* A reviewer noted that data may not exist outside of Lake Nicaragua on the exact extent of the species decline but that it is correct to say that severe declines have taken place within its range.

*Response:* NMFS agrees that no other fishery data exists outside of the Lake Nicaragua fishery data and we agree that significant declines in the species abundance have most likely occurred.

*Comment 21:* Capture records in the states south of Maranhao are incorrect. A few more reports from other states occurred in the 1970's.

*Response:* We corrected the information in our final rule.

*Comment 22:* A score of (3) was very low on our evaluation of ''other risk'' factors for evaluating extinction risk. Simpfendorfer (2000) indicates recovery would take decades and the species is very, very, vulnerable to fishing gear entanglement, so the reviewer suggests the score should be increased. The reviewer also suggests that fishing gears or risk of entanglement would fit better in the ''other risk'' evaluation category.

*Response:* A risk level of 3 equates to a moderate risk, which according to Wainwright and Kope's (1999) is defined as factors that contribute significantly to long-term risk of extinction, but do not alone constitute a danger of extinction in the future. We rated the ''other risk'' factors, which includes life history characteristics of slow growth and late maturity a 3 because life history alone does not alone constitute a danger of extinction in the future. We did not change our ranking of the ''other risks'' factors.

Wainwright and Kope (1999) explain the ''other risks'' factor category as including life history information so we believe this is the correct place for evaluating the life history information. Entanglement and other bycatch are commonly considered in the overutilization factor.

*Comment 23:* The fishing gear types listed under the ''Commercial Fisheries'' section of the proposed rule for the shark fishery in Brazil are incorrect. The gear types should be listed as gillnets and trawl nets.

*Response:* We corrected this error in the final rule.

*Comment 24:* In Brazil and Nicaragua the species is protected, which means catches and landings are illegal. Harvest limits are not in place and enforcement is a challenge. The reviewer requested we revise the sentence in the ''The Inadequacy of Existing Regulatory Mechanisms'' section on the protections in Brazil.

*Response:* We modified the sentence to clarify that the protections do not apply to harvest limits.

*Comment 25:* Protections in the U.S. for *P. pectinata* will benefit *P. perotteti,* should it return to U.S. waters.

*Response:* We agree because both species are susceptible to the same types of threats, and because we have conservations measures in place for *P. pectinata* throughout the U.S. historic range of *P. perotteti.*

*Comment 26:* Predation is not a threat for the species.

*Response:* We stated in the proposed rule that no evidence suggests that predation is a threat to the species.

*Comment 27:* A citation quoted rostral tooth counts incorrectly for Wiley *et al.* (2008). Rostral tooth counts for *P. pectinata* should be 22–29 per side.

*Response:* We corrected the error in the final rule.

*Public Comments*

*Comment 28:* Largetooth sawfish has not been documented within the boundaries of any National Park Service unit.

*Response:* This information has been incorporated into our files.

*Comment 29: Pristis perotteti* likely disappeared from the area of intervention of the Regional Commission on Fisheries which covers Gambia, Guinea, Guinea Bissau, Mauritania, Senegal, and Sierra Leone, 20 years ago. Investigations conducted in 2005–2006 for the Sharks Sub-Regional Action Plan, Fondation Internationale du Banc d'Arguin, Poverty Reduction Strategy Paper, and Noah Conservation, revealed that recent catches of *P. perotteti* in West Africa date back to 1970 in Gambia, 1984 in Senegal, 1993 in Guinea, 1995 in Mauritania, and 2000 in Guinea-Bissau. The species was abundant in West Africa until 1970. Additionally, investigators in the seven countries (Gambia, Guinea, Guinea Bissau, Mauritania, Senegal, and Sierra Leone) made no observations of *P. perotteti* between 2004 and September of 2010.

*Response:* The commenter's information supports the information in our files regarding the decline of the species in West Africa.

*Comment 30:* Loss of habitat has contributed to the reduction in range for *P. perotteti* and habitat loss is affecting the largetooth sawfish throughout its range; consequently a proposed project (Harbour Pointe) in southwest Florida has the potential to remove three acres of mangrove habitat that may impact the *P. perotteti* and other fishes.

*Response:* We acknowledge in our proposed rule that habitat loss is a threat to the species. The species is no longer found in U.S. waters so projects proposed in southwest Florida will not affect the species. However, NMFS will consult under section 7 of the ESA on federally authorized or funded projects in southwest Florida, if the effects of the proposed project may affect listed species (e.g. smalltooth sawfish and sea turtles) or their designated critical habitat, under our jurisdiction.

*Comment 31:* Effects from urban and agricultural activities can directly impact critical habitat but may also have lasting effects on adjacent water resources (i.e., water chemistry, hydrology, salinity, and quality). The commenter also noted that nutrient pollution from urban and agricultural sources can threaten sawfish and other fish species. In particular, the commenter notes that dinoflagellates, for example *Pfiesteria* species, can cause haemorrhaging, sloughing of the skin tissue and deep ulcerations, and that fish with these symptoms have a higher probability of experiencing mortality. The commenter also suggests that once listed, the recovery plan for the species should follow the goals of the smalltooth sawfish recovery plan for reducing threatening algal blooms, improving water quality, and decreasing red tide events.

*Response:* As stated in the proposed rule, we have no information indicating that diseases are a threat to the species. NMFS will consider all potential threats to the species if we develop a recovery plan for the species.

*Comment 32:* Based on the best available scientific reports NMFS cannot conclude confidently that the largetooth sawfish has been extirpated from Florida.

*Response:* The information in our files indicates the species has not been encountered in Florida since 1941.

*Comment 33:* Listing of the species should move forward while concurrently considering the prudency of determinability of critical habitat as required under 16 U.S.C. 1533 (a)(3)(A)(i).

*Response:* We are moving forward with the listing of *P. perotteti* but are not proposing to designate critical habitat for the species. Please see ''Critical Habitat'' section below for further explanation on our decision not to designate critical habitat.

*Comment 34:* Two commenters stated that failing to designate critical habitat within the U.S. jurisdictional waters will deprive largetooth sawfish of its key protections and will inadequately conserve the species. The primary conservation benefit of critical habitat designation is that it provides a separate basis for federal agencies to consult under ESA section 7, 16 U.S.C. 1536(a)(2). Additionally, 50 CFR 424.12(b)(5) requires NMFS to consider historic geographical and ecological distributions of a species and that in the proposed rule to list *P. perotteti* we fail to do this, and that we elevate only one of the regulatory factors (50 CFR 424.12(b)(4)), ''breeding'' above all others. The commenter further states

that we are ignoring 4 of the 5 factors we are required to consider for critical habitat designation and that it is inappropriate and illegal to do so. The commenter also stated that foraging is an essential biological function that cannot be discounted and requests we consider foraging behaviours as a trigger for designating critical habitat.

*Response:* We disagree, determining not to designate critical habitat for *P. perotteti* will not deprive the species of its key protections. Section 3(5)(A)(ii) of the ESA states that ''critical habitat'' for threatened or endangered species means specific area(s) outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of the Act, upon a determination of the Secretary that such area(s) are essential for the conservation of the species. Using the best available scientific and commercial data we cannot determine an area or areas essential to the conservation of *P. perotteti* within U.S. jurisdiction. We cannot designate critical habitat in foreign countries or in areas outside U.S. jurisdiction (50 CFR 424.12(h)). See the ''Critical Habitat'' section for further explanation on our determination not to designate critical habitat. Additionally, regulations at 50 CFR 424.12(b) only apply to identifying occupied areas. For unoccupied critical habitat the required finding is ''one or more specific areas are essential to the species conservation.''

*Comment 35:* Conclusions about largetooth sawfish uses of U.S. waters for seasonal foraging and our determination that the species will most likely never breed in U.S. waters is suspect. The commenter also stated that our reliance on historic accounts of reports of encounters of only large animals (14 ft or larger) to establish no breeding historically occurred in U.S. waters is also speculative.

*Response:* All encounter records of largetooth sawfish in U.S. waters were reported during the summer months and no juvenile largetooth sawfish have ever been documented from U.S. waters. Additionally, the commenter did not provide any data to support a breeding population of largetooth sawfish ever existed in the U.S.

*Comment 36:* Two commenters stated that historically, fisherman were only inclined to report the capture of large fish and generally do not report small (juvenile) sawfish so that our determination that U.S. waters does not contain the essential biological features necessary for the species conservation is flawed.

*Response:* The best available scientific and commercial data does not contain reports of small (juvenile) largetooth sawfish. Juvenile sawfish can range in size from 2–6 ft in total length, based on information taken from the smalltooth sawfish recovery plan. A fish that is 2–6 ft long is not considered by many people as small. Also, based on information in the National Sawfish Encounter Database, located at the Florida Museum of Natural History, reports of smaller sawfish species (not *P. perotteti*) have been reported historically, and currently by U.S. and foreign fishers. NMFS is not required to determine if essential biological features exist for the largetooth sawfish when designating unoccupied critical habitat. See ''Critical Habitat'' section for more details.

*Comment 37:* A commenter stated that we discount the recovery aspect of a critical habitat designation and that the designation of unoccupied critical habitat is necessary for population growth or foraging behaviour.

*Response:* Based on the best available scientific and commercial data, including the lack of evidence of a permanent, large population in U.S. waters, we have determined that the species does not require expansion into or re-establishment of use of U.S. habitats for recovery. See ''Critical Habitat'' section for more details.

*Comment 38:* A commenter questioned our conclusion in the proposed rule that the protections offered to the endangered U.S. distinct population segment (DPS) of smalltooth sawfish may benefit the largetooth sawfish.

*Response:* All sawfish species in the U.S. are threatened by similar factors (incidental and directed capture from commercial and recreational fishers, habitat loss, and trade) so conservation efforts directed toward the endangered U.S. DPS of smalltooth sawfish will also promote the conservation of the largetooth sawfish, should it return to U.S. waters.

*Comment 39:* NMFS should include an analysis on any new and likely significant impacts to largetooth sawfish from the recent BP Deepwater Horizon oil spill, and acknowledge that ongoing and/or future oil and gas production in the Gulf of Mexico is a significant threat to the largetooth sawfish.

*Response:* Studies are ongoing to determine the impacts from the BP Deepwater Horizon oil spill. No conclusive determinations have been made yet.

*Summary of Changes From the Proposed Listing Rule*

Based on the comments received and our review of the proposed rule, we made the changes listed below.

1. We corrected any errors identified by reviewers and commenters.

2. We corrected the error in the ''Background'' section that stated we completed a status review of the species in 2000.

**Species Determination**

We first considered whether *P. perotteti* met the definition of ''species'' pursuant to section 3 of the ESA as described above. As stated in the taxonomy section above, after reviewing the best available scientific and commercial taxonomic data on the species, we determined that *P. perotteti* is a ''species'' and its range is the eastern and western Atlantic Ocean.

**Extinction Risk**

We next considered the risk of extinction for *P. perotteti* to determine whether the species is threatened or endangered as defined above. No quantitative estimate of abundance for the species is known, so methods such as population viability analysis cannot be used to determine the risk of extinction for the species. Therefore, we must use a method to determine the risk of extinction using qualitative information.

Wainwright and Kope (1999) developed methods to assess the risk of extinction for U.S. West Coast salmon. Using the definitions of endangered and threatened in the ESA, they considered a variety of information to assess extinction risks, including abundance, trends, productivity, variability, genetic integrity, and other risks. Wainwright and Kope (1999) further consider the risk to small populations based on potential genetic effects or random demographic effects. They also considered habitat capacity to answer questions about the carrying capacity and whether the carrying capacity can ensure the populations viability. In assessing the risk of extinction using trends, productivity, and variability, Wainwright and Kope (1999) indicate that short- and long-term trends in abundance are the primary indicators of risk. Wainwright and Kope (1999) also assessed the effects of genetic integrity (introduced genotypes, interactions with hatchery fish, or anthropogenic selection) as it relates to evaluating the risk of extinction. Loss of fitness and loss of diversity can occur from random genetic effects and increase the risk of extinction for a species. Wainwright and

Kope (1999) also evaluated other risks that are considered for salmonids (disease, predation, and changes in life history). These ''other risks'' can affect the sustainability of a population. The last factor that Wainwright and Kope (1999) evaluated is the risks associated with recent events. Changes in harvest rates, anthropogenic changes in the environment (habitat degradation or enhancement), or natural events (floods, volcanic eruptions) can pose a risk for species but may not have been adequately considered by looking at the other effects above when there is a time-lag in seeing the effect of recent events.

In addition to analyzing factors that may affect the risk of extinction for salmon, Wainwright and Kope (1999) developed a general quantitative evaluation method to assess both qualitative and quantitative evidence for the various risk factors. In this method, four of the major categories of extinction risk are scored. These four categories are: (1) Abundance, (2) trend, productivity, and variability (TPV), (3) genetic integrity, and (4) ''other risks''. The risk categories are scored on a scale from 1 to 5. A score of 1 represents a very low risk and factors (single or multiple factors) scored at this level are unlikely to contribute significantly to risk of extinction. A score of 2 represents a low risk and single factors are unlikely to contribute to extinction alone, but in combination with other factors may be a concern. Scores of 3 represent moderate risk. These factors contribute significantly to long-term risk of extinction, but do not alone constitute a danger of extinction in the near future. Score values of 4 represent increasing risk. This rating indicates the present risk is low or moderate, but is likely to increase to high risk in the future (reflects the ESA definition of threatened). Scores of 5 represent the high risk rating. This factor indicates danger of extinction in the near future.

Biologists at SERO used Wainwright and Kope's (1999) methods to assess extinction risk for *P. perotteti.* For the abundance category the following were important considerations. Small-population risks for the species were considered to assess the risk of extinction. As detailed above, museum records, negative scientific survey results in the U.S. and Lake Nicaragua, and anecdotal reports from fishers suggest the trend for the species is declining and population size is small. This species is also a K-selected animal which indicates they are usually successful at maintaining relatively small, persistent population sizes in relatively constant environments. We expect changes from random demographic effects are likely to be significant for the species since they are not able to respond rapidly to stochastic events. Information on the distribution of the species was also used as an indicator of abundance. The current distribution for the species is significantly reduced from its historic range. Thus, the existing population of *P. perotteti* does not adequately represent historic patterns of geographic distribution and this is considered a risk factor for the species. We could not determine the habitat capacity for the species since most of the habitat within the species range is located in foreign countries and we have poor data from those areas. Based on small population risks that could occur from demographic effects and the range constriction that has occurred, we assigned a rating of 5 (high-risk) for the abundance factor.

For the TPV category we considered that the data for the species indicates a declining trend in abundance. A directed fishery existed for the species in Lake Nicaragua but no longer exists today. Reports of the species in Lake Nicaragua are rare. Lack of reports of the species occurrence throughout most of its range, including the U.S. and southern Brazil, also indicates the species abundance has declined from historic levels. Productivity rates are not known for the species but are expected to be declining. Variations in freshwater and marine environments within the species range are difficult to assess. Since reports of the species are rare throughout its range, we expect that productivity is low.

Genetic integrity was not evaluated or scored because we do not have information on the loss of fitness and loss of genetic diversity for the species.

Our evaluation of the ''other risks'' factor considered information about the species life history characteristics, in particular that the species has slow growth rates, late maturation, low fecundity, and population recovery potential is considered limited. Based on this information, we scored the other risks category as a 3.

Using Wainwright and Kope (1999) methods to determine the risk of extinction for *P. perotteti,* we believe that abundance and distribution of *P. perotteti* is likely to continue to decline in the near future. Therefore, we have determined the current threats affecting the species will continue into the future and the species is currently in danger of extinction throughout all of its range.

**Summary of Factors Affecting the Largetooth Sawfish**

In this section, we consider the five factors specified in section 4(a)(1) of the ESA that we outlined in our listing determination process above.

*The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range*

Coastal habitat loss throughout the species' historical range is a contributing factor to the species decline. Coastal habitats in the southern U. S. Gulf of Mexico region have experienced and continue to experience losses due to urbanization. Wetland losses in the Gulf of Mexico region of the U.S. averages annual net losses of 60,000 acres (242.8 $km^2$) of coastal and freshwater habitats from 1998 to 2004 (Stedman *et al.,* 2008). Although wetland restoration activities are ongoing in this region of the U.S., the losses significantly outweigh the gains (Stedman *et al.,* 2008). These losses have been attributed to commercial and residential development, port construction (dredging, blasting, and filling activities), construction of water control structures, modification to freshwater inflows (Rio Grande River in Texas), and gas and oil related activities. Riverine systems throughout the species' historical range have been altered or dammed. NOAA's Restoration Center is involved in ongoing coastal restoration activities throughout the Gulf of Mexico to restore coastal habitats. In spite of ongoing efforts to restore coastal habitats, coastal habitat losses will continue to occur.

The status of habitats within the current international range of the species is not well known, but with continued development and human population growth, negative effects on habitat are likely. Ruiz-Luna *et al.* (2008) acknowledge that deforestation of mangrove forests in Mexico has occurred from logging practices, construction of harbors, tourism, and aquaculture activities. In addition to deforestation, Ruiz-Luna *et al.* (2008) document that changes in the hydrological systems occurred with opening of the artificial canal in Cuautla, in the state of Nayarit. Valiela *et al.* (2001) report the total area of mangrove habitats in Brazil has decreased significantly (from 9,653 to 5,174 $mi^2$ (25,000 to 13,400 $km^2$) ) from 1983 to 1997, with similar trends in Guinnea-Bissau (1,838 to 959 $mi^2$ (4760 to 2484 $km^2$)) from 1953 to 1995. Habitat modification, including mangrove forest removal, is also likely in northern Brazil (Compagno *et al.,* 2006). The areas with the most rapid mangrove declines in the Americas included Venezuela, Mexico, Panama, the United States, and Brazil, while Senegal, Gambia, Sierra Leone, and

Guinnea-Bissau showed the largest declines in western Africa (Ruiz-Luna *et al.* 2008). World-wide mangrove habitat loss was estimated to be 35 percent from 1980 to 2000 (Valiela *et al.,* 2001). There are unconfirmed reports of dam building activities on the Rio San Juan (Nicaragua) system, which could affect the movements of largetooth sawfish in that region. These threats cannot be directly related to the decline of the largetooth sawfish, but habitat loss is a known factor contributing to the decline of many freshwater and marine species, including the endangered U.S. distinct population segment (DPS) of smalltooth sawfish.

*Overutilization for Commercial, Recreational, Scientific, or Educational Purposes*

*Commercial Fisheries*

Sawfishes are very vulnerable to most fishing gears, and were historically caught by gillnets, trawls, seines, and lines (Compagno *et al.,* 2006). Most targeted catches of largetooth sawfish in Texas in the 1930s were from recreational hook and line, but they were also caught incidentally by shrimp trawls and seines (Burgess *et al.,* 2009). The Lake Nicaragua commercial fishery for largetooth sawfish consisted mostly of gillnet boats (Thorson, 1982a), and the commercial small coastal shark fishery in Brazil mainly utilizes gillnets and some trawl nets (Charvet-Almeida, 2002). Today the main threat to the largetooth sawfish is most likely from bycatch mortality, though sawfishes may be targeted opportunistically in some areas (Brazil) when the occasion arises. The current scarcity of sawfish may inhibit targeted fisheries that might occur in spite of international trade bans. However, if caught as bycatch they are most likely retained because of the value of their parts (e.g., the rostra, teeth, and fins). For example McDavitt's (2006) review of eBay sales of rostra estimate a total of 200 rostra per year are sold, with a value of more than US $25,000.

*Recreational Fisheries*

Historically, recreational hook and line fishers targeted large elasmobranchs, including sawfishes, as trophies in Texas (Burgess *et al.,* 2009). Elsewhere in the U.S., abundance was likely never high enough for recreational fishers to encounter this species, much less target it. Because of its current distribution, which is mostly in developing nations, the largetooth sawfish is unlikely to be encountered by recreational fishers, with possible rare exceptions of tourists in these areas. There is no current information on the use of sawfish species for subsistence fishing, though it was noted in Brazil that the meat was often sold in local fish markets, while the other products (rostra, fins) were sold internationally (Charvet-Almeida, 2002).

*Commercial Trade*

There is very little information available about the trade of sawfish products in general, especially the largetooth sawfish. Largetooth sawfish were listed under Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) in 2007, which prohibits the commercial trade of largetooth sawfish parts (see Regulatory Mechanisms section below). In 2006, eBay banned the sale of smalltooth sawfish on their online auction site; however, the ban was not established for all sawfish species. A survey by McDavitt and Charvet-Almeida (2004) of sawfish rostra on eBay (before the ban) found that large rostra command prices of over $1,000 (US). An informal web search in November 2009 turned up several sawfish rostra for sale online to international buyers, some listed as ''largetooth'', along with sites selling cockfighting spurs made from South American sawfish teeth. It is apparent that largetooth and smalltooth sawfishes are still landed and sold illegally in northern Brazil (Charvet-Almeida pers. comm., 2009). It was previously observed that sawfish rostra from small individuals were sold to tourists, while damaged or cut rostra were used for local folk medicine (McDavitt and Charvet-Almeida, 2004). The larger rostra were sold in international cockfighting markets, as the rostral teeth were used as spurs. The larger rostra were also purchased by Asian shark fin buyers, most likely for medicine or curios. The proportion of largetooth sawfish in these markets is unknown, though as many as 180 large *Pristis spp.* rostra were sold per year at a single market in northern Brazil in the early 2000s (McDavitt and Charvet-Almeida, 2004). With little enforcement of regional and international laws, the practice of landing sawfishes may continue in Brazil, though the extent of any international trade since the CITES listing is unknown. No confirmed reports of *P. perotteti* in aquaria exist currently. No seizures of largetooth sawfish in international trade have occurred since its CITES listing (Sharon Lynn (USFWS) pers. comm.).

*Scientific Use*

The only published studies on life history and movements of the largetooth sawfish were conducted by Thorson in the 1970s and 1980s in Costa Rica and Nicaragua (Thorson, 1970; 1973; 1974; 1976a; 1976b; 1978; 1982a; 1982b; 1987; Thorson *et al.,* 1966a; 1966b). While many live largetooth sawfish were tagged by Thorson in this time period, it seems that most of the biological data were obtained from dead specimens that were purchased from commercial fishers. Most areas where the largetooth sawfish now occurs suffer from lack of biological sampling due to logistical difficulties and most likely low research funding. However, there is some scientific information being collected by researchers in Brazil, mostly from fish markets, where sawfishes are illegally landed and sold.

*Disease and Predation*

No commercial or scientific data exists on diseases that may affect the largetooth sawfish and all information related to predation is listed above in the ''Largetooth Sawfish Natural History'' section. There is no evidence that unusual levels of disease or predation are a threat to the species.

*The Inadequacy of Existing Regulatory Mechanisms*

Protective measures covering trade in the largetooth sawfish (*P. perotteti*) are implemented internationally under Appendix I of CITES, making non-domestic trade of parts or whole animals illegal. Additional Federal, state, and national laws in the United States, Nicaragua, and Brazil are designed to protect the species from harvest and sale locally and internationally. The Nicaraguan government officially banned commercial fishing for largetooth sawfish in Lake Nicaragua in 2006. The Brazilian Environment Ministry listed *P. perotteti* in Appendix I of the ''Instrucao Normativa numero 05,'' meaning that the species is considered endangered and therefore cannot be landed or sold. Enforcement of these regulations in Brazil and Nicaragua is difficult due to the length of the coastline, extensive internal waterways, lack of enforcement personnel, and the need for more efficient tools. Sawfish abundance within other parts of their current range is depleted so targeted fisheries are unlikely; however, those caught as bycatch are probably kept due to their value. Thus, illegal foreign trade of sawfish parts may be ongoing (efforts may be reduced due to CITES), in Nicaragua and Brazil and elsewhere, in spite of the CITES listing and national laws, due to lack of enforcement and the high value of sawfish parts.

The status of largetooth sawfish protection in western Africa is mostly unknown, though Guinnea-Bissau has created six official Protected Areas, which were established in 2005 (UNEP, 2008). Among these areas are several island chains and deltas with intertidal muddy sand banks and mangroves, which are ideal sawfish habitat. Nevertheless, existing regulations in this part of the world may be inadequate to protect and restore populations of largetooth sawfish.

Though not currently found in U.S. waters, existing regulations and measures put in place to protect the smalltooth sawfish could also benefit the largetooth sawfish, should it return into the northern most extent of its historical range in North America. The U.S. DPS of smalltooth sawfish (*P. pectinata*) was listed as endangered on April 1, 2003. Both the smalltooth and largetooth sawfish are susceptible to similar threats (e.g., bycatch in various fisheries and habitat loss) so protections for the smalltooth sawfish will benefit the largetooth sawfish. In response to the listing of the U.S. DPS of smalltooth sawfish, Texas implemented a ban on harvest of largetooth sawfish because of the possibility of misidentification. The trading of any largetooth sawfish parts is banned by state laws in both Florida and Louisiana. No directed research for largetooth sawfish is ongoing in Texas, but Texas Parks and Wildlife Department (TPWD) is conducting surveys which could capture sawfish in Texas waters. TPWD has ongoing standardized fisheries independent and dependent monitoring programs in all of the bay systems and in the Gulf of Mexico along the Texas coastline for the last 35 years. The surveys are conducted using seines, trawls, and gill nets annually. These are all gears that have been found to entangle sawfish. Only two sawfish have been recorded during the sampling and they were both smalltooth sawfish. Additionally, Florida (only in the Gulf of Mexico) and Texas do not allow gillnet fishing in state waters less than 9 miles (14.5 km) from shore, and Alabama restricts gillnet fishing within less than 3.5 miles (5.6 km) from shore.

In summary, the high value of sawfish parts, weak enforcement, and lack of adequate protections for largetooth sawfish habitat mean that existing regulations are inadequate to protect the species from further declines.

*Other Natural or Manmade Factors Affecting Its Continued Existence*

Largetooth sawfish have slow growth rates, late maturity, a long life span, and low fecundity rates. The largetooth sawfish is a more k-selected type species, with an intrinsic rate of population increase below 1.0 (Simpfendorfer, 2000). K-selected animals are usually successful at maintaining relatively small, persistent population sizes in relatively constant environments. Conversely, they are not able to respond rapidly to additional sources of mortality, such as overexploitation and habitat degradation. Because of this, the risk of extinction remains high without effective conservation plans put into place.

Red tide may also be a human amplified factor that could affect the species. Red tide is caused by an increase of toxic, naturally occurring microscopic blooms of plankton and is a coastal phenomenon which is caused by environmental conditions. Factors that are especially favorable include warm surface temperatures, high nutrient content, low salinity, and calm seas. Rain followed by sunny weather in the summer months is often associated with red tide blooms. We do not have specific information on red tide effects upon largetooth sawfish but we do have a report of a smalltooth sawfish that was found dead along the west coast of Florida during a red tide event (National Sawfish Encounter Database, 2009).

**Summary**

After considering the 5 factors above from section 4(a)(1) of the ESA we determined that the species is in danger of extinction throughout all of its range.

**Protective Efforts**

As a requirement of the ESA, current or future conservation efforts that have yet to be implemented or to show effectiveness to protect and recover largetooth sawfish must be evaluated under the PECE Policy (see above). This policy is designed to determine whether any conservation efforts that have been recently adopted or implemented or proposed, but not yet proven to be successful, will result in recovering the species to the point at which listing is not warranted or contribute to forming a basis for listing a species as threatened rather than endangered (68 FR 15101; March 28, 2003). The PECE policy established two basic criteria to be met before an action could be considered to help improve the conservation status of a species: (1) The certainty that the conservation efforts will be implemented, and (2) the certainty that the efforts will be effective.

Ongoing conservation efforts for the smalltooth sawfish may benefit the conservation of the largetooth sawfish if it returns to U.S. waters. The Smalltooth Sawfish Recovery Plan was finalized in 2009. The Smalltooth Sawfish Recovery Plan lays out specific guidelines for federal and state agencies to follow. Among the recovery plan's objectives are to minimize harm caused by human interactions and to protect and restore habitats. Since both species are susceptible to similar threats, implementation of the Smalltooth Sawfish Recovery Plan will provide conservation benefits for the largetooth sawfish if it returns to U.S. waters. Additionally, in 2010, NOAA funded coastal restoration activities in Texas and Louisiana using appropriations from The American Recovery and Reinvestment Act of 2009, which will restore habitats used by sawfish when completed. Both of these projects meet the criteria of the PECE for certainty of implementation and effectiveness. However, we have determined that these conservation efforts will not alter the extinction risk of the species.

**Listing Determination**

NMFS is responsible for determining whether the largetooth sawfish (*P. perotteti*) is threatened or endangered under the ESA (16 U.S.C. 1531 *et seq.*) Accordingly, we have followed a stepwise approach as outlined above in making this listing determination for the largetooth sawfish. We determined that *P. perotteti* is a valid species with a range in the eastern and western Atlantic Ocean. We then reviewed the status of the species and the threats to its status using the five-factor analysis described above. Next, we assessed efforts being made to protect the species, determining if these efforts are adequate to mitigate existing threats.

The largetooth sawfish (*P. perotteti*) faces ongoing threats from habitat alteration, bycatch, trade, and the inadequacy of existing regulatory mechanisms to address and reduce habitat alterations, bycatch, and trade. The species range has constricted so that it has not been seen in the U.S. since 1961. A similar range constriction is apparent at the southern extreme of the species' historical range. The species has not been reported from southern Brazil for almost a century. All of the threats attributed to the species decline are ongoing, except for the directed largetooth sawfish fishery in Lake Nicaragua. The Lake Nicaragua fishery collapsed presumably when the sawfish population collapsed. These ongoing threats exist throughout the species current range (Central and South America and West Africa) and existing regulatory mechanisms in place are insufficient to protect the species from further decline. No current or proposed

conservation activities will be enough to sufficiently improve the species status. Based on our review, therefore, we find that the species is in danger of extinction throughout all of its range and should be listed as endangered.

**Effects of Listing**

Conservation measures provided for species listed as endangered or threatened under the ESA include recovery actions (16 U.S.C. 1533(f)), Federal agency consultation requirements (16 U.S.C. 1536), and prohibitions on taking and, where appropriate, critical habitat designations (16 U.S.C. 1538). Recognition of the species' plight through listing promotes conservation actions by Federal and state agencies, foreign entities, private groups, and individuals.

*Identifying Section 7 Consultation Requirements*

Section 7(a)(2) of the ESA requires Federal agencies to consult with NMFS to ensure that activities authorized, funded, or carried out by those agencies are not likely to jeopardize the continued existence of the species or destroy or adversely modify critical habitat. We anticipate very few section 7 consultation requirements for Federal agencies given the species' current distribution and abundance.

*Critical Habitat*

Critical habitat is defined in section 3 of the ESA (16 U.S.C. 1532(5)) as: (1) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the ESA, on which are found those physical or biological features (a) essential to the conservation of the species and (b) that may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by a species at the time it is listed in accordance with the provisions of section 4 of the Act, upon a determination that such areas are essential for the conservation of the species. ''Conservation'' means the use of all methods and procedures needed to bring the species to the point at which listing under the ESA is no longer necessary. Regulations require that we shall designate critical habitat in areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species (50 CFR 424.12 (e)). We cannot designate critical habitat in foreign countries or other areas outside U.S. jurisdiction (50 CFR 424.12 (h)).

The best available scientific and commercial data, as discussed above, identifies the geographical area occupied by *P. perotteti* as Central and South America and West Africa. Since these areas are entirely outside U.S. jurisdiction, we cannot designate critical habitat in the geographical area occupied by the species. We can designate critical habitat in unoccupied areas in the U.S.

Section 3(5)(C) of the ESA specifies that except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species. We do not consider this section to stop or prevent the designation of unoccupied critical habitat because we are restricted from designating critical habitat outside U.S. jurisdiction.

In evaluating the applicability of section 3 of the ESA (16 U.S.C. 1532(5)) for unoccupied critical habitat, we must determine that the specific areas outside the geographical area occupied by the species at the time it is listed, are essential to the conservation of the species. Very little information is available on the specific areas occupied historically by *P. perotteti* in U.S. waters. Information in the status review document suggests the species made narrow seasonal migrations into U.S. waters. The majority of the records of the largetooth sawfish in U.S. waters are from three regions in Texas: Padre Island-Laguna Madre, Corpus Christi-Port Aransas, and Galveston-Freeport. The highest concentration of the species was in the Galveston area. Additionally, we believe that based on historic rarity of the species in U.S. waters, and since the U.S. represented a very limited portion of the species historic range, re-establishment back into U.S. waters is not required for the species recovery. We have reviewed all of the best available scientific and commercial data on *P. perotteti* and its habitat and cannot identify a specific unoccupied area or areas in the U.S. that are essential to the conservation of the species.

In summary, the best available scientific and commercial information on the species does not indicate that unoccupied area(s) are essential to the conservation of *P. perotteti,* therefore, no critical habitat designation is currently being proposed.

*Take Prohibitions*

ESA section 9(a) and 16 U.S.C. 1538 (a)(1)(B) take prohibitions apply to all species listed as endangered. These include prohibitions against the import, export, use in foreign commerce, or ''take'' of the species. Take is defined as ''to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.'' These prohibitions apply to all persons subject to the jurisdiction of the United States, including in the U.S. or on the high seas.

*Identification of Those Activities That Would Constitute a Violation of Section 9 of the ESA*

On July 1, 1994, we and the USFWS published a series of policies regarding listings under the ESA, including a policy to identify, to the maximum extent possible, those activities that would or would not constitute a violation of section 9 of the ESA (59 FR34272). The intent of this policy is to increase public awareness of the effect of this listing on proposed and ongoing activities within the species' range. We identify, to the extent known, specific activities that will not be considered likely to result in violation of ESA section 9, as well as activities that will be considered likely to result in violation. Activities that we believe could result in violation of section 9 prohibitions against ''take'' of the largetooth sawfish include, but are not limited to, the following: (1) Importation, (2) exportation, (3) take any such species within the U.S. or the territorially seas of the U.S., (4) sale, (5) delivery that directly or indirectly affect endangered species, and (6) take any such species on the high seas. These prohibitions apply to all individuals, organizations, and agencies subject to U.S. jurisdiction.

ESA sections 10(a)(1)(A) and 10(a)(1)(B) provide NMFS with authority to grant exceptions to the section 9 take prohibitions. Section 10(a)(1)(A) scientific research and enhancement permits may be issued to entities (Federal and non-Federal) conducting research that involves a take of listed species. We have issued section 10(a)(1)(A) research and enhancement permits for other listed species for these purposes. ESA section 10(a)(1)(B) incidental take permits may be issued to non-Federal entities performing activities that may incidentally take listed species.

The ESA also provides some exceptions to the prohibitions, without permits, for certain antique articles and species held in captivity at the time of listing. ESA section 10(h) allows antique articles of listed species to be excluded from essentially all the ESA prohibitions as long as they are at least 100 years old and meet certain other specified conditions. Section 9(b)(1) provides a narrow exemption for

animals held in captivity at the time of listing: those animals are not subject to the import/export prohibition or to protective regulations adopted by the Secretary, so long as the holding of the species in captivity, before and after listing, is not in the course of a commercial activity; however, 180 days after listing there is a rebuttable presumption that the exemption does not apply. Thus, in order to apply this exemption, the burden of proof for confirming the status of animals held in captivity prior to listing lies with the holder. The section 9(b)(1) exemption for captive wildlife would not apply to any progeny of the captive animals that may be produced post-listing.

*Policies on Peer Review*

On July 1, 1994, NMFS and USFWS published a series of policies regarding listings under the ESA, including a policy for peer review of scientific data (59 FR 34270; July 1, 1994), the Office of Management and Budget (2004) Bulletin on Peer Review. The intent of the peer review policies is to ensure that listings are based on the best scientific and commercial data available. We formally solicited the expert opinion of four appropriate and independent specialists regarding scientific or commercial data or assumptions related to the information considered for listing. We conclude that these experts' reviews satisfy the requirements for ''adequate [prior] peer review'' contained in the Bulletin (sec. II.2.) as well as the Services joint policy.

**References**

A complete list of the references used in this final rule is available upon request (see **ADDRESSES**).

**Classification**

*National Environmental Policy Act*

The 1982 amendments to the ESA, in section 4(b)(1)(A), restrict the information that may be considered when assessing species for listing. Based on this limitation of criteria for a listing decision and the opinion in *Pacific Legal Foundation* v. *Andrus,* 675 F. 2d 825 (6th Cir. 1981), we have concluded that ESA listing actions are not subject to the environmental assessment requirements of the National Environmental Policy Act (NEPA) (See NOAA Administrative Order 216–6).

*Executive Order 12866, Regulatory Flexibility Act and Paperwork Reduction Act*

As noted in the Conference Report on the 1982 amendments to the ESA, economic impacts cannot be considered when assessing the status of a species. Therefore, the economic analysis requirements of the Regulatory Flexibility Act are not applicable to the listing process. In addition, this final rule is exempt from review under Executive Order 12866. This final rule does not contain a collection-of-information requirement for the purposes of the Paperwork Reduction Act.

*Executive Order 13132, Federalism*

E.O. 13132 requires agencies to take into account any federalism impacts of regulations under development. It includes specific consultation directives for situations where a regulation will preempt state law, or impose substantial direct compliance costs on state and local governments (unless required by statue). Neither of those circumstances is applicable to this final listing determination.

*International Relations*

We have conferred with the U.S. Department of State to ensure appropriate notice is given to foreign nations within the range of the species. We intend to continue engaging in informal and formal contacts with the U.S. State Department.

**List of Subjects in 50 CFR Part 224**

Administrative practice and procedure, Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Dated: July 6, 2011.

**John Oliver,**

*Deputy Assistant Administrator for Operations, National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 224 is amended as follows:

## PART 224—ENDANGERED MARINE AND ANADROMOUS SPECIES

■ 1. The authority citation for part 224 continues to read as follows:

**Authority:** 16 U.S.C. 1531–1543 and 16 U.S.C. 1361 *et seq.*

■ 2. In § 224.101, the table in paragraph (a) is amended by adding an entry for ''Largetooth Sawfish'' at the end of the table to read as follows:

**§ 224.101 Enumeration of endangered marine and threatened anadromous species.**

* * * * *

(a) * * *

| Species [1] | | Where listed | Citation(s) for listing determination(s) | Citation(s) for critical habitat designation(s) |
|---|---|---|---|---|
| Common name | Scientific name | | | |
| * | * | * | * | * |
| Largetooth Sawfish | *Pristis perotteti* | Everywhere | [*Insert* ***FEDERAL REGISTER*** *citation],* July 12, 2011. | NA |

[1] Species includes taxonomic species, subspecies, distinct population segments (DPSs) (for a policy statement, see 61 FR 4722, February 7, 1996), and evolutionarily significant units (ESUs) (for a policy statement, see 56 FR 58612, November 20, 1991).

* * * * *

[FR Doc. 2011–17502 Filed 7–11–11; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 660

**[Docket No. 0912281446–0111–02]**

**RIN 0648–XA554**

## Fisheries Off West Coast States; Coastal Pelagic Species Fisheries; Closure

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

**ACTION:** Temporary rule; closure.

**SUMMARY:** NMFS is prohibiting directed fishing for Pacific sardine off the coasts of Washington, Oregon and California. This action is necessary because the directed harvest allocation total for the second seasonal period (July 1–September 14) is projected to be reached by the effective date of this rule. From the effective date of this rule until September 15, 2011, Pacific sardine may be harvested only as part of the live bait fishery or incidental to other fisheries; the incidental harvest of Pacific sardine is limited to 30-percent by weight of all fish per trip. Fishing vessels must be at shore and in the process of offloading at 12:01 a.m. Pacific Daylight Time, July 12, 2011.

**DATES:** Effective 12:01 a.m. Pacific Daylight Time (PDT) July 12, 2011, through 11:59 p.m., September 14, 2011.

**FOR FURTHER INFORMATION CONTACT:** Joshua Lindsay, Southwest Region, NMFS, (562) 980–4034.

**SUPPLEMENTARY INFORMATION:** This document announces that based on the best available information recently obtained from the fishery and information on past effort, the directed fishing harvest allocation for the second allocation period (July 1–September 14) will be reached and therefore directed fishing for Pacific sardine is being closed until September 15, 2011. Fishing vessels must be at shore and in the process of offloading at the time of closure. From 12:01 a.m., July 12, 2011 through September 14, 2011, Pacific sardine may be harvested only as part of the live bait fishery or incidental to other fisheries, with the incidental harvest of Pacific sardine limited to 30-percent by weight of all fish caught during a trip.

NMFS manages the Pacific sardine fishery in the U.S. exclusive economic zone (EEZ) off the Pacific coast (California, Oregon, and Washington) in accordance with the Coastal Pelagic Species (CPS) Fishery Management Plan (FMP). Annual specifications published in the **Federal Register** establish the harvest guideline (HG) and allowable harvest levels for each Pacific sardine fishing season (January 1–December 31). If during any of the seasonal allocation periods the applicable adjusted directed harvest allocation is projected to be taken only incidental harvest is allowed, and for the remainder of the period, any incidental Pacific sardine landings will be counted against that period's incidental set aside. In the event that an incidental set-aside is projected to be attained, all fisheries will be closed to the retention of Pacific sardine for the remainder of the period via appropriate rulemaking.

Under 50 CFR 660.509, if the total HG or these apportionment levels for Pacific sardine are reached at any time, NMFS is required to close the Pacific sardine fishery via appropriate rulemaking and it is to remain closed until it re-opens either per the allocation scheme or the beginning of the next fishing season. In accordance with § 660.509 the Regional Administrator shall publish a notice in the **Federal Register** announcing the date of the closure of the directed fishery for Pacific sardine.

The above in-season harvest restrictions are not intended to affect the prosecution of the live bait portion of the Pacific sardine fishery.

### Classification

This action is required by 50 CFR 660.509 and is exempt from Office of Management and Budget review under Executive Order 12866.

NMFS finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) for the closure of the directed harvest of Pacific sardine. For the reasons set forth below, notice and comment procedures are impracticable and contrary to the public interest. For the same reasons, NMFS also finds good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effectiveness for this action. This measure responds to the best available information and is necessary for the conservation and management of the Pacific sardine resource. A delay in effectiveness would cause the fishery to exceed the in-season harvest level. These seasonal harvest levels are important mechanisms in preventing overfishing and managing the fishery at optimum yield. The established directed and incidental harvest allocations are designed to allow fair and equitable opportunity to the resource by all sectors of the Pacific sardine fishery and to allow access to other profitable CPS fisheries, such as squid and Pacific mackerel.

Many of the same fishermen who harvest Pacific sardine rely on these other fisheries for a significant portion of their income.

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

Dated: July 7, 2011.

**Margo Schulze-Haugen,**

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

[FR Doc. 2011–17506 Filed 7–11–11; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 679

**[Docket No. 101126522–0640–02]**

**RIN 0648–XA556**

## Fisheries of the Exclusive Economic Zone Off Alaska; Pelagic Shelf Rockfish by Vessels Subject to Amendment 80 Sideboard Limits in the Western Regulatory Area of the Gulf of Alaska

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

**ACTION:** Temporary rule; closure.

**SUMMARY:** NMFS is prohibiting directed fishing for pelagic shelf rockfish (PSR) by Amendment 80 vessels subject to sideboard limits in the Western Regulatory Area of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the 2011 PSR sideboard limit established for Amendment 80 vessels subject to sideboard limits in the Western Regulatory Area of the GOA.

**DATES:** Effective 1200 hrs, Alaska local time (A.l.t.), July 7, 2011, until 2400 hrs, A.l.t., December 31, 2011.

**FOR FURTHER INFORMATION CONTACT:** Steve Whitney, 907–586–7269.

**SUPPLEMENTARY INFORMATION:** NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing

fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679. Regulations governing sideboard protections for GOA groundfish fisheries appear at subpart B of 50 CFR part 679.

The 2011 PSR sideboard limit established for Amendment 80 vessels subject to sideboard limits in the Western Regulatory Area of the GOA is 467 metric tons (mt), as established by the 2011 and 2012 harvest specifications for groundfish of the GOA (76 FR 11111, March 1, 2011).

In accordance with § 679.20(d)(1)(v)(A), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the PSR sideboard limit established for Amendment 80 vessels subject to sideboard limits in the Western Regulatory Area of the GOA is sufficient to support a directed fishing allowance. Therefore, the Regional Administrator is establishing a sideboard directed fishing allowance for PSR as 462 mt in the Western Regulatory Area of the Gulf of Alaska. The remaining 5 mt in the Western Regulatory Area of the Gulf of Alaska will be set aside as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(v)(C), the Regional Administrator finds that this Amendment 80 sideboard directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for the 2011 PSR sideboard limit by Amendment 80 vessels subject to sideboard limits in the Western Regulatory Area of the GOA.

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

**Classification**

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the directed fishing closure of PSR by Amendment 80 vessels subject to sideboard limits in the Western Regulatory Area of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of July 6, 2011.

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

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

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

Dated: July 7, 2011.

**Margo Schulze-Haugen,**

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

[FR Doc. 2011–17479 Filed 7–7–11; 4:15 pm]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 679

**[Docket No. 101126522–0640–02]**

**RIN 0648–XA557**

## Fisheries of the Exclusive Economic Zone Off Alaska; Northern Rockfish in the Western Regulatory Area of the Gulf of Alaska

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

**ACTION:** Temporary rule; closure.

**SUMMARY:** NMFS is prohibiting directed fishing for northern rockfish in the Western Regulatory Area of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the 2011 total allowable catch (TAC) of northern rockfish in the Western Regulatory Area of the GOA.

**DATES:** Effective 1200 hrs, Alaska local time (A.l.t.), July 7, 2011, through 2400 hrs, A.l.t., December 31, 2011.

**FOR FURTHER INFORMATION CONTACT:** Steve Whitney, 907–586–7269.

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

The 2011 TAC of northern rockfish in the Western Regulatory Area of the GOA is 2,573 metric tons (mt) as established by the final 2011 and 2012 harvest specifications for groundfish of the GOA (76 FR 11111, March 1, 2011).

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2011 TAC of northern rockfish in the Western Regulatory Area of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 2,473 mt, and is setting aside the remaining 100 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for northern rockfish in the Western Regulatory Area of the GOA.

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

**Classification**

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of northern rockfish in the Western Regulatory Area of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of July 6, 2011.

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

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

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

Dated: July 7, 2011.

**Margo Schulze-Haugen,**

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

[FR Doc. 2011–17481 Filed 7–7–11; 4:15 pm]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 679

**[Docket No. 101126522–0640–02]**

**RIN 0648–XA558**

## Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Ocean Perch for Catcher Vessels Participating in the Rockfish Entry Level Trawl Fishery in the Central Regulatory Area of the Gulf of Alaska

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

**ACTION:** Temporary rule; modification of a closure.

**SUMMARY:** NMFS is opening directed fishing for Pacific ocean perch by trawl catcher vessels participating in the rockfish entry level fishery in the Central Regulatory Area of the Gulf of Alaska (GOA) for 48 hours. This action is necessary to fully use the 2011 directed fishing allowance of Pacific ocean perch for trawl catcher vessels participating in the rockfish entry level fishery in the Central Regulatory Area of the GOA.

**DATES:** Effective 1200 hrs, Alaska local time (A.l.t.), July 7, 2011, through 1200 hrs, A.l.t., July 9, 2011. Comments must be received at the following address no later than 4:30 p.m., A.l.t., July 22, 2011.

**ADDRESSES:** Send comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by RIN 0648–XA558, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal Web site at *http://www.regulations.gov*.
- *Mail:* P.O. Box 21668, Juneau, AK 99802.
- *Fax:* (907) 586–7557.
- *Hand delivery to the Federal Building:* 709 West 9th Street, Room 420A, Juneau, AK.

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

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

**FOR FURTHER INFORMATION CONTACT:** Steve Whitney, 907–586–7269.

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

NMFS closed directed fishing for Pacific ocean perch by trawl catcher vessels participating in the rockfish entry level fishery in the Central Regulatory Area of the GOA under § 679.20(d)(1)(iii) on July 3, 2011 (publication in the **Federal Register** pending).

NMFS has determined that approximately 190 metric tons of Pacific ocean perch remain in the directed fishing allowance. Therefore, in accordance with § 679.25(a)(1)(i), (a)(2)(i)(C), and (a)(2)(iii)(D), and to fully utilize the 2011 directed fishing for Pacific ocean perch by trawl catcher vessels participating in the rockfish entry level fishery in the Central Regulatory Area of the GOA, NMFS is terminating the previous closure and is reopening directed fishing for Pacific ocean perch by trawl catcher vessels participating in the rockfish entry level fishery in the Central Regulatory Area of the GOA. This will enhance the socioeconomic well-being of harvesters dependent upon Pacific ocean perch in this area. The Administrator, Alaska Region (Regional Administrator) considered the following factors in reaching this decision: (1) The current catch of Pacific ocean perch by trawl catcher vessels participating in the rockfish entry level fishery and, (2) the harvest capacity and stated intent on future harvesting patterns of vessels participating in this fishery.

In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance will be reached after 48 hours. Consequently, NMFS is prohibiting directed fishing for Pacific ocean perch by trawl catcher vessels participating in the rockfish entry level fishery in the Central Regulatory Area of the GOA effective 1200 hrs, A.l.t., July 9, 2011.

### Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the opening of Pacific ocean perch by trawl catcher vessels participating in the rockfish entry level fishery in the Central Regulatory Area of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent and relevant data only became available as of July 6, 2011.

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

Without this in-season adjustment, NMFS could not allow the fishery for Pacific ocean perch by trawl catcher vessels participating in the rockfish entry level fishery in the Central Regulatory Area of the GOA to be harvested in an expedient manner and in accordance with the regulatory schedule. Under § 679.25(c)(2), interested persons are invited to submit written comments on this action to the above address until July 22, 2011.

This action is required by § 679.20 and § 679.25 and is exempt from review under Executive Order 12866.

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

Dated: July 7, 2011.

**Margo Schulze-Haugen,**

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

[FR Doc. 2011–17482 Filed 7–7–11; 4:15 pm]

**BILLING CODE 3510–22–P**

# Proposed Rules

Federal Register
Vol. 76, No. 133
Tuesday, July 12, 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 COMMERCE

### United States Patent and Trademark Office

### 37 CFR Parts 2 and 7

**[Docket No. PTO–T–2010–0073]**

**RIN 0651–AC49**

## Changes in Requirements for Specimens and for Affidavits or Declarations of Continued Use or Excusable Nonuse in Trademark Cases

**AGENCY:** United States Patent and Trademark Office, Commerce.

**ACTION:** Proposed rule.

**SUMMARY:** In order to help assess and ensure the accuracy of the trademark register, the United States Patent and Trademark Office (''USPTO'') proposes to revise the Trademark Rules of Practice and the Rules of Practice for Filings Pursuant to the Madrid Protocol to provide for the USPTO to require: any information, exhibits, and affidavits or declarations deemed reasonably necessary to examine an affidavit or declaration of continued use or excusable nonuse in trademark cases, or for the USPTO to assess the accuracy and integrity of the register; and upon request, more than one specimen in connection with a use-based trademark application, an allegation of use, an amendment to a registered mark, or an affidavit or declaration of continued use in trademark cases. A lack of ability to rely on the trademark register as an accurate reflection of marks that are actually in use in the United States for the goods/services identified in the registration imposes costs and burdens on the public. The proposed rules will allow the USPTO to require additional proof of use of a mark to verify the accuracy of claims that a trademark is in use on particular goods/services. The USPTO anticipates issuing requirements for such proof in a relatively small number of cases to assess the accuracy of the identifications. The proposed rules will facilitate an assessment of the reliability of the trademark register in this regard, so that the USPTO and stakeholders may determine whether and to what extent a general problem may exist and consider measures to address it, if necessary.

**DATES:** Comments must be received by September 12, 2011 to ensure consideration.

**ADDRESSES:** The USPTO prefers that comments be submitted via electronic mail message to *TMFRNotices@uspto.gov.* Written comments may also be submitted by mail to Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313–1451, attention Cynthia C. Lynch; by hand delivery to the Trademark Assistance Center, Concourse Level, James Madison Building—East Wing, 600 Dulany Street, Alexandria, Virginia, attention Cynthia C. Lynch; or by electronic mail message via the Federal eRulemaking Portal. See the Federal eRulemaking Portal Web site (*http://www.regulations.gov*) for additional instructions on providing comments via the Federal eRulemaking Portal. The comments will be available for public inspection on the USPTO's Web site at *http://www.uspto.gov*, and will also be available at the Office of the Commissioner for Trademarks, Madison East, Tenth Floor, 600 Dulany Street, Alexandria, Virginia.

**SUPPLEMENTARY INFORMATION:** To benefit the public through a better ability to assess the accuracy of the trademark register, the USPTO proposes to revise the Trademark Rules of Practice (37 CFR part 2) and the Rules of Practice for Filings Pursuant to the Madrid Protocol (''Madrid Rules'') (37 CFR part 7) to provide for the USPTO to require: (1) Any information, exhibits, and affidavits or declarations deemed reasonably necessary to examine a post registration affidavit or declaration of continued use in trademark cases, or for the USPTO to assess the accuracy and integrity of the register; and (2) upon request, more than one specimen in connection with a use-based trademark application, an allegation of use, an amendment to a registered mark, or an affidavit or declaration of continued use in trademark cases.

The proposed revisions will facilitate the USPTO's ability to verify the accuracy of identifications of goods/services. The accuracy of the trademark register as a reflection of marks that are actually in use in the United States for the goods/services identified in the registration serves an important purpose for the public. The public relies on the register to clear trademarks that they may wish to adopt or are already using. Where a party searching the register uncovers a potentially confusingly similar mark, that party may incur a variety of resulting costs and burdens, such as changing plans to avoid use of the mark, investigative costs to determine how the similar mark is actually used and assess the nature of any conflict, or cancellation proceedings or other litigation to resolve a dispute over the mark. If a registered mark is not actually in use in the United States, or is not in use on all the goods/services in the registration, these types of costs and burdens may be incurred unnecessarily. Thus, accuracy and reliability of the trademark register help avoid such needless costs and burdens, and thereby benefit the public.

Specimens of use in use-based trademark applications illustrate how the applicant is using the proposed mark in commerce on particular goods/services identified in the application. Post registration affidavits or declarations of use and their accompanying specimens demonstrate a trademark owner's continued use of its mark in commerce for the goods/services in the registration. The USPTO anticipates issuing requirements for additional specimens or other information, exhibits, and affidavits or declarations in a relatively small number of cases, to assess the accuracy of the identifications of goods/services.

On April 26, 2010, the USPTO and the George Washington University Law School hosted a roundtable discussion on the topic of ''The Future of the Use-Based Register.'' Panelists and audience members explored the implications of the decision of the Court of Appeals for the Federal Circuit in *In re Bose Corp.,* 580 F.3d 1240, 91 USPQ2d 1938 (Fed. Cir. 2009), clarifying the high standard for fraud on the USPTO in connection with trademark cases. Specifically, the roundtable focused on *Bose's* impact on the growing length of identifications of goods and services in U.S. trademark registrations and how to assess whether such identifications accurately reflect actual use or intent to use.

A ''brainstorming'' session at the conclusion of the roundtable resulted in

a list of suggestions for how to improve the accuracy of identifications of goods/services. These suggestions were not focused on fraud, but rather on accuracy in the register. Several participants made the suggestion that the USPTO require additional specimens, or a specific type of proof of use of a mark, for all, or more than one, of the identified goods/services. Such additional requirements could help provide information about to what extent a problem with inaccuracy exists on the register, and could help discourage inaccuracies.

The Trademark Act gives the Director discretion regarding the number of specimens to require, 15 U.S.C. 1051(a)(1), (d)(1), 1058(b)(1)(C), 1141k(b)(1)(C). However, the current Trademark Rules of Practice and Madrid Rules mandate the submission of only one specimen per class in connection with use-related filings, 37 CFR 2.34(a)(1)(iv), 2.56(a), 2.76(b)(2), 2.86(a)(3) and (b), 2.88(b)(2), 2.161(g), 7.37(g). Similarly, the current rules require only one specimen to be submitted in connection with the amendment to a registered mark, 37 CFR 2.173(b)(3). In addition, although the current Trademark Rules of Practice allow the USPTO to require additional information or exhibits deemed reasonably necessary to the examination of a pending application (37 CFR 2.61(b)), no counterpart rule exists in the post registration context to facilitate proper examination of an affidavit or declaration of continued use or excusable nonuse.

To ensure that the USPTO may properly examine affidavits or declarations, and the nature and veracity of the use claimed therein, additional specimens or other information or exhibits, such as a photograph of the mark appearing on certain goods, may be needed. Accompanying affidavits or declarations to verify information or exhibits may also be needed. One purpose of the rule is to allow the USPTO to require trademark applicants or registrants to submit any additional specimens or other information, exhibits and affidavits or declarations necessary to properly examine an applicant's or registrant's claim to be using the mark. The USPTO wishes to use such requirements as a means to assess and improve the accuracy and integrity of the register. The proposed rules do not focus on fraud issues, but only on the more general concern with ensuring accuracy. Another purpose of the rule is to harmonize the requirements that can be made as part of the examination of use allegations made in post registration maintenance documents with the requirements currently authorized in the examination of use allegations made prior to registration.

Though the proposed rules allow for the possibility that additional specimens or evidence may be required in any case, the USPTO currently has no plans to implement such requirements in all cases. Rather, the USPTO likely would rely on the proposed rules to seek additional specimens or a specific type of evidence of use in a relatively small subset of cases to assess the accuracy of particular identifications of goods/services. Where an Office action issues requiring additional specimens or evidence, a response must be filed within six months of the Office action, or before the end of the filing period for the Section 8 affidavit, whichever is later, 37 CFR 2.163(b). If no response is filed within this time period, the registration will be cancelled. 37 CFR 2.163(c). If a response is filed but fails to include the required specimens or evidence, the USPTO may deem the Section 8 affidavit unacceptable as to the goods/services to which the requirement pertained and delete them from the registration, or in the case of all goods/services, cancel the registration for failure to file an acceptable Section 8 affidavit. *See* 37 CFR 2.163.

References below to ''the Act,'' ''the Trademark Act,'' or ''the statute'' refer to the Trademark Act of 1946, 15 U.S.C. 1051 *et seq.,* as amended. References to ''TMEP'' or ''*Trademark Manual of Examining Procedure''* refer to the 7th edition, October 2010.

**Discussion of Proposed Rules Changes**

The USPTO proposes to revise §§ 2.34(a)(1)(iv), 2.56(a), 2.76(b)(2), 2.86(a)(3), 2.86(b), and 2.88(b)(2) to indicate that the USPTO may, upon request, require more than one specimen, including more than one specimen per class, if the USPTO deems additional specimens reasonably necessary to examine the application or allegation of use. These revisions codify existing practice, where such additional specimens occasionally are requested under § 2.61 as information or exhibits necessary to examination. The Trademark Act gives the Director discretion regarding the number of specimens to require, 15 U.S.C. 1051(a)(1), (d)(1).

The USPTO proposes to revise § 2.61(b) to indicate that accompanying affidavits or declarations may be required along with information or exhibits, and to clarify that the requirement may issue for the Office to assess the accuracy and integrity of the register.

The USPTO proposes to revise § 2.161(g) and § 7.37(g) to indicate that the USPTO may require more than one specimen in connection with the examination of the affidavit or declaration of continued use. For example, additional specimens may be requested in a case to verify the accuracy and the nature of the use when the identification includes a large number of, or significant disparity in, goods/services. The Trademark Act gives the Director discretion regarding the number of specimens to require, 15 U.S.C. 1058(b)(1)(C), 1141k(b)(1)(C).

The USPTO proposes to add § 2.161(h) and § 7.37(h) to provide that the USPTO may require such information, exhibits, and affidavits or declarations as the USPTO deems reasonably necessary to the proper examination of the affidavit or declaration of continued use, or for the USPTO to assess the accuracy and integrity of the register. These provisions are corollaries to § 2.61(b), which currently allows the USPTO to require additional information or exhibits in connection with the examination of a pending application. These provisions also clarify that accompanying affidavits or declarations may be required.

For example, the USPTO may require a verified photograph showing use of the mark on particular goods in a registration for which an affidavit or declaration of continued use is being examined in order to verify the accuracy of goods/services in the identification. This type of requirement may more likely be made where an identification includes a large number of, or significant disparity in, goods/services. Or, such a requirement may issue as part of an effort to assess and improve the accuracy and integrity of the register.

The USPTO proposes to revise § 2.173(b)(3) to clarify that where an amendment involves a change in the mark, a new specimen must be provided for each class in a multiple-class registration and to add § 2.173(b)(4) to provide that the USPTO may require additional specimens and such information, exhibits, and affidavits or declarations as the USPTO deems reasonably necessary to the proper examination of the proposed amendment.

**Rule Making Requirements**

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

*Executive Order 13563:* The Office has complied with Executive Order 13563. Specifically, the Office has: (1) Used the best available techniques to quantify costs and benefits, and has considered values such as equity, fairness and distributive impacts, (2) provided the public with a meaningful opportunity to participate in the regulatory process, including soliciting the views of those likely affected prior to issuing a notice of proposed rule making, and provided online access to the rule making docket, (3) attempted to promote coordination, simplification and harmonization across government agencies and identified goals designed to promote innovation, (4) considered approaches that reduce burdens and maintain flexibility and freedom of choice for the public, and (5) ensured the objectivity of scientific and technological information and processes, to the extent applicable.

*Administrative Procedure Act:* This rule merely involves rules of agency practice and procedure within the meaning of 5 U.S.C. 553(b)(A). Therefore, this rule may be adopted without prior notice and opportunity for public comment under 5 U.S.C. 553(b) and (c), or thirty-day advance publication under 5 U.S.C. 553(d). However, the USPTO has chosen to seek public comment before implementing the rule.

*Regulatory Flexibility Act:* As prior notice and an opportunity for public comment are not required pursuant to 5 U.S.C. 553 or any other law, neither a Regulatory Flexibility Act analysis nor a certification under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) is required. *See* 5 U.S.C. 603. The proposed rules involve rules of agency practice and procedure.

Nonetheless, in an abundance of caution, the USPTO has undertaken an Initial Regulatory Flexibility Act Analysis of the proposed rule.

*1. Description of the Reasons That Action by the Office Is Being Considered*

The United States Patent and Trademark Office (USPTO) is proposing to require: (1) Any information, exhibits, and affidavits or declarations deemed reasonably necessary to examine an affidavit or declaration of continued use in trademark cases; and (2) upon request, more than one specimen in connection with a use-based trademark application, an allegation of use, an amendment to a registered mark, or an affidavit or declaration of continued use in trademark cases.

These proposed revisions will facilitate the USPTO's ability to verify the accuracy of identifications of good/services. Specimens of use in use-based trademark applications illustrate how the applicant is using the proposed mark in commerce on particular goods/services identified in the application. Post registration affidavits or declarations of use and their accompanying specimens demonstrate a trademark owner's continued use of its mark in commerce for the goods/services in the registration.

*2. Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule*

The objective of the proposed rules is to facilitate the USPTO's ability to verify the accuracy of identifications of goods/services in trademark applications and registrations. The proposed rules would ensure that the USPTO may properly examine the nature and veracity of allegations of use made during the trademark application or post registration phase, and upon request, may require additional specimens or other information or exhibits, such as a photograph of the mark appearing on certain goods. Another purpose of the rule is to harmonize the requirements that can be made as part of the examination of use allegations made in post registration maintenance documents, which are currently more limited, with the requirements authorized in the examination of use allegations made prior to registration.

The Trademark Act gives the Director of the USPTO discretion regarding the number of specimens to require, 15 U.S.C. 1051(a)(1), (d)(1), 1058(b)(1)(C), 1141k(b)(1)(C). However, the current Trademark Rules of Practice and the Rules of Practice for Filings Pursuant to the Madrid Protocol Trademark mandate the submission of only one specimen per class in connection with use-related filings, 37 CFR 2.34(a)(1)(iv), 2.56(a), 2.76(b)(2), 2.86(a)(3) and (b), 2.88(b)(2), 2.161(g), 7.37(g). Similarly, the current rules require only one specimen to be submitted in connection with a proposed amendment of a registered mark, 37 CFR 2.173(b)(3). In addition, although the current Trademark Rules of Practice allow the USPTO to require additional information or exhibits deemed reasonably necessary to the examination of a pending application (37 CFR 2.61(b)), no counterpart rule exists in the post registration context to facilitate proper examination of an affidavit or declaration of continued use or excusable nonuse.

*3. Description and Estimate of the Number of Affected Small Entities*

The USPTO does not collect or maintain statistics in trademark cases on small versus large entity applicants, and this information would be required in order to estimate the number of small entities that would be affected by the proposed rules. However, the USPTO believes that the overall impact of the proposed rules on applicants and registrants will be relatively minimal.

The proposed rules could apply to any entity filing a use-based trademark application and to any entity filing trademark registration maintenance filings or amendments. With respect to allegations of use in trademark applications, the proposed rules merely codify existing practice, whereby the USPTO already occasionally requests additional specimens or other information under 37 CFR 2.61. Thus, because no change in practice would result from the proposed rules in this regard, they will have no impact in the trademark application context.

After registration, registrants must make periodic filings with the USPTO to maintain their registrations. A Section 8 affidavit of continued use is a sworn statement that the mark is in use in commerce, filed by the owner of a registration, 15 U.S.C. 1058. The purpose of the Section 8 affidavit is to facilitate the cancellation of registrations for marks no longer in use. With respect to post registration maintenance filings, the Office estimates that only a small subset of registrants would be required to provide more than one specimen, or information or exhibits in connection with a Section 8 affidavit. The USPTO is unable to estimate what subset of the registrants would be small entities impacted by the proposed rules. In Fiscal Year 2010, 105,244 Section 8 affidavits were filed.

*4. Description of the Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record*

The proposed rules impose no new recordkeeping requirements on trademark applicants or registrants.

Regarding compliance with the proposed rules, as an initial matter, the USPTO does not anticipate that the proposed rules would have a disproportionate impact upon any particular class of small or large entities. Any entity that has a registered trademark could potentially be impacted by the proposed rules.

The USPTO estimates that in those post registration cases where a requirement for additional information, exhibits, declarations, or specimens is

issued, it will take less than one hour to comply.

While the statement of use is a similar type of filing to those at issue in the proposed rules applied in the post registration context, as the statement of use involves providing one or more specimens of use and an accompanying declaration, the compliance time involved to comply with the proposed rules should be less. Under the proposed rules applied in the post registration context, the type of fact gathering and review of the nature and extent of the use of the mark that underlies a statement of use will already have occurred. Compliance with the proposed requirement will only necessitate gathering and submitting the evidence to demonstrate what has already been assessed.

Assuming the mark is in use, as claimed, the compliance time involves the length of time to secure a specimen, exhibit (such as taking a digital photograph), information, or declaration, plus any time it takes an attorney to communicate with the client in order to obtain what is required and make the necessary filing with the USPTO. In reality, approximately one-third of applications are filed pro se. These applicants and registrants, therefore, would likely have a lower compliance time than the USPTO has estimated, which assumes the involvement of counsel. These proposed rules do not mandate the use of counsel.

The Office does not estimate any change in compliance cost associated with the proposed rules with respect to allegations of use in trademark applications, since the USPTO's current practice already allows for this. The rule change merely codifies existing practice.

*5. Description of Any Significant Alternatives to the Proposed Rule Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact of the Rule on Small Entities*

The USPTO has considered whether and how it is appropriate to reduce any burden on small businesses through increased flexibility. The following options have been considered, but rejected, by the USPTO.

The alternative of never requiring additional specimens or other information in connection with Section 8 affidavits or exempting small entities from such requirements would have a lesser economic impact on small entities, but would not accomplish the stated objective of verifying the accuracy of identifications of goods/services in trademark registrations. As set forth above, the USPTO will rely on the proposed rules to assess the accuracy of use allegations. This assessment may provide a better sense of whether significant problems may exist with the accuracy of identifications of goods and services. Thus, exempting small entities would prevent the potential consideration of all Section 8 affidavits for this purpose, and therefore would not achieve the stated objective of verifying accuracy.

The stated objective of the proposed rules also facilitates the cancellation of any registrations for marks that are no longer in use, the policy underlying the statutory requirement for Section 8 affidavits. Exempting small entities from any possible scrutiny regarding use allegations would fail to reach non-use of marks by small entity owners, thereby failing to achieve the objective.

Other options to potentially lessen the impact on small entities have been rejected. For example, the USPTO deems unnecessary extended time periods for small entity compliance because there appears to be no reason that compliance with the requirements in the proposed rules would be more time-consuming for small entities, and because the USPTO's standard six-month time for responding to trademark Office actions allows sufficient time regardless of small entity status.

The USPTO deems any streamlined or simplified compliance mechanism for small entities unnecessary, given the ease of responding to trademark Office actions electronically. Thus, compliance will be as streamlined and simplified as possible for all affected entities. Moreover, where the objective is to verify the accuracy of a claim of use in an affidavit, the proposed requirements of one or more additional examples of the manner of the claimed use, or of other information such as photographic proof already seem to be the least burdensome and complex way to achieve the objective. Any more minimal requirement would not demonstrate use and therefore would not meet the objective to verify use claims.

Use of performance rather than design standards is not applicable to the proposed rule making because the USPTO is not issuing any sort of standard. Rather, the proposed rules will require applicants and registrants to furnish evidence of use, rather than comply with a performance or design standard.

Finally, with respect to allegations of use in trademark applications, the proposed rules merely codify existing practice, whereby the USPTO already occasionally requests additional specimens or other information under 37 CFR 2.61. Thus, because no change in practice would result from the proposed rules in this regard, any different treatment of small entities in this context would fail to meet the stated objective and likely would generate concern and confusion about a change in practice.

*6. Identification, to the Extent Practicable, of All Relevant Federal Rules Which May Duplicate, Overlap or Conflict With the Proposed Rule*

The proposed rules would not duplicate, overlap or conflict with any other Federal rules.

*Unfunded Mandates:* The Unfunded Mandates Reform Act requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any given year. This rule would have no such effect on State, local, and tribal governments or the private sector.

*Executive Order 13132:* This rule does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (Aug. 4, 1999).

*Paperwork Reduction Act:* The changes in this rule making involve information collection requirements which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The Office will be submitting an information collection request to OMB for its review and approval because the changes in this proposed rule would affect the information collection requirements associated with the information collection under OMB control number 0651–0055.

This rule making will provide for the USPTO to require: (1) Any information, exhibits, and affidavits or declarations deemed reasonably necessary to examine an affidavit or declaration of continued use or excusable nonuse in trademark cases, or for the USPTO to assess the accuracy and integrity of the register; and (2) upon request, more than one specimen in connection with a use-based trademark application, an allegation of use, an amendment to a registered mark, or an affidavit or declaration of continued use in trademark cases.

There is no fee impact for submission of specimens. Additional burden due to postage costs for paper submissions for the post-registration office actions is estimated at $181, for a total increase in

fee burden by an estimated $181. The agency estimates the following overall impact on burden: an increase of responses of 3,165; an increase in burden hours of 1,120; and an increase in burden hour costs of $364,000.

Comments are invited on: (1) Whether the collection of information is necessary for proper performance of the functions of the agency; (2) the accuracy of the agency's estimate of the burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information to respondents.

Interested persons are requested to send comments regarding these information collections, including suggestions for reducing this burden, to Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313–1451, attention Cynthia C. Lynch, or to the Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street, NW., Washington, DC 20503, *Attention:* Desk Officer for the Patent and Trademark Office.

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 unless that collection of information displays a currently valid OMB control number.

**List of Subjects**

*37 CFR Part 2*

Administrative practice and procedure, Trademarks.

*37 CFR Part 7*

Administrative practice and procedure, Trademarks, International registration.

For the reasons stated in the preamble and under the authority contained in 15 U.S.C. 1123 and 35 U.S.C. 2, as amended, the USPTO proposes to amend parts 2 and 7 of title 37 as follows:

## PART 2—RULES OF PRACTICE IN TRADEMARK CASES

1. The authority citation for 37 CFR part 2 continues to read as follows:

**Authority:** 15 U.S.C. 1123, 35 U.S.C. 2, unless otherwise noted.

2. Revise § 2.34(a)(1)(iv) to read as follows:

**§ 2.34 Bases for filing.**

(a) * * *

(1) * * *

(iv) One specimen per class showing how the applicant actually uses the mark in commerce. When requested by the Office, additional specimens must be provided.

* * * * *

3. Revise § 2.56(a) to read as follows:

**§ 2.56 Specimens.**

(a) An application under section 1(a) of the Act, an amendment to allege use under § 2.76, and a statement of use under § 2.88 must each include one specimen per class showing the mark as used on or in connection with the goods, or in the sale or advertising of the services in commerce. When requested by the Office, additional specimens must be provided.

* * * * *

4. Revise § 2.61(b) to read as follows:

**§ 2.61 Action by examiner.**

* * * * *

(b) The Office may require the applicant to furnish such information, exhibits, and affidavits or declarations as may be reasonably necessary to the proper examination of the application, or for the Office to assess the accuracy and integrity of the register.

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5. Revise § 2.76(b)(2) to read as follows:

**§ 2.76 Amendment to allege use.**

* * * * *

(b) * * *

(2) One specimen per class showing the mark as actually used in commerce. When requested by the Office, additional specimens must be provided. See § 2.56 for the requirements for specimens; and

* * * * *

6. Revise §§ 2.86(a)(3) and (b) to read as follows:

**§ 2.86 Application may include multiple classes.**

(a) * * *

(3) Include either dates of use (see §§ 2.34(a)(1)(ii) and (iii)) and one specimen for each class, or a statement of a bona fide intention to use the mark in commerce on or in connection with all the goods or services specified in each class. When requested by the Office, additional specimens must be provided. The applicant may not claim both use in commerce and a bona fide intention to use the mark in commerce for the identical goods or services in one application.

(b) An amendment to allege use under § 2.76 or a statement of use under § 2.88 must include, for each class, the required fee, dates of use, and one specimen. When requested by the Office, additional specimens must be provided. The applicant may not file the amendment to allege use or statement of use until the applicant has used the mark on all the goods or services, unless the applicant files a request to divide. See § 2.87 for information regarding requests to divide.

* * * * *

7. Revise § 2.88(b)(2) to read as follows:

**§ 2.88 Filing statement of use after notice of allowance.**

* * * * *

(b) * * *

(2) One specimen of the mark as actually used in commerce. When requested by the Office, additional specimens must be provided. See § 2.56 for the requirements for specimens; and

* * * * *

8. Amend § 2.161 by revising the introductory text of paragraph (g) and adding paragraph (h) to read as follows:

**§ 2.161 Requirements for a complete affidavit or declaration of continued use or excusable nonuse.**

* * * * *

(g) Include one specimen showing current use of the mark for each class of goods or services, unless excusable nonuse is claimed under § 2.161(f)(2). When requested by the Office, additional specimens must be provided. The specimen must:

* * * * *

(h) The Office may require the owner to furnish such information, exhibits, and affidavits or declarations as may be reasonably necessary to the proper examination of the affidavit or declaration under section 8 of the Act, or for the Office to assess the accuracy and integrity of the register.

9. Amend § 2.173 by revising paragraph (b)(3) and adding paragraph (b)(4) to read as follows:

**§ 2.173 Amendment of registration.**

* * * * *

(b) * * *

(3) If the amendment involves a change in the mark: One new specimen per class showing the mark as used on or in connection with the goods or services; an affidavit or declaration under § 2.20 stating that the specimen was in use in commerce at least as early as the filing date of the amendment; and a new drawing of the amended mark. When requested by the Office, additional specimens must be provided.

(4) The Office may require the owner to furnish such information, exhibits, and affidavits or declarations as may be reasonably necessary to the proper

examination of the amendment, or for the Office to assess the accuracy and integrity of the register.

* * * * *

## PART 7—RULES OF PRACTICE IN FILINGS PURSUANT TO THE PROTOCOL RELATING TO THE MADRID AGREEMENT CONCERNING THE INTERNATIONAL REGISTRATION OF MARKS

10. The authority citation for 37 CFR part 7 continues to read as follows:

**Authority:** 15 U.S.C. 1123, 35 U.S.C. 2, unless otherwise noted.

11. Amend § 7.37 by revising paragraph (g) and adding paragraph (h) to read as follows:

**§ 7.37 Requirements for a complete affidavit or declaration of continued use or excusable nonuse.**

* * * * *

(g) Include a specimen showing current use of the mark for each class of goods or services, unless excusable nonuse is claimed under § 7.37(f)(2). When requested by the Office, additional specimens must be provided. The specimen must meet the requirements of § 2.56 of this chapter.

(h) The Office may require the holder to furnish such information, exhibits, and affidavits or declarations as may be reasonably necessary to the proper examination of the affidavit or declaration under section 71 of the Act, or for the Office to assess the accuracy and integrity of the register.

Dated: June 29, 2011.

**David J. Kappos,**

*Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.*

[FR Doc. 2011–17121 Filed 7–11–11; 8:45 am]

**BILLING CODE 3510–16–P**

## POSTAL SERVICE

## 39 CFR Part 111

## Changes to Move Update Standards

**AGENCY:** Postal Service™.

**ACTION:** Proposed rule, revised.

**SUMMARY:** The Postal Service proposes to revise *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM®) to add 602.5.0 and 602.6.0, and to revise the Move Update standards regarding change of address orders, by including in the revised standards change of address notices filed by postal employees. The Postal Service also deletes multiple sections throughout the DMM to centralize Move Update and ZIP Code™ accuracy standards under section 602.

**DATES:** We must receive your comments on or before August 11, 2011.

**ADDRESSES:** Mail or deliver written comments to the manager, Product Classification, U.S. Postal Service,® 475 L'Enfant Plaza, SW., Room 4446, Washington, DC 20260–5015. You may inspect and photocopy all written comments at USPS® Headquarters Library, 475 L'Enfant Plaza, SW., 11th Floor North, Washington, DC, between 9 a.m. and 4 p.m., Monday through Friday. Email comments, containing the name and address of the commenter, may be sent to: *MailingStandards@usps.gov,* with a subject line of ''Move Update.'' Faxed comments are not accepted.

**FOR FURTHER INFORMATION CONTACT:** Jim Wilson at 901–681–4600, or Bill Chatfield at 202–268–7278.

**SUPPLEMENTARY INFORMATION:** On September 21, 2010, the Postal Service published a proposed rule in the **Federal Register** (75 FR 57410–57412) to include all changes-of-address, whether filed by customers or postal employees, as subject to Move Update requirements. In addition, the proposal announced that the online publication, *Guide to Move Update,* is the appropriate source for additional information and procedures for meeting the Move Update requirements.

The prior proposal also would have changed the timeframe for providing address correction and nixie notices without charge for First-Class Mail®, Standard Mail®, and Bound Printed Matter (BPM) pieces eligible for full-service Intelligent Mail® prices. The Postal Service is not including that initiative in this rule; for now, we will retain the current timeframe for notices without charge for pieces eligible for full-service prices.

In this notice we provide an overview of the revised proposal, a summary of comments on the original proposal, our response to those comments, and the proposed new mailing standards to implement this proposal.

### Change of Address Orders

The Postal Service proposes that the Move Update standards are met, not only by updating address records from customer-filed change-of-address (COA) orders, but also from COA orders supplied by postal employees. Customers occasionally move from a street address or allow their Post Office™ Box service to expire without providing a new address to redirect their mail. In these instances, the customer no longer receives mail at that address, and the postal employee files either a ''Moved Left No Address'' (MLNA) or a ''Box Closed No Order'' (BCNO) COA order. These two types of COAs are included in the address change databases the Postal Service maintains. To comply with the new proposed Move Update standards, mailers must not include pieces in presorted mailings to these undeliverable addresses once the effective date of the COA is older than 95 days.

However, the Postal Service understands that some mailers may have difficulty isolating MLNAs and BCNOs in their mailing processes. Therefore, to allow mailers sufficient time to modify their mailing systems to properly handle MLNA and BCNO occurrences, MLNAs and BCNOs with effective dates older than 95 days would not be classified as failures to update a COA by Performance Based Verification (PBV) Move Update verifications until a year after publication of the final rule. After the one-year grace period, MLNA/BCNO addresses with effective dates between 95 days and 18 months would be treated by PBV verifications for commercial mailings of First-Class Mail and Standard Mail pieces as failures to update a COA.

### Guide to Move Update

The online USPS publication *Guide to Move Update* (available on the RIBBS® Web site at *http://ribbs.usps.gov*) provides general information and recommendations about each authorized Move Update method. This publication also provides specific information on the best use of the methods available for meeting the Move Update standards. It describes in detail the four primary and the two alternative Move Update methods available for updating mailing lists.

Since the amount of information on Move Update involves numerous technical details in addition to the basic standards, it is not appropriate to include all the information within the DMM. Therefore, we reference the *Guide to Move Update* where relevant and appropriate in sections of the DMM. The *Guide to Move Update* is accessible online at: *ribbs.usps.gov/move_update/documents/tech_guides/GuidetoMoveUpdate.pdf.*

### Comments and USPS Responses

*General*

We received comments from two customers and eight mailer associations. A general comment recommended that the Postal Service explain the financial and other service-related benefits to

users of the mail as a consequence of this rule. Improving the quality and currency of addresses used on mail facilitates the efficient delivery of the mail and reduces cost associated with unnecessary handling and processing of mailpieces that are undeliverable-as-addressed.

Several associations suggested that the USPS should review all address-related recommendations made by appropriate Mailers' Technical Advisory Committee (MTAC) workgroups to make sure that those issues are being addressed, and also that we should provide an update on all work pertaining to the undeliverable-as-addressed (UAA) reduction goal, including data on address quality improvements and specific factors that contributed to those results. The USPS appreciates and values the input and recommendations submitted through the MTAC Workgroup process and, where implementation of recommendations is practical and beneficial to the mutual interests of the mailing industry and the USPS, the USPS will take action to adopt MTAC Workgroup-submitted recommendations. We have made several responsive presentations to MTAC concerning the state of address quality and the performance by the mailing industry towards the goal to reduce UAA by 50 percent.

One association requested that the USPS acknowledges that the pricing for First-Class Mail includes the cost to handle return mail. The cited statements that First-Class Mail prices ''factor in the cost'' of UAA mail is a reasonable summary of the relationship between costs and prices under the previous regulatory framework (the Postal Reorganization Act or PRA), in which a markup factor was added to attributable cost per piece to determine prices. Under the current Postal Accountability and Enhancement Act framework, however, prices are not directly connected to costs; price increase percentages cannot exceed the CPI price-cap even if the attributable cost per piece has risen faster than the CPI. In any case, because of the way the Move Update assessment is applied, changes in the assessment formula (tolerance or per-piece assessment) are included in price-cap calculations.

One association asserted that the original proposed rule represented an instance of imposing rules that require major investment by mailers for little or no return, thus creating additional costs that functionally act as an increase in postage. In the association's opinion, the rules become unfunded mandates. The statement went on to recommend that USPS consider the impact of the burdens inherent in the costs associated with rules changes. The association suggested that ways can be found to reduce the customer impact, starting with a realistic assessment of the costs associated with the rules change.

The USPS believes we have demonstrated sensitivity to the impact of new requirements that result in changes for mailers and mailing systems. We typically make accommodations to mailing industry interests to implement necessary changes in a reasonable manner that are minimally intrusive to the mailing industry. Examples of this accommodation are the 3-year implementation cycle of the DPV (delivery-point validation) changes, the 2-year gradual implementation of the Suite®; changes, and the 1-year implementation deferral of the MLNA/BCNO changes from the date of the original proposal. And, in recognition of the comments, we are proposing to extend that deferral so that full implementation would begin one year after publication of the final rule. On an ongoing basis, the USPS will continue to seek opportunities to work collaboratively with the mailing industry to resolve issues of importance to both the mailing industry and the USPS. Better address quality benefits mailers and the customers they are trying to reach, because better quality current addresses enable product offers to reach addressees more quickly, resulting in higher and quicker response rates.

One association commented extensively on the previously proposed change in the Move Update tolerance, a subject of a different proposal.

*Moved Left No Address (MLNA) and Box Closed No Order (BCNO) Notices*

Several commenters asked that the USPS eliminate the MLNA/BCNO requirement until all data quality issues are rectified. The USPS believes that it is appropriate to include MLNA/BCNO postal employee-filed changes in the Move Update Performance Based Verification process. The 95-day allowance granted to mailers provides sufficient time for customers for whom an MLNA or BCNO entry into the change-of-address data has been made to resolve any data quality issues. The USPS does not believe that mailers should continue to send potentially sensitive mail at presorted prices to customers at addresses where it is known that customers no longer receive mail, when the result is that the USPS must re-handle this undeliverable-as-addressed mail.

Several commenters urged the USPS to change MLNA and BCNO notices for Periodicals to nixie notifications or ensure the accuracy and consistency of the notices for multiple mailings to the same addressee. The USPS has historically treated MLNA and BCNO notices as change-of-address notifications and not as nixies. This is demonstrated in USPS documents, such as Publication 8A, *Address Change Service,* that define MLNA and BCNO as carrier-filed actions.

One mailer asserted that the MLNA/BCNO requirement will cause mailers to consider moving away from the mail due to the cost to provide solutions. The mailer further stated that this concern has been escalated on numerous occasions with the USPS management team, and recommended elimination of the MLNA/BCNO additional requirement. The USPS has made numerous accommodations of mailing industry concerns regarding the enforcement of the Move Update requirement for MLNA/BCNO changes-of-address orders. The USPS believes the revised accommodation to implement this change one year from publication of the **Federal Register** final rule provides sufficient time for the mailing industry to implement the changes necessary to handle these transactions. The same mailer also stated that the USPS should establish quality measurements to ensure that accurate and timely controls for issuance of MLNA/BCNO notices are in place. This mailer suggested that the USPS should be required to provide initial projections and detailed results of the savings associated with mailing requirements implemented to ensure accountability for proposed savings. Including the Move Update standard for MLNA/BNCO records protects against the revenue lost by the USPS from providing mailers reduced prices for mailpieces that will incur higher USPS processing costs.

One association requested that the USPS confirm that the PBV process is not applied to single-piece full-rate mailings as the DMM does not state the need to apply PBV to full rate First-Class Mail pieces. The USPS confirms that mailpieces sent to MLNA or BCNO addresses at First-Class Mail single-piece prices are not subject to PBV (Performance Based Verification).

*Temporarily Away Notices*

Several commenters requested that we clarify the proposed treatment of temporary moves in terms of Move Update requirements. Temporary change-of-address (COA) orders have never been included in the Move

Update standards, and there is no intent to include these records in Move Update standards in the future. The USPS will not subject temporary COA notices to the 95-day test, and will not charge mailers for additional temporary COA notices provided after 95 days beyond the date of the first temporary COA notification through full-service ACS.

*Guide To Move Update*

Several commenters stated that we should develop other means (rather than the *Guide to Move Update*) for communicating changes in policies and procedures pertaining to Move Update. The *Guide to Move Update* is the USPS response to requests made by the mailing industry for a single source document that provides greater detail and additional information and recommendations on how mailers could use the approved Move Update products and services to meet the Move Update requirements. The Guide is not intended to be the vehicle for implementing changes in Move Update policies or price eligibility requirements; instead these changes will continue to be communicated through the DMM.

Several commenters suggested that the USPS should publish changes to the *Guide to Move Update* in the **Federal Register** as a proposed rule so that all changes are vetted and visible to customers for their consideration and comments. One mailer suggested that a change management process should be used to notate modifications of requirements. The USPS does not believe the publication of changes made within the *Guide to Move Update* warrants the issuance of a **Federal Register** notice. The *Guide to Move Update* is not and will not be used to make changes to the Move Update requirements. It is intended to be a resource for the mailing industry to understand how various USPS programs and services can be used by a mailer to meet Move Update requirements. Where changes to Move Update requirements may occur, the standard processes for incorporating changes within the DMM will be followed. In response to industry concerns, the USPS will adopt a version control process as a standard method for describing changes within the *Guide to Move Update.*

**Effective Dates**

We would implement the changes related to COAs filed for MLNA and BCNO addresses one year from the date of publication of a final rule.

Although we are exempt from the notice and comment requirements of the Administrative Procedure Act [5 U.S.C of 553(b), (c)] regarding proposed rulemaking by 39 U.S.C. 410(a), we invite public comments on the following proposed revisions to *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM), 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 proposed to be 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:

*Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM)

* * * * *

**200 Commercial Letters and Cards**

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**230 First-Class Mail**

**233 Prices and Eligibility**

* * * * *

**3.0 Basic Standards for First-Class Mail Letters**

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**3.5 Move Update Standard**

*3.5.1 Basic Standards*

*[Revise text of 3.5.1 to read as follows:]*

The Move Update standard requires the periodic matching of a mailer's address records with all change-of-address orders maintained by the USPS. For this standard, *address* is a specific address associated with a specific occupant name. The USPS *Guide to Move Update* (at *ribbs.usps.gov*) has more information on the methods for meeting this standard. Each address in a mailing at First-Class Mail commercial letter prices must meet the requirements in 602.5.0.

*[Delete 3.5.2, USPS-Approved Methods, and 3.5.3, Mailer Certification, in their entirety and renumber current item 3.5.4 as the new 3.5.2.]*

* * * * *

**3.6 ZIP Code Accuracy**

*[Delete the title of 3.6.1, Basic Standard, and move the text of 3.6.1 under 3.6 and revise as follows:]*

The ZIP Code accuracy standard is a means of ensuring that the 5-digit ZIP Code in the delivery address correctly matches the delivery address information. For the purposes of this standard, *address* means a specific address associated with a specific 5-digit ZIP Code. Each address in a mailing at commercial First-Class Mail letter prices must meet the ZIP Code accuracy requirements in 602.6.0.

*[Delete 3.6.2, USPS-Approved Methods, and 3.6.3, Mailer Certification, in their entirety.]*

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**240 Standard Mail**

**243 Prices and Eligibility**

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**3.0 Basic Standards for Standard Mail Letters**

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**3.8 ZIP Code Accuracy**

*[Delete the title of 3.8.1, Basic Standard, and move the text of 3.8.1 under 3.8 and revise as follows:]*

The ZIP Code accuracy standard is a means of ensuring that the 5-digit ZIP Code in the delivery address correctly matches the delivery address information. For the purposes of this standard, *address* means a specific address associated with a specific 5-digit ZIP Code. Each address in a mailing at Standard Mail letter prices must meet the ZIP Code accuracy requirements in 602.6.0.

*[Delete 3.8.2, USPS-Approved Methods, and 3.8.3, Mailer Certification, in their entirety.]*

* * * * *

**3.9 Move Update Standards**

**3.9.1 Basic Standards**

*[Revise text of 3.9.1 to read as follows:]*

The Move Update standard requires the periodic matching of a mailer's address records with all change-of-address orders maintained by the USPS. For this standard, *address* is a specific address associated with a specific occupant name. The USPS *Guide to Move Update* (at *ribbs.usps.gov*) has more information on the methods for meeting this standard. Each address in a mailing at Standard Mail letter prices must meet the requirements in 602.5.0.

* * * * *

*[Delete 3.9.2, USPS-Approved Methods, and 3.9.3, Mailer Certification,*

*in their entirety and renumber current item 3.9.4 as the new 3.9.2.]*

* * * * *

**300 Commercial Flats**

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**330 First-Class Mail**

**333 Prices and Eligibility**

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**3.0 Eligibility Standards for First-Class Mail Flats**

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**3.5 Move Update Standards**

**3.5.1 Basic Standards**

*[Revise text of 3.5.1 to read as follows:]*

The Move Update standard requires the periodic matching of a mailer's address records with all change-of-address orders maintained by the USPS. For this standard, *address* is a specific address associated with a specific occupant name. The USPS *Guide to Move Update* (at *http://ribbs.usps.gov*) has more information on methods for meeting this standard. Each address in a mailing at commercial First-Class Mail flats prices must meet the requirements in 602.5.0.

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*[Delete 3.5.2, USPS-Approved Methods, and 3.5.3, Mailer Certification, in their entirety and renumber current item 3.5.4 as the new 3.5.2.]*

* * * * *

**3.6 ZIP Code Accuracy**

*[Delete the title of 3.6.1, Basic Standard, and move the text of 3.6.1 under 3.6 and revise as follows:]*

The ZIP Code accuracy standard is a means of ensuring that the 5-digit ZIP Code in the delivery address correctly matches the delivery address information. For the purposes of this standard, *address* means a specific address associated with a specific 5-digit ZIP Code. Each address in a mailing at commercial First-Class Mail flats prices must meet the ZIP Code accuracy requirements in 602.6.0.

*[Delete 3.6.2, USPS-Approved Methods, and 3.6.3, Mailer Certification, in their entirety.]*

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**340 Standard Mail**

**343 Prices and Eligibility**

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**3.0 Basic Standards for Standard Mail Flats**

* * * * *

**3.8 ZIP Code Accuracy**

*[Delete the title of 3.8.1, Basic Standard, and move the text of 3.8.1 under 3.8 and revise as follows:]*

The ZIP Code accuracy standard is a means of ensuring that the 5-digit ZIP Code in the delivery address correctly matches the delivery address information. For the purposes of this standard, *address* means a specific address associated with a specific 5-digit ZIP Code. Each address in a mailing at Standard Mail flats prices must meet the ZIP Code accuracy requirements in 602.6.0.

*[Delete 3.8.2, USPS-Approved Methods, and 3.8.3, Mailer Certification in their entirety.]*

* * * * *

**3.9 Move Update Standard**

**3.9.1 Basic Standards**

*[Revise text of 3.9.1 to read as follows:]*

The Move Update standard requires the periodic matching of a mailer's address records with all change-of-address orders maintained by the USPS. For this standard, *address* is a specific address associated with a specific occupant name. The USPS *Guide to Move Update* (at *ribbs.usps.gov*) has more information on the methods for meeting this standard. Each address in a mailing at Standard Mail flats prices must meet the requirements in 602.5.0.

* * * * *

*[Delete 3.9.2, USPS-Approved Methods, and 3.9.3, Mailer Certification, in their entirety, and renumber current item 3.9.4 as the new 3.9.2.]*

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**360 Bound Printed Matter**

**363 Prices and Eligibility**

* * * * *

**4.0 Price Eligibility for Bound Printed Matter Flats**

* * * * *

**4.3 ZIP Code Accuracy**

*[Delete the title of 4.3.1, Basic Standard, and move the text of 4.3.1 under 4.3 and revise as follows:]*

The ZIP Code accuracy standard is a means of ensuring that the 5-digit ZIP Code in the delivery address correctly matches the delivery address information. For the purposes of this standard, *address* means a specific address associated with a specific 5-digit ZIP Code. Each address in a mailing at Bound Printed Matter presorted or carrier route prices must meet the ZIP Code accuracy requirements in 602.6.0.

*[Delete 4.3.2, USPS-Approved Methods, and 4.3.3, Mailer Certification, in their entirety.]*

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**400 Commercial Parcels**

* * * * *

**430 First-Class Mail**

**433 Prices and Eligibility**

* * * * *

**3.0 Basic Standards for First-Class Mail Parcels**

* * * * *

**3.5 Move Update Standard**

**3.5.1 Basic Standards**

*[Revise text of 3.5.1 to read as follows:]*

The Move Update standard requires the periodic matching of a mailer's address records with all change-of-address orders maintained by the USPS. For this standard, *address* is a specific address associated with a specific occupant name. The USPS *Guide to Move Update* (at *ribbs.usps.gov*) has more information on the methods for meeting this standard. Each address in a mailing at commercial First-Class Mail parcel prices must meet the requirements in 602.5.0.

*[Delete 3.5.2, USPS-Approved Methods, and 3.5.3, Mailer Certification, in their entirety and* renumber current item 3.5.4 as the new 3.5.2.]

* * * * *

**3.6 ZIP Code Accuracy**

*[Delete the title of 3.6.1, Basic Standard, and move the text of 3.6.1 under 3.6 and revise as follows:]*

The ZIP Code accuracy standard is a means of ensuring that the 5-digit ZIP Code in the delivery address correctly matches the delivery address information. For the purposes of this standard, *address* means a specific address associated with a specific 5-digit ZIP Code. Each address in a mailing at commercial First-Class Mail parcel prices must meet the ZIP Code accuracy requirements in 602.6.0.

*[Delete 3.6.2, USPS-Approved Methods, and 3.6.3, Mailer Certification, in their entirety.]*

* * * * *

**440 Standard Mail**

**443 Prices and Eligibility**

* * * * *

**3.0 Basic Standards for Standard Mail Parcels**

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**3.8 ZIP Code Accuracy**

*[Delete the title of 3.8.1, Basic Standard, and move the text of 3.8.1 under 3.8 and revise as follows:]*

The ZIP Code accuracy standard is a means of ensuring that the 5-digit ZIP Code in the delivery address correctly matches the delivery address information. For the purposes of this standard, *address* means a specific address associated with a specific 5-digit ZIP Code. Each address in a mailing at Standard Mail parcel prices must meet the ZIP Code accuracy requirements in 602.6.0.

*[Delete 3.8.2 USPS-Approved Methods, and 3.8.3, Mailer Certification, in their entirety.]*

* * * * *

**3.9 Move Update Standards**

*3.9.1 Basic Standards*

*[Revise text of 3.9.1 to read as follows:]*

The Move Update standard requires the periodic matching of a mailer's address records with all change-of-address orders maintained by the USPS. For this standard, *address* is a specific address associated with a specific occupant name. The USPS *Guide to Move Update* (at *ribbs.usps.gov*) has more information on the methods for meeting this standard. Each address in a mailing at Standard Mail parcel prices must meet the requirements in 602.5.0.

* * * * *

*[Delete 3.9.2, USPS-Approved Methods, and 3.9.3, Mailer Certification, in their entirety and* renumber current 3.9.4 as new 3.9.2.]

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**460 Bound Printed Matter**

**463 Prices and Eligibility**

* * * * *

**4.0 Price Eligibility for Bound Printed Matter Parcels**

* * * * *

**4.3 ZIP Code Accuracy**

*[Delete the title of 4.3.1, Basic Standard, and move the text of 4.3.1 under 4.3 and revise as follows:]*

The ZIP Code accuracy standard is a means of ensuring that the 5-digit ZIP Code in the delivery address correctly matches the delivery address information. For the purposes of this standard, *address* means a specific address associated with a specific 5-digit ZIP Code. Each address in a mailing at Bound Printed Matter presorted or carrier route prices must meet the ZIP Code accuracy requirements in 602.6.0.

*[Delete 4.3.2, USPS-Approved Methods, and 4.3.3, Mailer Certification, in their entirety.]*

* * * * *

**600 Basic Standards for All Mailing Services**

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**602 Addressing**

* * * * *

*[Add new 5.0 and 6.0 as follows:]*

**5.0 Move Update Standards**

**5.1 Basic Standards**

Each address, except for mail bearing an alternative address format (under 602.3.0), in a mailing at commercial First-Class Mail or any Standard Mail prices is subject to the Move Update standard and must meet these requirements:

a. Each address and associated occupant name used on the mailpieces in a mailing must be updated within 95 days before the mailing date, with one of the USPS-approved methods below.

b. The Move Update standard is met when an address used on a mailpiece in a mailing at any class of mail is updated with an approved method, and the same address is used in a First-Class Mail or Standard Mail mailing within 95 days after the address has been updated.

**5.2 USPS-Approved Methods**

The following methods are authorized for meeting the Move Update standard:

a. Address Change Service (ACS).

b. National Change of Address Linkage System (NCOA Link).

c. *FASTforward* MLOCR processes, for letters and flats, if used each time before mail entry. If a mailpiece that initially uses *FASTforward* MLOCR processing is rejected and then entered into a Direct View Encoding Desk (DVED) operation (or similar system), the piece does not meet the Move Update standard. The name and address information on the piece must then be processed through a *FASTforward* RVE system to meet the Move Update standard. *FASTforward* RVE processes also meet the Move Update standard if used each time before mail entry.

d. Applicable ancillary service endorsements under 507.1.5.1 or 507.1.5.3, except ''Forwarding Service Requested.''

e. For First-Class Mail only: Mailer Move Update Process Certification and USPS-approved alternative methods for mailers with legitimate restrictions on incorporating USPS-supplied change-of-address information into their mailing lists. The National Customer Support Center (see 608.8.1 for address) administers and approves both Mailer Move Update Process Certification and alternative methods.

**5.3 Mailer Certification**

The mailer's signature on the postage statement certifies that the Move Update standard has been met for each address in the corresponding mailing presented to the USPS.

**6.0 ZIP Code Accuracy Standards**

**6.1 Basic Standards**

Except for mail bearing a simplified address, addresses used on pieces in a mailing at commercial First-Class Mail, and all Standard Mail and Bound Printed Matter prices are subject to the ZIP Code accuracy standard and must meet these requirements:

a. Each address and associated 5-digit ZIP Code used on the mailpieces in a mailing must be verified and corrected within 12 months before the mailing date with one of the USPS-approved methods below.

b. If an address used on a mailpiece in a mailing at one class of mail and price is verified and corrected with an approved method, the same address may be used during the following 12 months to meet the ZIP Code accuracy standard required for mailing at any other class of mail and price.

**6.2 USPS-Approved Methods**

The following methods are authorized for meeting the ZIP Code accuracy standard:

a. For computerized lists, Coding Accuracy Support System (CASS)-certified address matching software and current USPS City State Product, within a mailer's computer systems or through an authorized service provider.

b. For manually maintained lists or small computerized lists, options include the following:

1. Surveys of addressees on mailers address lists inquiring about the accuracy of ZIP Code information.

2. Any mailing list service in 507.7.0.

3. An authorized service provider.

4. CASS-certified matching software.

5. USPS Web site *http://www.usps.com.*

**6.3 Mailer Certification**

The mailer's signature on the postage statement certifies that the ZIP Code accuracy standard has been met for each address in the corresponding mailing presented to the USPS.

* * * * *

We will publish an appropriate amendment to 39 CFR part 111 to reflect

these changes if our proposal is adopted.

**Stanley F. Mires,**

*Chief Counsel, Legislative.*

[FR Doc. 2011–17390 Filed 7–11–11; 8:45 am]

**BILLING CODE 7710–12–P**

## POSTAL SERVICE

## 39 CFR Part 111

## Post Office (PO) Box Fee Groups for Merged Locations

**AGENCY:** Postal Service.™

**ACTION:** Proposed rule.

**SUMMARY:** The Postal Service proposes to revise *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM®) 508.4 to allow Post Office™ (PO) Box fee groups to be merged due to Post Office mergers and to have the ability to change a box fee group more than one higher or lower level at a time in limited circumstances.

**DATES:** We must receive your comments on or before August 11, 2011.

**ADDRESSES:** Mail or deliver written comments to the manager, Mailing Standards, U.S. Postal Service®, 475 L'Enfant Plaza, SW., Room 4446, Washington, DC 20260–5015. You may inspect and photocopy all written comments at USPS® Headquarters Library, 475 L'Enfant Plaza, SW., 11th Floor N, Washington, DC between 9 a.m. and 4 p.m., Monday through Friday. E-mail comments concerning the proposed price eligibility, containing the name and address of the commenter, may be sent to: *MailingStandards@usps.gov,* with a subject line of ''PO Box Fee Group for Merged Locations.'' Faxed comments are not accepted.

**FOR FURTHER INFORMATION CONTACT:** Nan McKenzie at 202–268–3089, David Rubin at 202–268–2986, or Richard Daigle at 202–268–6392.

**SUPPLEMENTARY INFORMATION:** Current mailing standards limit changes for a PO Box™ fee group assignment for a 5-digit ZIP Code™ to one level higher or lower, and only once per calendar year. This proposed rule would allow the Postal Service to change the fee group assignment for PO Boxes by more than one level (higher or lower) when boxes move to a different ZIP Code location because of a merger of two or more ZIP Code locations into a single location. Absent a change, where a box section is merged with a location whose box section is more than one fee group level different, the location would need to charge two different fee groups. Changing the standards would allow the fee group of the merged (receiving) location to apply to all customers receiving PO Box service in that location.

Also, prior to any such merge, existing PO Box customers would have the option to renew at their current fees for another 6-month or 12-month period, even if the resulting fee will have been paid for more than one year in advance.

Although we are exempt from the notice and comment requirements of the Administrative Procedure Act [5 U.S.C. of 553(b), (c)] regarding proposed rulemaking by 39 U.S.C. 410(a), we invite public comments on the following proposed revisions to *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM), 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 proposed to be 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:

**Mailing Standards of the United States Postal Service, Domestic Mail Manual (DMM)**

* * * * *

**500 Additional Mailing Services**

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**508 Recipient Services**

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**4. Post Office Box Service**

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**4.5 Basis of Fees and Payment**

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**4.5.3 Fee Changes**

*[Revise 4.5.3 as follows:]*

A change in Post Office box service fees applicable to a 5-digit ZIP Code can arise from a general fee change. In addition, the manager, Retail Services, may assign a fee group to a new ZIP Code, may reassign one or more 5-digit ZIP Codes to the next higher or lower fee group if the past fee group assignments were in error, or may regroup 5-digit ZIP Codes. Except when boxes from two or more ZIP Codes are being merged into a single location, a ZIP Code may be moved only into the next higher or lower fee group. If boxes in two or more ZIP Codes merge, the fee group will be that of the merged (receiving) location, even if one of the fee groups changes by more than one level. No ZIP Code may be moved into a different fee group more than once a calendar year. Any change in Post Office box service fees takes effect on the date of the action that caused the change unless an official announcement specifies another date. If Post Office box service fees are increased, no customer must pay the new price until the end of the current service period, and no retroactive adjustment will be made for a payment received before the date of the change. The fee charged is that in effect on the date of payment.

**4.5.4 Payment**

*[Revise the introductory text of 4.5.4 as follows:]*

All fees for Post Office box service are for 6- or 12-month prepaid periods, except as noted under 4.5.6, 4.5.7, and 4.5.10. The general rule is that a fee may be paid up to one year in advance; however, when boxes from two or more ZIP Codes are being merged into a single location, a customer has the option, prior to the merge, to renew at the current fee for another 6-month or 12-month period, even when this results in a fee being paid more than one year in advance. Customers may pay the fee using any of the following methods:

* * * * *

**4.5.5 Payment Period**

*[Revise 4.5.5 as follows:]*

Except under 4.5.7, the beginning date for a Post Office box fee payment period is determined by the approval date of the application. The period begins on the first day of the same month if the application is approved on or before the 15th of the month, or the next month if approved after the 15th of the month. Fees for service renewal may be paid any time during the last 30 days of the service period, except as allowed under 4.5.4, but no later than the last day of the service period.

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**4.5.8 Change of Payment Period**

*[Revise 4.5.8 as follows:]*

Except for customers at Post Offices subject to 4.5.7, a Post Office box customer of record may change the payment period by submitting a new

application noting the month to be used as the start of the revised payment period. The date selected must be before the end of the current payment period. The unused fee for the period being discontinued may be refunded under 4.7, and the fee for the new payment period must be fully paid in advance. Except when boxes from two or more ZIP Codes are being merged into a single location (see 4.5.4), a change of payment period date must not be used to circumvent a change in box fees.

* * * * *

**4.6 Fee Groups**

**4.6.1 Regular Fee Groups**

*[Revise 4.6.1 as follows:]*

For Post Office box fee groups, see Notice 123—Price List. Post Office boxes are assigned to fee groups and classified as competitive or market dominant based upon the Post Office location. Local Post Offices can provide information about fees for a particular ZIP Code.

* * * * *

We will publish an appropriate amendment to 39 CFR part 111 to reflect these changes if our proposal is adopted.

**Stanley F. Mires,**

*Chief Counsel, Legislative.*

[FR Doc. 2011–17386 Filed 7–11–11; 8:45 am]

**BILLING CODE 7710–12–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 721

**[EPA–HQ–OPPT–2009–0767; FRL–8877–8]**

**RIN 2070–AJ52**

## Glymes; Proposed Significant New Use Rule

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing a significant new use rule (SNUR) under section 5(a)(2) of the Toxic Substances Control Act (TSCA) for the 14 glymes identified in this proposed rule. This action would require persons who intend to manufacture, import, or process these chemical substances for an activity that is designated as a significant new use by this proposed rule to notify EPA at least 90 days before commencing that activity. The required notification would provide EPA with the opportunity to evaluate the intended use and, if necessary, to prohibit or limit that activity before it occurs.

**DATES:** Comments must be received on or before September 12, 2011.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2009–0767, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Hand Delivery:* OPPT Document Control Office (DCO), EPA East Bldg., Rm. 6428, 1201 Constitution Ave., NW., Washington, DC. *Attention:* Docket ID Number EPA–HQ–OPPT–2009–0767. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to docket ID number EPA–HQ–OPPT–2009–0767. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov,* or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

**FOR FURTHER INFORMATION CONTACT:** *For technical information contact:* Amy Breedlove, Chemical Control Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; *telephone number:* 202–564–9823; *e-mail address: breedlove.amy@epa.gov.*

*For general information contact:* The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; *telephone number:* (202) 554–1404; *e-mail address: TSCA–Hotline@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this action apply to me?*

You may be potentially affected by this action if you manufacture, import, or process the chemicals listed in Unit III.A. Potentially affected entities may include, but are not limited to:

- Manufacturers, importers, or processors of one or more of subject chemical substances (North American Industrial Classification System (NAICS) codes 325 and 324110), e.g., chemical manufacturing and petroleum refineries;
- All other basic organic chemical manufacturing (NAICS 325199);
- Printing ink manufacturing (NAICS 325910);

- Paint and Coating Manufacturing (NAICS 325510);
- Adhesive Manufacturing (NAICS 325520);
- Primary Battery Manufacturing (NAICS 335912); and
- Motor Vehicle Brake System Manufacturing (NAICS 336340).

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 NAICS codes have been provided to assist you and others in determining whether this action might apply to certain entities. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions in 40 CFR 721.5. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

This action may also affect certain entities through pre-existing import certification and export notification rules under TSCA. Persons who import any chemical substance governed by a final SNUR are subject to the TSCA section 13 (15 U.S.C. 2612) import certification requirements and the corresponding regulations at 19 CFR 12.118 through 12.127; see also 19 CFR 127.28. Those persons must certify that the shipment of the chemical substance complies with all applicable rules and orders under TSCA, including any SNUR requirements. The EPA policy in support of import certification appears at 40 CFR part 707, subpart B. In addition, any persons who export or intend to export a chemical substance that is the subject of this proposed rule on or after August 11, 2011 are subject to the export notification provisions of TSCA section 12(b) (15 U.S.C. 2611(b)), (see 40 CFR 721.20), and must comply with the export notification requirements in 40 CFR part 707, subpart D.

*B. What should I consider as I prepare my comments for EPA?*

1. *Submitting CBI.* Do not submit confidential business information (CBI) 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 redacted copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal

threats.

viii. Make sure to submit your comments by the comment period deadline identified.

## II. Background

*A. What is the agency's authority for taking this action?*

Section 5(a)(2) of TSCA (15 U.S.C. 2604(a)(2)) authorizes EPA to determine that a use of a chemical substance is a ''significant new use.'' Since on-going uses are by definition, not new, they are identified and excluded from the SNUR. EPA must make the determination of a ''significant new use'' by rule after considering all relevant factors, including those listed in TSCA section 5(a)(2). The relevant factors to be considered are:

- The projected volume of manufacturing and processing of a chemical substance.
- The extent to which a use changes the type or form of exposure of human beings or the environment to a chemical substance.
- The extent to which a use increases the magnitude and duration of exposure of human beings or the environment to a chemical substance.
- The reasonably anticipated manner and methods of manufacturing, processing, distribution in commerce, and disposal of a chemical substance.
- In addition to the factors enumerated in TSCA section 5(a)(2), the statute authorizes EPA to consider any other relevant factors.

Once EPA determines that a use of a chemical substance is a significant new use, TSCA section 5(a)(1)(B) requires persons to submit a significant new use notice (SNUN) to EPA at least 90 days before they manufacture, import, or process the chemical substance for that use (15 U.S.C. 2604(a)(1)(B)). As described in Unit VII., the general SNUR provisions are found at 40 CFR Part 721, Subpart A.

Section 26(c) of TSCA (15 U.S.C. 2625(c)) authorizes EPA to take action under other sections of TSCA with respect to categories of chemical substances.

*B. Why is the agency taking this action?*

EPA has concerns about the 14 glymes listed in this SNUR, all of which have similar chemical structures. EPA is concerned about the reproductive and/or developmental toxicity of monoglyme, diglyme, and ethylglyme and believes that individuals could suffer adverse effects from their use. In addition, EPA has concerns about the remaining 11 glymes due to the lack of available use, exposure, and toxicity information. Currently, exposure to monoglyme in lithium batteries is very limited since the batteries are sealed. The amount of exposure to diglyme in printing inks is less certain, but any additional use would increase the existing exposure to the chemical. Ethylglyme currently has no consumer uses but has been found in water sources, its production level appears to be increasing, and given its toxicity, EPA would be concerned if this chemical substance became prevalent in consumer products. EPA further believes that the use of any of these chemical substances in consumer products, beyond the limited, on-going current uses, could significantly increase the magnitude and duration of exposure to humans and the environment over that which would otherwise exist and that such increase should not occur without opportunity for EPA review. Finally, for pentaethylene glycol dibutyl ether and butyltriglyme, which presently show no reported production to the IUR or any ongoing uses, EPA believes that any use of these chemical substances could be a significant increase in the magnitude and duration of exposure to humans and the environment over that which currently exist.

On March 18, 2008, EPA published risk based prioritization related documents on monoglyme and diglyme (Refs. 1, 2, 3, and 4), which indicated that it appeared these two chemical substances are used in consumer products and also indicated EPA's concerns about the potential health effects of these two chemical substances. Studies on monoglyme and diglyme indicate adverse health effects concerning reproductive and developmental toxicity, as well as on blood and blood-forming organs. Studies on ethylglyme show developmental toxicity as well as potential for gene mutation. Several manufacturers initially responded that, with the exception of monoglyme use in sealed lithium batteries, there are no consumer uses. Follow up contact with manufacturers revealed some additional potential consumer uses and raised questions about some of the other uses. For monoglyme, diglyme, and ethylglyme, as well as the remaining 11 chemicals, the level of toxicity is uncertain and/or the type and extent of the use of the chemical substance is unclear. EPA is proposing to issue this SNUR to require notification prior to any new manufacturing, importing, or processing of these chemicals for consumer uses (with specified exceptions), or in some cases all uses. EPA intends to continue to monitor production, use and other relevant information on the subject substances and, where appropriate, initiate further action.

EPA previously published a SNUR on November 29, 2005, (70 FR 71401), (FRL–7740–7), on a major metabolite of monoglyme, 2-methoxyethanol (2-ME), CASRN 109–86–4, requiring notice to the Agency before 2-ME is used in a consumer product (40 CFR 721.10001) (Ref. 5).

## III. Significant New Use Determination

### *A. What chemicals are included in this SNUR?*

The proposed category of glymes to be regulated by this SNUR consists of the 14 chemical substances shown in Table 1 and Table 2. Specifically, the designated significant new use for the glymes chemicals in Table 1 of this unit would be ''use in a consumer product,'' with the exception of the ongoing uses which are the excluded uses listed under ''Proposed Excluded Consumer Uses,'' and where the designated significant new use for the chemicals in Table 2 would be ''any use.'' ''Consumer product'' is defined at 40 CFR 721.3 as: ''a chemical substance that is directly, or as part of a mixture, sold or made available to consumers for their use in or around a permanent or temporary household or residence, in or around a school, or in recreation.''

While hazard data are only currently available for 3 of the 14 chemical substances in this category (see Unit IV.D.), EPA is proposing to designate significant new uses for all 14 chemical substances listed in Tables 1 and 2 on the basis of the available information. Consistent with its authority under TSCA section 26(c), EPA is proposing to make all 14 chemical substances subject to the significant new use rule based on similarities in the molecular structures, physical and chemical properties, uses, and potential uses of the chemical substances in the category. EPA acknowledges that there are differences in the ongoing uses of the 14 chemical substances, and has accounted for those differences by varying the proposed significant new use designations for the chemical substances, as shown in Tables 1 and 2. Nonetheless, EPA believes that the chemicals are sufficiently similar such that it is appropriate, for purposes of this SNUR, to act on them together. EPA solicits public comment on the scope of the chemical substances to be subject to this SNUR. Specifically, whether any of the chemical substances included in the category are sufficiently dissimilar from the rest that they should be removed from the category, or whether any additional chemical substances are sufficiently similar that they should be added to the category.

TABLE 1—CHEMICALS WITH USE IN A CONSUMER PRODUCT AS THE PROPOSED SIGNIFICANT NEW USE AND PROPOSED EXCLUDED CONSUMER USES

| Chemical Abstract Service (CAS) Registry No. (CASRN) | Chemical abstract index name | Common name | Proposed excluded consumer uses |
|---|---|---|---|
| 110–71–4 | Ethane, 1,2-dimethoxy- | Monoglyme or Monoethylene glycol dimethyl ether. | In electrolyte solutions for sealed lithium batteries. |
| 111–96–6 | Ethane, 1,1′-oxybis[2-methoxy- | Diglyme or Diethylene glycol dimethyl ether. | As a solvent in printing inks for consumer products. |
| 112–36–7 | Ethane, 1,1′-oxybis[2-ethoxy- | Ethyldiglyme or Diethylene glycol diethyl ether. | |
| 112–49–2 | 2,5,8,11-Tetraoxadodecane | Triglyme or Triethylene glycol dimethyl ether. | —As a solvent in consumer adhesives.<br>—As a component of consumer brake fluids.<br>—As a component of consumer paint/graffiti removers.<br>—in consumer paints. |
| 112–73–2 | Butane, 1,1′-[oxybis(2,1-ethanediyloxy)]bis- | Butyldiglyme or Diethylene glycol dibutyl ether. | |
| 112–98–1 | 5,8,11,14,17-Pentaoxaheneicosane | Tetraethylene glycol dibutyl ether. | |
| 143–24–8 | 2,5,8,11,14-Pentaoxapentadecane | Tetraglyme or Tetraethylene glycol dimethyl ether. | —As an HFC/CFC lubricant.<br>—As a solubilizing agent for consumer printing inks.<br>—As a coalescing agent in consumer paints. |
| 629–14–1 | Ethane, 1,2-diethoxy- | Ethylglyme or Ethylene glycol diethyl ether. | |
| 4353–28–0 | 3,6,9,12,15-Pentaoxaheptadecane | Tetraethylene glycol diethyl ether. | |
| 23601–39–0 | 3,6,9,12,15,18-Hexaoxaeicosane | Pentaethylene glycol diethyl ether. | |

TABLE 1—CHEMICALS WITH USE IN A CONSUMER PRODUCT AS THE PROPOSED SIGNIFICANT NEW USE AND PROPOSED EXCLUDED CONSUMER USES—Continued

| Chemical Abstract Service (CAS) Registry No. (CASRN) | Chemical abstract index name | Common name | Proposed excluded consumer uses |
|---|---|---|---|
| 24991–55–7 | Poly(oxy-1,2-ethanediyl), .alpha.-methyl-.omega.-methoxy-. | Polyglyme or Polyethylene glycol dimethyl ether. | Use in consumer paint strippers. |
| 31885–97–9 | Poly(oxy-1,2-ethanediyl), .alpha.-butyl-.omega.-butoxy-. | Polyethylene glycol dibutyl ether. | |

TABLE 2—CHEMICALS WITH ''ANY USE'' AS THE PROPOSED SIGNIFICANT NEW USE

| Chemical Abstract Service (CAS) Registry No. (CASRN) | Chemical abstract index name | Common name |
|---|---|---|
| 51105–00–1 | 5,8,11,14,17,20-Hexaoxatetracosane | Pentaethylene glycol dibutyl ether. |
| 63512–36–7 | 5,8,11,14-Tetraoxaoctadecane | Butyltriglyme or Triethylene glycol dibutyl ether. |

*B. What relevant factors were considered for this SNUR?*

To develop its preliminary determination of what would constitute a significant new use of the glymes listed in Table 1 and Table 2, EPA considered relevant information about the toxicity of these substances, likely human exposures and environmental releases associated with possible uses, and the four factors listed in section 5(a)(2) of TSCA and Unit II.A. of this proposed SNUR.

The latest information available to EPA, which is summarized in Unit IV. of this SNUR, indicates that based on historical production levels of five of these chemicals, any production or commencement of Inventory Update Reporting (IUR) reporting would be considered a significant change. For the two chemicals which currently do not appear to be in production or use, commencement of production for any use could result in a significant increase in the type and form of exposure to both humans and the environment. For the seven chemicals which currently do not have ongoing consumer uses, any commencement of use in a consumer product would change the type of exposure to humans from indirect to direct exposure and the form of exposure from primarily inhalation to both inhalation and skin exposure.

EPA believes that any shift from a status of no uses in a consumer product to any use in a consumer product would increase the magnitude and duration of exposure to consumers than would otherwise exist since use of a consumer product could result in more frequent, direct, and longer exposures than the infrequent or indirect exposures that currently exist. Additional workers are also likely to be exposed, as is the surrounding environment at manufacturing or processing sites, due to possible increases in releases which could contribute additional glymes into the environment. Finally, EPA believes that any changes in the reasonably anticipated manner and methods of manufacturing, processing, distribution in commerce, or disposal of these glymes could contribute to the type, form, magnitude and duration of exposure to humans and the environment.

Based on these relevant factors, EPA has preliminarily determined that the manufacture, import, or processing of ethyldiglyme, butyldiglyme, tetraethylene glycol dibutyl ether, ethylglyme, tetraethylene glycol diethyl ether, pentaethylene glycol diethyl ether, and polyethylene glycol dibutyl ether for any use in a consumer product is a significant new use. EPA has also primarily determined that the manufacture, import, or processing of monoglyme, diglyme, triglyme, tetraglyme, polyglyme for any use in a consumer product, other than for the ongoing uses listed in Table 1, is a significant new use. In addition, EPA has primarily determined that the manufacture, import, or processing of pentaethylene glycol dibutyl ether and butyltriglyme for any use is a significant new use.

*C. What are EPA objectives for this SNUR?*

EPA wants to achieve the following objectives with regard to the significant new use(s) that are designated in this proposed rule:

1. EPA would receive notice of any person's intent to manufacture, import, or process the glymes listed in Table 1 and Table 2 for the described significant new uses before that activity begins.

2. EPA would have an opportunity to review and evaluate data submitted in a SNUN before the notice submitter begins manufacturing, importing or processing of the glymes listed in Table 1 and Table 2 for the described significant new uses.

3. EPA would be able to regulate prospective uses of the glymes listed in Table 1 and Table 2 before the described significant new uses of the chemical substance occur, provided that regulation is warranted pursuant to TSCA sections 5(e), 5(f), 6 or 7.

**IV. Summary of Relevant Available Information on the Glymes**

*A. What are the ongoing uses of these chemicals?*

1. *Known Ongoing Uses of Glymes.* To identify the ongoing consumer uses of these glymes, as well as potential industrial uses, EPA used information submitted under the 2006 IUR rule, contacted manufacturers, searched business periodicals, and searched other available sources. Monoglyme is used in consumer products in electrolyte solutions for sealed lithium batteries. Industrial uses include printed circuit board manufacturing; in reactions with strong bases; in mixtures where solvent separation and recovery is necessary; as an inert special solvent; and as a solvent in pharmaceutical production (Ref. 6, p. 9).

Diglyme is used as a solvent in printing inks for consumer products and industrially as a solvent in a variety of processes (Ref. 6, p. 10).

Triglyme is used in consumer products in consumer brake fluids, as a solvent in consumer adhesives, as a component of consumer paint and graffiti removers and in consumer paints. Industrial uses include

generation of chemicals, use as a reaction solvent, and use as a binding agent in porcelain powders (Ref. 6, p. 11).

Tetraglyme is used in consumer products as a solubilizing agent for consumer printing inks, as a coalescing agent in consumer paints, and as an HFC/CFC lubricant which may be used in consumer air conditioners. Industrial uses include use as a solubilizing agent in textiles and plastics, as a dye fixation additive for cotton textiles, as a fungicide process solvent, and as a gas scrubbing agent (Ref. 6, p. 12).

Polyglyme is used in consumer paint strippers. Industrial uses include use as special, high boiling solvents for chemical reactions, use as a solubilizing agent for plastic, textile, and paper processes, and use as a gas scrubbing agent (Ref. 6, p. 13).

Ethyldiglyme, butyldiglyme, tetraethylene glycol dibutyl ether, ethylglyme, tetraethylene glycol diethyl ether, pentaethylene glycol diethyl ether, and polyethylene glycol dibutyl ether, have no known uses in consumer products. Industrial uses of these glymes can include use: as a high-boiling solvent for nitrocellulose, resins, and lacquers; as a solubilizer in organic synthesis; as a solvent in the production of plastic resins and compounds, rubber chemicals; as a solvent for conductive printing ink; in the production of printed circuit etchants; in the preparation of and reaction with Grignard reagents; in metal extractions; as a solvent in pharmaceutical syntheses; in the production of coatings; and as a gas scrubbing liquid (Ref. 6, pp. 14–19).

The chemicals listed in Table 2, pentaethylene glycol dibutyl ether and butyltriglyme, have no known uses (Ref. 6, p. 19).

2. *Potential for Other Ongoing Uses of Glymes.* In order to ascertain if there are any ongoing uses of these glymes, EPA used information submitted under the IUR rule, contacted manufacturers, searched business periodicals, and searched other available sources. In some instances, EPA could confirm the existence of an ongoing use in a consumer product from the information reviewed. In other instances, the results of EPA's search were unclear, and EPA could not confirm whether certain reported consumer product uses were actual ongoing uses.

Therefore, EPA is requesting public comment on whether any of the additional unconfirmed uses listed in this unit are actual, ongoing uses in a consumer product, and whether there are any other ongoing uses in a consumer product of the chemicals listed in Table 1. For pentaethylene glycol dibutyl ether and butyltriglyme, EPA is requesting public comment on whether there are any ongoing uses at all (consumer or industrial). EPA does not anticipate that it will add additional exclusions to the final rule, beyond those listed in Table 1, except where public comment adequately substantiates the existence of a claimed additional ongoing use.

TABLE 3—REPORTED CONSUMER USES OF GLYMES THAT ARE UNCONFIRMED

| Common name | Additional unconfirmed reports of use (In addition to any confirmed ongoing consumer uses listed in table 1) |
|---|---|
| Monoglyme | Treat aluminum surfaces to ensure surfaces are less reactive, inner and outer layer etching of printed circuit board manufacturing. |
| Diglyme | Component in automotive care products, a component of brake fluid, a component in paints and coatings, and a component in adhesives and sealants. |
| Ethyldiglyme | Component in paint and paint varnishes, use in coatings manufacturing, use in adhesives manufacturing, and as a solvent in printing. |
| Triglyme | None in consumer products. |
| Butyldiglyme | None in consumer products. |
| Tetraethylene glycol dibutyl ether | Use as an ingredient in consumer brake fluid. |
| Tetraglyme | Use in fabrics, textiles and apparel. |
| Ethylglyme | Use as a solvent in consumer paint production, use as an adhesive solvent, use as a polycarbonate swelling agent, use in consumer polishes and related products. |
| Tetraethylene glycol diethyl ether | Use as an ingredient in consumer brake fluid. |
| Pentaethylene glycol diethyl ether | Use as an ingredient in consumer brake fluid, use in the soldering of electronic circuit boards. |
| Polyglyme | Use in adhesive removers, use in fragrance production, use in anti-fog compounds, use in brake fluid, use in automotive care products, and use in paper products. |
| Polyethylene glycol dibutyl ether | Use in the production of gel laundry detergents. |
| Pentaethylene glycol dibutyl ether | None. |
| Butyltriglyme | None. |

*B. What are the estimated production levels of these chemicals?*

The 2006 IUR regulation required manufacturers and importers of certain chemical substances included on the TSCA Chemical Substance Inventory to report site and manufacturing information for chemicals manufactured (including imported) in amounts of 25,000 pounds or greater at a single site. For monoglyme and diglyme, EPA expects that current production levels will continue. For triglyme and ethylglyme, predicting future production is infeasible, although ethylglyme production appears to be increasing. For ethyldiglyme, butyldiglyme, and tetraglyme, EPA expects that production will remain at the previous levels. Production of pentaethylene glycol diethyl ether appears to be steadily increasing. For polyglyme, EPA expects that production will continue to decrease and/or remain the same. For tetraethylene glycol dibutyl ether, tetraethylene glycol diethyl ether, polyethylene glycol dibutyl ether, pentaethylene glycol dibutyl ether, and butyltriglyme, EPA expects that production of these chemical substances, if any, will remain below reporting levels. Previous IUR reporting rules required that chemicals produced at amounts of 10,000 pounds or greater be reported. Table 3 summarizes 2006 and prior year IUR data for the 14 glymes. The projected trends are based on the IUR data from 1986–2006. The projections may not be precise since the IUR data does not reflect 100% of chemicals and their production and requirements for reporting have varied over time.

TABLE 4—PRODUCTION REPORTING AMOUNTS TO IUR 1986–2006 (REF. 6)

| Common name | 2006 IUR reporting | Prior IUR reporting |
|---|---|---|
| Monoglyme | >1 million (M)–<10M lbs | 1986: >10 thousand (K)–<500K lbs.<br>1990–2002: >1M–<10M lbs. each year. |
| Diglyme | >1M–<10M lbs | 1986–2002: >1M–<10M lbs. each year. |
| Ethyldiglyme | >10K–<500K lbs | 1986–2002: >10K–<500K lbs. each year. |
| Triglyme | No report | 1994–2002: >10K–<500K lbs. each year. |
| Butyldiglyme | >10K–<500K lbs | 1990–2002: >10K–<500K lbs. each year. |
| Tetraethylene glycol dibutyl ether | No report | No reports 1986–2002. |
| Tetraglyme | >10K–<500K lbs | 1986–2002: >10K–<500K lbs. each year. |
| Ethylglyme | >10K–<500K lbs | 1986–2002: No reports. |
| Tetraethylene glycol diethyl ether | No report | No reports 1986–2002. |
| Pentaethylene glycol diethyl ether | >1M–<10M lbs | 1986 & 1990: >10K–<500K lbs. each year.<br>1994: No report.<br>1998: >500K–<1M lbs.<br>2002: >1M–<10M lbs. |
| Polyglyme | 10–500K | 1986: >1M–<10M lbs.<br>1994: No report.<br>1998, 2002: >10K–<500K lbs. each year. |
| Polyethylene glycol dibutyl ether | No report | No reports 1986–2002. |
| Pentaethylene glycol dibutyl ether | No report | No reports 1986–2002. |
| Butyltriglyme | No report | No reports 1986–2002. |

*C. What are the potential routes and sources of exposure for these chemicals?*

The following are summaries of the potential routes and sources of exposure for these chemicals considering ongoing current uses. More detailed information can be found in the Exposure Characterization documents for monoglyme and diglyme (Refs. 1, 2) and in the description of ethylglyme in the Hazardous Substances Data Bank (Ref. 7).

1. *Potential exposures to the environment, consumers, and general population.* The exposures described in this unit reflect the actual and/or potential indirect exposures to the environment, consumers, and the general population resulting from ongoing industrial and commercial uses of these glymes. Consumer uses, however, also potentially allow for the direct exposure to skin from product handling and more immediate inhalation exposures resulting from proximity to the product. However, little to no data is available for those types of use scenarios.

Monoglyme, diglyme, ethyldiglyme, triglyme, butyldiglyme, and ethylglyme are included in the category of chemicals reported as ''certain glycol ethers'' under the ID number N230 in the Toxics Release Inventory (TRI) (Ref. 8). The total release reported to the TRI in 2007 from all reporting sites was 18,476,420 pounds. This total includes air releases of 16,416,033 pounds from on-site fugitive and point sources, in addition to on-site water releases of 87,035 pounds. Most of the remaining volume of release was deep-well injected, sent to land treatment, transferred for energy recovery or transferred to a Publicly Owned Treatment Works (POTW). Release information about the individual glymes within the larger glycol ether category is not known (Ref. 9). Manufacturers, importers, or processors are required to report releases of chemicals on the TRI when total manufacturing, imports or processing by a facility equals 25,000 pounds/year for the chemicals combined.

Ethylglyme was found in the US EPA Office of Water Storage and Retrieval (STORET) database indicating potential environmental exposure since this chemical substance was found in ground water and/or surface water (Ref. 9).

Monitoring data indicate that the general population may be exposed to diglyme and ethyldiglyme via inhalation of vehicle exhaust and ingestion of contaminated drinking water (Refs. 10 and 11). Diglyme was listed as a contaminant found in drinking water (Ref. 10).

Diglyme has been detected in diluted vehicle exhaust from a light-duty truck using different fuel types (Ref. 10).

Industrial manufacture and processing may result in the release of glymes to the environment through various waste streams (Ref. 10). Diglyme, ethyldiglyme, and ethylglyme have been found at measurable concentrations in industrial wastewater treatment systems (Refs. 10, 11, and 7). Wastewater treatment systems discharge to either surface waters or publicly owned treatment works. Either of these two discharge options could result in exposures for the general population and the environment to these chemicals.

Ethyldiglyme has been qualitatively detected in drinking water from Cincinnati, OH; in ground water from the Hipps Road Landfill in Jacksonville, FL; in trench leachates from Maxey Flats, KY and West Valley, NY low-level radioactive waste disposal sites and in advanced waste treatment water from Lake Tahoe, CA, Pomona, CA, and Blue Plains, Washington, DC (Ref. 11).

Ethylglyme has been detected in western Cleveland, OH wastewater influents at 140 µg/L and it was identified in Chicago Central water works water (treated and untreated) at 2 µg/L (Ref. 7).

Monitoring data for ethylglyme indicates that the general population may be exposed to the chemical substance through releases from manufacturing facilities. The general population can then be exposed via inhalation of ambient air, ingestion of drinking water, and dermal contact with these substances and other products containing these chemicals. Evidence of releases from industrial manufacturing and processing is demonstrated by concentrations of 400 milligrams per liter (mg/L) of diglyme which have been found in activated sludge from the waste treatment facility of the industry producing the chemical substance (Ref. 7).

For the remaining chemicals in Table 1 or Table 2, little or no release information was found.

EPA's Source Ranking Databank (Ref. 12) shows metal polish and polishing cloths and papers as containing ethylglyme. Most of the entries in this databank for consumer products are from the late 1990s and therefore may not still be current. If ethylglyme is still

found in these products, however, there is potential that consumers and children might be exposed to this chemical substance from these consumer products. Furthermore, production of ethylglyme appears to be increasing.

Based on IUR data and communications with manufacturers, EPA believes that monoglyme is used as a component of lithium batteries and diglyme is used in printing inks, both of which are consumer applications of monoglyme. It is believed that disposal of the lithium batteries containing monoglyme and paper with printing inks containing diglyme could present the potential for release of these chemicals to environmental media and subsequent exposure to humans and ecological receptors.

2. *Potential occupational exposure.* Occupational exposure to these chemicals may occur through inhalation and dermal contact at workplaces where the chemicals are produced or used. Monoglyme, diglyme, ethylglyme, ethyldiglyme, triglyme, and tetraethylene glycol diethyl ether all have vapor pressures high enough to potentially result in significant exposures to workers if they are near the chemical substance (Refs. 1, 2, 9, and 13). Based on IUR data, ethyldiglyme, butyldiglyme, tetraglyme, pentaethylene glycol diethyl ether, and polyglyme are manufactured in liquid forms, and worker exposures through dermal contact are possible (Ref. 13).

These chemicals do not have Occupational Safety and Health Administration (OSHA) Permissible Exposure Limits (PELs) (Refs. 1, 2, and 9). Ferro Corporation, in their publications, recommended a Threshold Limit Value (TLV) for glycol ethers of 5 parts per million (ppm) (Time Weighted Average (TWA)) with a Short Term Exposure Limit (STEL) of 25 ppm. The 15-minute STEL should not be achieved more than 4 times in 8 hours. For women of child-bearing potential, Ferro recommended a TLV of 1 ppm with a STEL of 5 ppm (Ref. 14).

Based on the 2006 IUR reports, the maximum total number of potentially exposed industrial workers to monoglyme and ethylglyme during manufacturing and industrial processing and use is less than 100 each, and the maximum total number of workers likely to be exposed to diglyme was between 100 and 999 workers. There may, however, be additional potentially exposed industrial workers who are not included in these estimates since not all production volume may have been accounted for in the IUR (production below 25,000 pounds at a site does not have to be reported to the IUR), and commercial workers may be exposed as well (Refs. 1, 2, and 15).

*D. What are the potential health effects of these chemicals?*

The following are summaries of the potential health effects of these chemicals considering ongoing current uses. More detailed information can be found in the Hazard Characterization documents for monoglyme and diglyme (Refs. 3, 4) and in the description of ethylglyme in the Hazardous Substances Data Bank (Ref. 7).

Toxicology studies in laboratory animals have shown that exposure to monoglyme results in hemolytic effects (destruction of red blood cells), and developmental and reproductive toxicity. The acute toxicity of monoglyme is low via oral, dermal and inhalation routes of exposure. Monoglyme's chronic adverse health effects generally fall into the moderate to high hazard range based on the classification ranges used in the Globally Harmonized System for Classification and Labeling of Chemicals (GHS). The potential toxicity from repeated exposure to monoglyme was assessed using a major metabolite, 2-methoxyethanol (CASRN 109–86–4). Oral 90-day studies of 2-methoxyethanol in rats and mice showed testicular degeneration and adverse effects on the process of blood cell formation. The lowest observed adverse effect level (LOAEL) in rats was 70 milligrams/kilograms (mg/kg)-day; the LOAEL in mice was 300 mg/kg-day. An oral prenatal developmental toxicity study of monoglyme in rats showed fetal mortality at doses as low as 60 mg/kg-day, and edema at doses as low as 30 mg/kg-day. An oral prenatal developmental toxicity study of monoglyme in mice showed reduced fetal body weight and increased skeletal defects at 250 mg/kg-day. Available data also suggest that monoglyme has the potential to be genotoxic (Ref. 3).

Toxicology studies in laboratory animals have shown that exposure to diglyme results in hemolytic effects (destruction of red blood cells), and developmental and reproductive toxicity. The acute toxicity of diglyme to rats via the oral and inhalation routes of exposure is low. The chronic adverse health effects of diglyme generally fall into the moderate to high hazard range based on the classification ranges used in the GHS. The toxicity profile following repeated exposures to diglyme is similar to the profile for monoglyme. Rats showed testicular degeneration and hemolytic effects following inhalation exposure to diglyme for two weeks at concentrations as low as 0.6 mg/L-day; a NOAEL was not established. An inhalation dominant-lethal study in rats showed a reduced pregnancy rate at 5.5 mg/L-day (5.5 ppm in air). An oral prenatal developmental toxicity study in mice showed effects on fetal growth and viability, and an increase in malformations at 125 mg/kg-day; the NOAEL was 62.5 mg/kg-day. *In vitro* gene mutation and *in vivo* chromosomal aberration tests were negative (Ref. 4).

Toxicology studies in laboratory animals have shown that exposure to ethylglyme results in developmental toxicity. The acute toxicity of ethylglyme is low in rats. Oral prenatal developmental toxicity studies of ethylglyme in mice and rabbits showed a significant decrease in fetal body weight and viability, and a significant increase in malformations; the NOAEL for developmental toxicity was 50 mg/kg-day in mice and 25 mg/kg-day in rabbits (Ref. 7), both falling into the high chronic hazard range based on the GHS.

Based on a review of the literature, there is insufficient information available to arrive at any health effects related conclusions for the remaining chemicals in Table 1 or Table 2.

## V. Alternatives Considered for This SNUR

Before proposing this SNUR, EPA considered promulgating a TSCA section 8(a) reporting rule for these glymes. Under a TSCA section 8(a) rule, EPA could, among other things, generally require persons to report information to the Agency when they intend to manufacture, import, or process a listed chemical substance for a specific use or any use. However, for these glymes, the use of TSCA section 8(a) rather than SNUR authority would have several limitations. First, if EPA was to require reporting under TSCA section 8(a) instead of TSCA section 5(a), EPA would not have the opportunity to review human and environmental hazards and exposures associated with the proposed significant new use and, if necessary, take immediate follow-up regulatory action under TSCA sections 5(e) or 5(f) to prohibit or limit the activity before it begins. In addition, EPA may not receive important information from small businesses, because such firms generally are exempt from TSCA section 8(a) reporting requirements. In view of the level of health and environmental concerns about monoglyme, diglyme, and ethylglyme if used for the proposed significant new use, and the lack of information to be able to judge exposure for the remaining glymes, EPA believes that a TSCA section 8(a) rule for this

substance would not meet EPA's regulatory objectives.

## VI. Applicability of Rule to Uses Occurring Before Effective Date of the Final Rule

As discussed in the **Federal Register** of April 24, 1990 (55 FR 17376), EPA has decided that the intent of section 5(a)(1)(B) of TSCA is best served by designating a use as a significant new use as of the date of publication of the proposed rule rather than as of the effective date of the final rule. If uses begun after publication of the proposed rule were considered ongoing rather than new, it would be difficult for EPA to establish SNUR notice requirements, because a person could defeat the SNUR by initiating the proposed significant new use before the rule became final, and then argue that the use was ongoing as of the effective date of the final rule. Thus, persons who begin commercial manufacture, import, or processing of the chemical substance(s) that would be regulated through this proposed rule, if finalized, would have to cease any such activity before the effective date of the rule if and when finalized. To resume their activities, these persons would have to comply with all applicable SNUR notice requirements and wait until the notice review period, including all extensions, expires. EPA has promulgated provisions to allow persons to comply with this SNUR before the effective date. If a person were to meet the conditions of advance compliance under section 721.45(h), that person would be considered to have met the requirements of the final SNUR for those activities.

## VII. Applicability of General Provisions

General provisions for SNURs appear under 40 CFR part 721, subpart A. These provisions describe persons subject to the rule, recordkeeping requirements, exemptions to reporting requirements, and applicability of the rule to uses occurring before the effective date of the final rule. Provisions relating to user fees appear at 40 CFR part 700. According to 40 CFR 721.1(c), persons subject to SNURs must comply with the same notice requirements and EPA regulatory procedures as submitters of Premanufacture Notices (PMNs) under TSCA section 5(a)(1)(A). In particular, these requirements include the information submissions requirements of TSCA section 5(b) and 5(d)(1), the exemptions authorized by TSCA section 5(h)(1), (h)(2), (h)(3), and (h)(5), and the regulations at 40 CFR part 720. Once EPA receives a SNUN, EPA may take regulatory action under TSCA section 5(e), 5(f), 6 or 7 to control the activities on which it has received the SNUN. If EPA does not take action, EPA is required under TSCA section 5(g) to explain in the **Federal Register** its reasons for not taking action.

Persons who export or intend to export a chemical substance identified in a proposed or final SNUR are subject to the export notification provisions of TSCA section 12(b). The regulations that interpret TSCA section 12(b) appear at 40 CFR part 707, subpart D. Persons who import a chemical substance identified in a final SNUR are subject to the TSCA section 13 import certification requirements, codified at 19 CFR 12.118 through 12.127; see also 19 CFR 127.28. Such persons must certify that the shipment of the chemical substance complies with all applicable rules and orders under TSCA, including any SNUR requirements. The EPA policy in support of import certification appears at 40 CFR part 707, subpart B.

## VIII. Test Data and Other Information

EPA recognizes that TSCA section 5 does not require developing any particular test data before submission of a SNUN. There are two exceptions: i. development of test data is required where the chemical substance subject to the SNUR is also subject to a test rule under TSCA section 4 (see TSCA section 5(b)(1)); and ii. development of test data may be necessary where the chemical substance has been listed under TSCA section 5(b)(4) (see TSCA section 5(b)(2)). In the absence of a section 4 test rule or a section 5(b)(4) listing covering the chemical substance, persons are required only to submit test data in their possession or control and to describe any other data known to or reasonably ascertainable by them (15 U.S.C. 2604(d); 40 CFR 721.25, and 40 CFR 720.50). However, as a general matter, EPA recommends that SNUN submitters include data that would permit a reasoned evaluation of risks posed by the chemical substance during its manufacture, import, processing, use, distribution in commerce, or disposal. EPA encourages persons to consult with the Agency before submitting a SNUN. As part of this optional pre-notice consultation, EPA would discuss specific data it believes may be useful in evaluating a significant new use. SNUNs submitted for significant new uses without any test data may increase the likelihood that EPA will take action under TSCA section 5(e) to prohibit or limit activities associated with this chemical.

SNUN submitters should be aware that EPA will be better able to evaluate SNUNs that provide detailed information on:

1. Human exposure and environmental releases that may result from the significant new uses of the chemical substances.

2. Potential benefits of the chemical substances.

3. Information on risks posed by the chemical substances compared to risks posed by potential substitutes.

## IX. SNUN Submissions

EPA recommends that submitters consult with the Agency prior to submitting a SNUN to discuss what data may be useful in evaluating a significant new use. Discussions with the Agency prior to submission can afford ample time to conduct any tests that might be helpful in evaluating risks posed by the substance. According to 40 CFR 721.1(c), persons submitting a SNUN must comply with the same notice requirements and EPA regulatory procedures as persons submitting a PMN, including submission of test data on health and environmental effects as described in 40 CFR 720.50. SNUNs must be submitted to EPA, on EPA Form No. 7710–25 in accordance with the procedures set forth in 40 CFR 721.25 and 720.40.

Readers are reminded that EPA published a final rule at 75 FR 773 on January 6, 2010, (FRL–8794–5) that established standards and requirements for the use of the electronic-PMN (e-PMN) software and EPA's Central Data Exchange (CDX) to electronically submit these notices. The Agency is introducing electronic reporting via CDX using the e-PMN in three phases over a two-year period. The effective date of the rule was April 6, 2010. During the first year following the effective date of the final rule, submissions will be permitted via CDX, optical disc, or paper. After April 6, 2011, paper submissions will no longer be accepted. After April 6, 2012, all submissions will be required to be submitted electronically via CDX. Regardless of the delivery method, after April 6, 2010, EPA requires that all submissions be generated using the new e-PMN software. For additional information and instructions go to: *http://www.epa.gov/opptintr/newchems//epmn/epmn-index.htm.* Until April 6, 2012, SNUNs may still be mailed to the Environmental Protection Agency, OPPT Document Control Office (7407M), 1200 Pennsylvania Avenue, NW., Washington, DC 20460–0001.

## X. Economic Analysis

*A. SNUNs*

EPA has evaluated the potential costs of establishing SNUR reporting requirements for potential manufacturers, importers, and processors of the chemical substances included in this proposed rule. While most businesses are subject to a $2,500 user fee required by 40 CFR 700.45(b)(2)(iii), small businesses with annual sales of less than $40 million when combined with those of the parent company (if any) are subject to a reduced user fee of $100 (40 CFR 700.45(b)(1)). The costs of submission of SNUNs will not be incurred by any company unless a company decides to pursue a significant new use as defined in this proposed SNUR. Furthermore, EPA believes that the expense of submitting a notice (approximately $6,000 plus the user fee) is unlikely to discourage innovations of high potential value. EPA's complete economic analysis is available in the public docket for this proposed rule (Ref. 16).

*B. Export Notification*

Under section 12(b) of TSCA and the implementing regulations at 40 CFR part 707, subpart D, exporters must notify EPA if they export or intend to export a chemical substance or mixture for which, among other things, a rule has been proposed or promulgated under TSCA section 5. For persons exporting a substance the subject of a SNUR, a one-time notice must be provided for the first export or intended export to a particular country. EPA estimates the one-time cost to be approximately $937 per exporter including mailing costs. The total costs of export notification will vary by chemical, depending on the number of required notifications (i.e., the number of countries to which the chemical substance is exported). Because EPA is unable to make an estimate of the likely number of export notifications for the chemicals covered in this proposed SNUR, a total export notification cost is not available.

## XI. Request for Public Comment

EPA welcomes comment on all aspects of this proposed rule. In addition, EPA is particularly interested in receiving stakeholder input on a number of issues that were identified for public comment earlier in this proposed rule. Please provide comments on the following issues:

1. *Scope of the chemical substances to be subject to this SNUR.* While hazard data are only currently available for 3 of the 14 chemical substances in the glymes chemical category identified in this proposed rule (see Unit IV.D.), EPA is proposing to designate significant new uses for all 14 chemical substances listed in Tables 1 and 2 in Unit III.A. on the basis of the available information. As discussed in Unit III.A. of this document, EPA believes that the chemicals are sufficiently similar such that it is appropriate, for purposes of this SNUR and consistent with TSCA section 26(c), to act on them together. However, EPA would be interested in hearing whether any of the chemical substances included in the category are sufficiently dissimilar from the rest such that they should be removed from the category, or whether any additional chemical substances are sufficiently similar such that they should be added to the category.

2. *Ongoing uses.* EPA solicits comment on whether any of the additional unconfirmed uses listed in this proposed rule are actual ongoing uses in a consumer product, and whether there are any other ongoing uses in a consumer product of the chemicals listed in Table 1 in Unit III.A. For pentaethylene glycol dibutyl ether and butyltriglyme, EPA is soliciting comment on whether there are any ongoing uses at all (consumer or industrial). In providing comments on ongoing uses, it would be most helpful if you provide sufficient information for EPA to adequately substantiate the existence of a claimed additional ongoing use.

## XII. References

The following is a list of the documents that are specifically referenced in this proposed rule and placed in the public docket that was established under Docket ID No. EPA–HQ–OPPT–2009–0767. The docket includes information considered by EPA in developing this proposed rule. In addition, interested parties should consult documents that are referenced in the documents that EPA has placed in the public docket, regardless of whether these referenced documents are physically located in the public docket.


1. US EPA. Screening-Level Exposure Characterization of High Production Volume Chemicals: 1,2-Dimethoxyethane (CAS No. 110–71–4), [9th CI Name: Ethane, 1,2-dimethoxy-]. March 2008, page 21. *http://www.epa.gov/chemrtk/hpvis/rbp/Monoglyme.110714.Web.SupportDocs.31408.pdf.*
2. US EPA. Screening-Level Exposure Characterization of High Production Volume Chemicals: Diglyme (CAS No. 111–96–6), [9th CI Name: Bis(2-methoxyethyl) Ether]. March 2008, page 16. *http://www.epa.gov/chemrtk/hpvis/rbp/Diglyme.111966.Web.SupportDocs.031808.pdf.*
3. US EPA. Screening-Level Hazard Characterization of High Production Volume Chemicals: 1,2-Dimethoxyethane (CAS No. 110–71–4), [9th CI Name: Ethane, 1,2-dimethoxy-]. February 2008, page 6. *http://www.epa.gov/chemrtk/hpvis/rbp/Monoglyme.110714.Web.SupportDocs.31408.pdf.*
4. US EPA. Screening-Level Hazard Characterization of High Production Volume Chemicals: Diglyme (CAS No. 111–96–6), [9th CI Name: Bis(2-methoxyethyl) Ether]. February 2008, page 6. *http://www.epa.gov/chemrtk/hpvis/rbp/Diglyme.111966.Web.SupportDocs.031808.pdf*
5. US EPA. ''2-ethoxyethanol, 2-ethoxyethanol acetate, 2-methoxyethanol, and 2-methoxyethanol acetate; Significant New Use Rule.'' 70 FR 71401. November 29, 2005.
6. Wilson, Kimberly; Tome, Alice; and Narayan, Tulika, Abt Associates, Inc. ''Memorandum to EPA, Nishkam Agarwal, 'Actual and Potential Uses of Fourteen Selected Glymes.' '' September 9, 2009.
7. Hazardous Substances Data Bank (HSDB). Entry for Ethylene glycol diethyl ether, CASRN 629–14–1. Accessed on October 30, 2009. *http://toxnet.nlm.nih.gov.*
8. US EPA. TRI Web site. *http://www.epa.gov/ttn/atw/glycol2000.pdf.*
9. US EPA. Exposure Characterization for Ethylglyme. November 6, 2009.
10. Hazardous Substances Data Bank (HSDB). Hazardous Substances Data Bank. Entry for diglyme. Accessed October 30, 2009. *http://toxnet.nlm.nih.gov.*
11. Hazardous Substances Data Bank (HSDB). Entry for CASRN 112–36–7. Accessed on October 28, 2009. *http://toxnet.nlm.nih.gov.*
12. The Source Ranking Database is an EPA database that performs a systematic screening-level review of over 12,000 potential indoor pollution sources to identify high-priority product and material categories for further evaluation. It can also identify the products that have contained a specific chemical. May 1997. *http://www.epa.gov/oppt/exposure/pubs/srd_apdx.pdf.*
13. US EPA. Physical-Chemical Properties and Fate Characterization: Glycol Ethers. Washington, DC: U.S. EPA/OPPT/EETD/EAB. August 2009.
14. Ferro Corporation. 1,2-Dimethoxyethane US EPA HPV Challenge Program Submission. December 2001, pages 7–8 of 93.
15. US EPA. IUR database search results for number of workers exposed to ethylglyme, *http://cfpub.epa.gov/iursearch/2006_iur_natlcheminfo.cfm?id=3975.* Accessed on October 21, 2009.
16. US EPA. Economic Analysis of the Proposed Significant New Use Rule for 14 Glymes. Washington, DC: U.S. EPA/OPPT/EETD/EPAB. January 12, 2010.

## XIII. Statutory and Executive Order Reviews

### A. Regulatory Planning and Review

Under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993), the Office of Management and Budget (OMB) has designated this a ''significant regulatory action'' under section 3(f) of the Executive Order. Accordingly, this action was submitted to OMB for review under Executive Order 12866 and any changes made in response to OMB recommendations have been documented in the docket for this rulemaking as required by section 6(a)(3)(E) of the Executive Order.

### B. Paperwork Reduction Act

According to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* an Agency may not conduct or sponsor, and a person is not required to respond to a collection of information that requires OMB approval under the PRA, unless it has been approved by OMB and displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in Title 40 of the CFR, after appearing in the **Federal Register**, are listed in 40 CFR, part 9, and included on the related collection instrument, or form, if applicable. The information collection requirements related to this action have already been approved by OMB pursuant to the PRA under OMB control number 2070–0038 (EPA ICR No. 1188). This action does not impose any burden requiring additional OMB approval. If an entity were to submit a SNUN to the Agency, the annual burden is estimated to average 110 hours per response. This burden estimate includes the time needed to review instructions, search existing data sources, gather and maintain the data needed, and complete, review, and submit the required SNUN. Send any comments about the accuracy of the burden estimate, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques, to the Director, Collection Strategies Division, Office of Environmental Information (2822T), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. Please remember to include the OMB control number in any correspondence, but do not submit any completed forms to this address.

### C. Small Entity Impacts

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.,* the Agency hereby certifies that this action will not have a significant adverse economic impact on a substantial number of small entities. Under RFA, small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of this proposed rule on small entities, small entity is defined in accordance with RFA section 601 as:

1. A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201.

2. A small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000.

3. A small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

A SNUR applies to any person (including small or large entities) who intends to engage in any activity described in the rule as a ''significant new use.'' By definition of the word ''new'' and based on all information currently available to EPA, it appears that no small or large entities presently engage in such activity. Since this proposed SNUR would require a person who intends to engage in such activity in the future to first notify EPA by submitting a SNUN, no economic impact will occur unless someone files a SNUN to pursue a significant new use in the future or forgoes profits by avoiding or delaying the significant new use. Although some small entities may decide to conduct such activities in the future, EPA cannot presently determine how many, if any, there may be. However, EPA's experience to date is that, in response to the promulgation of over 1,000 SNURs, the Agency receives on average only 5 notices per year. Of those SNUNs submitted, only one appears to be from a small entity in response to any SNUR. Therefore, EPA believes that the potential economic impact of complying with this SNUR is not expected to be significant or adversely impact a substantial number of small entities. In a SNUR that published as a final rule on August 8, 1997 (62 FR 42690) (FRL–5735–4), the Agency presented its general determination that proposed and final SNURs are not expected to have a significant economic impact on a substantial number of small entities, which was provided to the Chief Counsel for Advocacy of the Small Business Administration.

### D. Unfunded Mandates Reform Act

Based on EPA's experience with proposing and finalizing SNURs, State, local, and Tribal governments have not been impacted by these rulemakings, and EPA does not have any reason to believe that any State, local, or Tribal government would be impacted by this rulemaking. As such, EPA has determined that this regulatory action would not impose any enforceable duty, contain any unfunded mandate, or otherwise have any effect on small governments subject to the requirements of sections 202, 203, 204, or 205 of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538.

### E. Federalism

This action would not have a substantial direct effect on 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, entitled *Federalism* (64 FR 43255, August 10, 1999).

### F. Tribal Implications

This proposed rule would not have Tribal implications because it is not expected to have substantial direct effects on Indian Tribes. This proposed rule would not significantly or uniquely affect the communities of Indian Tribal governments, nor would it involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000), do not apply to this proposed rule.

### G. Children's Health Protections

This action is not subject to Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997), because this is not an economically significant regulatory action as defined by Executive Order 12866, and this action does not address environmental health or safety risks disproportionately affecting children.

### H. Affect on Energy Supply, Distribution, or Use

This proposed rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001), because this action is not expected to affect energy supply, distribution, or use.

### I. Technical Standards

Because this action does not involve any technical standards, section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA) (15

U.S.C. 272 note), does not apply to this action.

*J. Environmental Justice*

This action does not entail special considerations of environmental justice related issues as delineated by Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

**List of Subjects in 40 CFR Part 721**

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: June 30, 2011.

**Wendy C. Hamnett,**

*Director, Office of Pollution Prevention and Toxics.*

Therefore, it is proposed that 40 CFR chapter I be amended as follows:

## PART 721—[AMENDED]

1. The authority citation for part 721 continues to read as follows:

**Authority:** 15 U.S.C. 2604, 2607, and 2625(c).

2. Add § 721.10229 to subpart E to read as follows:

**§ 721.10229 Glymes.**

*Chemical substances and significant new uses subject to reporting.* The chemical substances identified in Table 1 are subject to reporting under this section for the significant new uses described in Table 1, Column 3 ''Significant New Use.''

TABLE 1—CHEMICALS SUBJECT TO REPORTING AND DESIGNATED SIGNIFICANT NEW USES

| CAS Registry No. (CASRN) | CA index name | Significant new use |
|---|---|---|
| 110–71–4 | Ethane, 1,2-dimethoxy- | Any use in a consumer product except in electrolyte solutions for sealed lithium batteries. |
| 111–96–6 | Ethane, 1,1′-oxybis[2-methoxy- | Any use in a consumer product except as a solvent in printing inks for consumer products. |
| 112–36–7 | Ethane, 1,1′-oxybis[2-ethoxy- | Any use in a consumer product. |
| 112–49–2 | 2,5,8,11-Tetraoxadodecane | Any use in a consumer product except:<br>—As a solvent in consumer adhesives.<br>—As a component of consumer brake fluids.<br>—As a component of consumer paint/graffiti removers.<br>—In consumer paints. |
| 112–73–2 | Butane, 1,1′-[oxybis(2,1-ethanediyloxy)]bis- | Any use in a consumer product. |
| 112–98–1 | 5,8,11,14,17-Pentaoxaheneicosane | Any use in a consumer product. |
| 143–24–8 | 2,5,8,11,14-Pentaoxapentadecane | Any use in a consumer product except:<br>—As an HFC/CFC lubricant.<br>—As a solubilizing agent for consumer printing inks.<br>—As a coalescing agent in consumer paints. |
| 629–14–1 | Ethane, 1,2-diethoxy- | Any use in a consumer product. |
| 4353–28–0 | 3,6,9,12,15-Pentaoxaheptadecane | Any use in a consumer product. |
| 23601–39–0 | 3,6,9,12,15,18-Hexaoxaeicosane | Any use in a consumer product. |
| 24991–55–7 | Poly(oxy-1,2-ethanediyl), .alpha.-methyl-.omega.-methoxy-. | Any use in a consumer product except in consumer paint strippers. |
| 31885–97–9 | Poly(oxy-1,2-ethanediyl), .alpha.-butyl-.omega.-butoxy- | Any use in a consumer product. |
| 51105–00–1 | 5,8,11,14,17,20-Hexaoxatetracosane | Any use. |
| 63512–36–7 | 5,8,11,14-Tetraoxaoctadecane | Any use. |

[FR Doc. 2011–17084 Filed 7–11–11; 8:45 am]

**BILLING CODE 6560–50–P**

## DEPARTMENT OF TRANSPORTATION

## National Highway Traffic Safety Administration

## 49 CFR Part 571

**[Docket No. NHTSA–2011–0100]**

## Notice of Intent To Prepare an Environmental Assessment for Pedestrian Safety Enhancement Act of 2010 Rulemaking

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

**ACTION:** Notice of intent; request for scoping comments.

**SUMMARY:** Pursuant to the National Environmental Policy Act (NEPA), NHTSA plans to analyze the potential environmental impacts of the agency's rulemaking to implement the Pedestrian Safety Enhancement Act of 2010. The Pedestrian Safety Enhancement Act mandates a rulemaking to establish a standard requiring electric and hybrid vehicles to be equipped with a pedestrian alert sound system that would activate in certain vehicle operating conditions to aid visually-impaired and other pedestrians in detecting the presence, direction, location, and operation of those vehicles.

Under NEPA, once an agency determines the purpose and need of the proposed federal action, it engages in scoping. This is the process by which the scope of the issues and the alternatives to be examined are determined. This notice initiates the scoping process by inviting comments from Federal, State, and local agencies, Indian Tribes, and the public to help identify the environmental issues and reasonable alternatives to be examined under NEPA. This notice also provides guidance for participating in the scoping process and additional information about the alternatives NHTSA expects to consider in its NEPA analysis.

**DATES:** The scoping process will culminate in the preparation and issuance of an Environmental Assessment (EA), which will be made available for public comment. To ensure that NHTSA has an opportunity to consider scoping comments fully and to

facilitate NHTSA's prompt preparation of the EA, scoping comments should be submitted in time to ensure that they will be received on or before August 11, 2011. NHTSA will try to consider comments received after that date to the extent the rulemaking schedule allows.

**ADDRESSES:** You may submit comments to the docket number identified in the heading of this document by any of the following methods:

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

Regardless of how you submit your comments, you should mention the docket number of this document.

You may call the Docket at 202–366–9324.

Note that all comments received, including any personal information provided, will be posted without change to *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** For technical issues, contact Gayle Dalrymple, Office of Crash Avoidance Standards, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. Telephone: 202–366–1810. For legal issues, contact Thomas Healy, Office of the Chief Counsel, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. Telephone: 202–366–2992.

**SUPPLEMENTARY INFORMATION:** In a forthcoming notice of proposed rulemaking, NHTSA intends to propose a Federal motor vehicle safety standard requiring electric and hybrid vehicles to be equipped with a pedestrian safety (PEDSAFE) sound system that emits a sound in certain operating conditions to aid visually-impaired and other pedestrians in detecting the presence and operation of those vehicles. The issuance of a PEDSAFE standard is mandated by the Pedestrian Safety Enhancement Act of 2010 (''Pedestrian Safety Act'').[1]

In connection with this action, NHTSA intends to prepare an EA analyzing the potential environmental impacts of the proposed safety standard and reasonable alternative standards pursuant to the National Environmental Policy Act (NEPA) and implementing regulations issued by the Council on Environmental Quality (CEQ) and NHTSA.[2] NEPA requires Federal agencies to consider the potential environmental impacts of their proposed actions and reasonable alternatives in their decisionmaking. To inform decisionmakers and the public, the NEPA analysis will compare the potential environmental impacts of the agency's preferred alternative and reasonable alternatives, including a ''no action'' alternative. As required by NEPA, the agency will consider direct, indirect, and cumulative impacts and discuss impacts in proportion to their significance.

## I. Background

### *A. 2008 NHTSA Public Meeting*

On May 30, 2008, NHTSA published a notice [3] in the **Federal Register** announcing the holding of a public meeting on June 23, 2008 to bring together government policymakers, stakeholders from the visually-impaired community, industry representatives and public interest groups to discuss the technical and safety policy issues associated with hybrids, all-electric vehicles and quiet internal combustion engine vehicles, and the resultant risks to visually-impaired pedestrians. The prepared presentations submitted at the meeting and a transcript of the meeting can be found in Docket No. NHTSA–2008–0108 on *http://www.regulations.gov.*[4]

### *B. 2009 and 2010 NHTSA Reports*

In the two years following the public meeting, NHTSA issued two reports, one in October 2009 and the other in April 2010. The earlier report was entitled ''Research on Quieter Cars and the Safety of Blind Pedestrians, A Report to Congress.[5] The report briefly discussed the quieter cars issue, how NHTSA's research plan addresses the issue, and the status of the agency's research in following that plan. In an effort to quantify the problem of hybrid crashes with pedestrians, NHTSA examined the incidence rates for crashes involving hybrid electric vehicles and pedestrians under different circumstances, using data from 12 states, and compared the results to those for internal combustion engine (ICE) vehicles. This study, which was based on a small sample size, found an increased rate of pedestrian crashes for hybrid vehicles compared to their peer ICE vehicles.

In the April 2010 report,[6] NHTSA said that it recognized that quieter cars, such as hybrid-electric vehicles in low-speed operation using their electric motors, may introduce a safety issue for pedestrians who are visually-impaired. This study documented the overall sound levels and general spectral content (i.e., the characteristics of the sound such as frequency, phase, and amplitude values of the sound) for a selection of hybrid-electric and internal combustion vehicles in different operating conditions, evaluated vehicle detectability for two surrounding (or ambient) sound levels, and considered countermeasure concepts that are categorized as vehicle-based, infrastructure-based, and systems requiring vehicle-pedestrian communications.

Some of the main findings were that overall sound levels for the hybrid-electric vehicles tested were lower at low speeds than for the internal combustion engine vehicles tested. There were also significant differences in human subjects' response time depending on whether electric or internal combustion propulsion was used at both the lower and higher levels of ambient sound. Candidate countermeasures were discussed in terms of types of information provided (direction, vehicle speed, and rate of speed change, etc); useful range of detection of vehicles by pedestrians, warning time, user acceptability, and barriers to implementation. This study provided baseline data on the acoustic characteristics and auditory

[1] The Pedestrian Safety Act is Public Law 111–373, 124 Stat. 4086 (January 4, 2011). 49 U.S.C. 30111 note.

[2] NEPA is codified at 42 U.S.C. 4321–4347. CEQ's NEPA implementing regulations are codified at 40 CFR parts 1500–1508, and NHTSA's NEPA implementing regulations are codified at 49 CFR part 520.

[3] 73 FR 31187; May 30, 2008.

[4] The presentations are in document # 0012 and the transcript is in document # 0023 (Docket No. NHTSA–2008–0108–0012 and Docket No. NHTSA–2008–0108–0023, respectively).

[5] Research on Quieter Cars and the Safety of Blind Pedestrians, A Report to Congress, National Highway Traffic Safety Administration, U.S. Department of Transportation, Washington, DC, October 2009, available at *http://www.nhtsa.gov/DOT/NHTSA/NVS/Crash%20Avoidance/Technical%20Publications/2010/RptToCongress091709.pdf.*

[6] Garay-Vega, Lisandra; Hastings, Aaron; Pollard, John K.; Zuschlag, Michael; and Stearns, Mary D., Quieter Cars and the Safety of Blind Pedestrians: Phase I, John A. Volpe National Transportation Systems Center, DOT HS 811 304 April 2010, available at *http://www.nhtsa.gov/DOT/NHTSA/NVS/Crash%20Avoidance/Technical%20Publications/2010/811304rev.pdf.*

detectability of a vehicle when a single vehicle is tested at a time.

*C. 2011 Pedestrian Safety Act*

The Pedestrian Safety Act requires NHTSA to conduct a rulemaking to establish a Federal motor vehicle safety standard [7] requiring an alert sound for pedestrians to be emitted by all types of motor vehicles [8] that are electric vehicles [9] or hybrid vehicles [10] (EVs and HVs). Thus, the covered types of vehicles include not only light vehicles (passenger cars, vans, sport utility vehicles and pickup trucks), but also low speed vehicles, motorcycles, medium and heavy trucks and buses.

The rulemaking must be initiated not later than 18 months after the date of enactment of the Pedestrian Safety Act. Given that the date of enactment was January 4, 2011, rulemaking must be initiated by July 4, 2012.

The PEDSAFE standard must specify performance requirements for an alert sound that enables visually-impaired and other pedestrians to reasonably detect EVs and HVs operating below their cross-over speed.[11] The Pedestrian Safety Act defines ''alert sound'' as a vehicle-emitted sound that enables pedestrians to discern the presence, direction,[12] location, and operation of the vehicle.[13]

The Pedestrian Safety Act specifies several requirements regarding the performance of the alert sound to enable pedestrians to discern the operation of motor vehicles. First, the alert sound must be sufficient to allow a pedestrian to reasonably detect a nearby EV or HV operating at constant speed, accelerating, decelerating and operating in any other scenarios that NHTSA deems appropriate.[14] Second, it must reflect the agency's determination of the minimum sound level emitted by a motor vehicle that is necessary to allow visually-impaired and other pedestrians to reasonably detect a nearby EV or HV operating below the cross-over speed.[15] Third, it must reflect the agency's determination of the performance requirements necessary to ensure that each vehicle's alert sound is recognizable to pedestrians as that of a motor vehicle in operation.[16]

The Pedestrian Safety Act mandates that the PEDSAFE standard shall not require the alert sound to be dependent on either driver or pedestrian activation. It also requires that the safety standard allow manufacturers to provide each vehicle with one or more alert sounds that comply, at the time of manufacture, with the safety standard. Each vehicle of the same make and model must emit the same alert sound or set of sounds. The standard is required to prohibit manufacturers from providing anyone, other than the manufacturer or dealers, with a device designed to disable, alter, replace or modify the alert sound or set of sounds emitted from the vehicle. A manufacturer or a dealer, however, is allowed to alter, replace, or modify the alert sound or set of sounds in order to remedy a defect or non-compliance with the safety standard.

Because the Pedestrian Safety Act directs NHTSA to issue these requirements as a motor vehicle safety standard under the National Traffic and Motor Vehicle Safety Act (Vehicle Safety Act),[17] the requirements must comply with that Act as well as the Pedestrian Safety Act. The Vehicle Safety Act requires each safety standard to be performance-oriented, practicable,[18] and objective [19] and meet the need for safety. In addition, in developing and issuing a standard, NHTSA must consider whether the standard is reasonable, practicable, and appropriate for each type of motor vehicle covered by the standard.

As a federal motor vehicle safety standard, the pedestrian alert sound system standard would be enforced in the same fashion as any other safety standard issued under the Safety Act. Thus, violators of the standard would be subject to civil penalties.[20] A vehicle manufacturer would be required to conduct a recall and provide remedy without charge if its vehicles were determined to fail to comply with the standard or if the alert sound system were determined to contain a safety related defect.[21] Further, vehicle manufacturers, distributors, dealers, and motor vehicle repair businesses would be prohibited from rendering the sound system inoperative.[22]

The Pedestrian Safety Act requires NHTSA to consider the overall community noise impact of any alert sound required by the safety standard. In addition, NHTSA will consider the environmental analysis prepared under NEPA when setting the standard.

As part of the rulemaking process, NHTSA is expressly required by the Pedestrian Safety Act to consult with:

- The Environmental Protection Agency (EPA) to assure that any alert sound required by the rulemaking is consistent with noise regulations issued by that agency;
- Consumer groups representing visually-impaired individuals;
- Automobile manufacturers and trade associations representing them;
- Technical standardization organizations responsible for measurement methods such as
  - The Society of Automotive Engineers,
  - The International Organization for Standardization, and
  - The United Nations Economic Commission for Europe, World Forum for Harmonization of Vehicle Regulations.[23]

Under the Act, NHTSA must publish a final rule establishing the standard requiring an alert sound for EVs and HVs by January 4, 2014. The Pedestrian

[7] NHTSA is delegated authority by the Secretary of Transportation to carry out Chapter 301 of Title 49 of the United States Code. *See* 49 CFR § 501.2. This includes the authority to issue Federal motor vehicle safety standards. 49 U.S.C. 30111.

[8] Section 2(4) of the Pedestrian Safety Act defines the term ''motor vehicle'' as having the meaning given such term in section 30102(a)(6) of title 49, United States Code, except that such term shall not include a trailer (as such term is defined in section 571.3 of title 49, Code of Federal Regulations). Section 30102(a)(6) defines ''motor vehicle'' as meaning a vehicle driven or drawn by mechanical power and manufactured primarily for use on public streets, roads, and highways, but does not include a vehicle operated only on a rail line.

[9] Section 2(10) of the Pedestrian Safety Act defines ''electric vehicle'' as a motor vehicle with an electric motor as its sole means of propulsion.

[10] Section 2(9) of the Pedestrian Safety Act defines ''hybrid vehicle'' as a motor vehicle which has more than one means of propulsion. As a practical matter, this term is currently essentially synonymous with ''hybrid electric vehicle.''

[11] Section 2(3) of the Pedestrian Safety Act defines ''cross-over speed'' as the speed at which tire noise, wind resistance, or other factors make an EV or HV detectable by pedestrians without the aid of an alert sound. The definition requires NHTSA to determine the speed at which an alert sound is no longer necessary.

[12] The Pedestrian Safety Act does not specify whether vehicle ''direction'' is to be defined with reference to the vehicle itself (thus meaning forward or backward) or the pedestrian.

[13] Section 2(2) of the Pedestrian Safety Act.

[14] Section 3(a) of the Pedestrian Safety Act.

[15] Section 3(b) of the Pedestrian Safety Act.

[16] Section 3(b)(2) of the Pedestrian Safety Act.

[17] 49 U.S.C. Chapter 301.

[18] In a case involving passive occupant restraints, the U.S. Circuit Court of Appeals for D.C. said that the agency must consider public reaction in assessing the practicability of required safety equipment like an ignition interlock for seat belts. *Pacific Legal Foundation* v. *Department of Transportation,* 593 F.2d 1338 (D.C. Cir. 1978). cert. denied, 444 U.S. 830 (1979).

[19] In a case involving passive occupant restraints, the U.S. Circuit Court of Appeals for the 6th Circuit said, quoting the House Report (H.R. 1776, 89th Cong. 2d Sess.1966, p. 16) for the original Vehicle Safety Act, that ''objective criteria are absolutely necessary so that 'the question of whether there is compliance with the standard can be answered by objective measurement and without recourse to any subjective determination.''' *Chrysler* v. *Department of Transportation,* 472 F.2d 659 (6th Cir. 1972).

[20] 49 U.S.C. 30112 and 30165.

[21] 49 U.S.C. 30118–30120.

[22] 49 U.S.C. 30122.

[23] NHTSA officials have been participating in the meetings of the World Forum informal working group charged with addressing the problem of quiet cars. NHTSA is sending copies of this notice to that group and to each of the other organizations with which it is required to consult.

Safety Act requires that the agency provide a phase-in period, as determined by NHTSA. However, full compliance with the standard must be achieved for all vehicles manufactured on or after September 1st of the calendar year beginning three years after the date of publication of the final rule. Thus, if the final rule were promulgated sometime in 2013, the three-year period after the date of publication of the final rule would end sometime in 2016. The first calendar year that would begin after that date in 2016 would be calendar year 2017. Thus, under that time scenario, full compliance would be required not later than September 1, 2017.

Finally, the Pedestrian Safety Act requires NHTSA to conduct a study and report to Congress whether the agency believes that there is a safety need to require alert sounds for motor vehicles with internal combustion engines. The report must be submitted to Congress by January 4, 2015. If NHTSA determines that there is a safety need to require alert sounds for those motor vehicles the agency must initiate a rulemaking to require alert sounds for them.

*D. Related Activities*

Other national regulatory bodies, international standards organizations, and automotive manufacturers are considering the possibility of adding alert sounds to EVs and HVs to aid pedestrian detection of these vehicles.

The Japanese Ministry of Land, Infrastructure, Transport and Tourism (MLIT), after studying the feasibility of alert sounds for EVs and HVs, issued guidelines for pedestrian alert sounds in 2010. MLIT concluded that pedestrian alert sounds should be required only on HVs that can run exclusively on an electric motor, EVs, and fuel-cell vehicles.[24] MLIT guidelines require that EVs and HVs generate a pedestrian alert sound whenever the vehicle is moving forward at any speed less than 20 km/h and when the vehicle is operating in reverse. MLIT guidelines do not require vehicles to produce an alert sound when the vehicle is operating, but stopped, such as at a traffic light.[25] The manufacturer is allowed to equip the vehicle with a switch to deactivate the alert sound temporarily.

The MLIT includes the following guidelines for the type and volume of sounds emitted by EVs and HVs:

- The sound shall be a continuous sound associated with a motor vehicle in operation.
- The sound is not allowed to sound like sirens, chimes, bells, a melody, or a horn. The sound of animals, insects, and natural phenomena such as waves, wind, and river currents, are also prohibited.
- The sound shall be automatically altered in volume or tone, depending on the vehicle's speed for easier recognition of the movement of the vehicle.
- The volume of the sound shall not exceed the level of the sound generated by ICE vehicles operating at the speed of 20 km/h.

During its March 2011 session, the World Forum for Harmonization of Vehicle Regulation of the United Nations Economic Commission for Europe (UNECE) adopted guidelines covering alert sounds for EVs and HVs that are closely based on the Japanese guidelines.[26] The guidelines will be published as an annex to the UNECE Consolidated Resolution on the Construction of Vehicles (R.E.3). The guidelines developed by the UNECE recommend that EVs and HVs emit pedestrian alert sounds beginning when the vehicle starts moving and continuing until the speed of the vehicle reaches 20 km/h. The guidelines do not specify that a vehicle emit an alert sound when the vehicle is stopped or when a HV's ICE is engaged and thus emitting sound. As under the Japanese guidelines, manufacturers would be allowed to equip vehicles with an on-off switch that the driver can use to silence the alert sound. The UNECE guidelines also contain the same provisions for the type and volume of alert sounds emitted by EVs and HVs as do the Japanese guidelines.

The Vehicle Sound for Pedestrians (VSP) subcommittee of the Society of Automotive Engineers (SAE) is working to develop a test procedure to measure sound emitted by ICE vehicles and sound systems that procedure alert sounds for use on EVs and HVs.[27] SAE has developed a draft version of standard J2889–1, *Measurement of Minimum Noise Emitted by Road Vehicles.* The purpose of J2889–1 is to provide an objective, technology neutral test to measure the sound emitted by a vehicle in a specified ambient noise condition.[28] J2889–1 does not account for psychoacoustic factors such as annoyance, recognizability, or detectability. J2889–1 specifies the test site conditions, meteorological conditions, and ambient noise level under which the sound should be recorded. The test contains procedures for measuring the sound pressure level (loudness) in decibels and frequency content[29] and changes in sound pressure level and frequency content of sounds emitted by a vehicle in order to measure how the sounds relate to vehicle speed.

The International Organization for Standardization (ISO) is cooperating with SAE in its efforts to develop a vehicle minimum noise measurement standard. The ISO document (ISO/NP 16254 Measurement of minimum noise emitted by road vehicles)[30] and SAE document are reportedly technically identical. The standard will provide procedures for assessing the performance of countermeasure systems, including, for example, a pitch shift measurement procedure.

Automotive manufacturers that produce EVs for the U.S. market have developed various pedestrian alert sounds, recognizing that those vehicles, when operating at low speeds, pose a risk to pedestrians. For example, the pedestrian alert system for the Nissan Leaf produces a sound that could be described as a high-pitched whirring sound that increases in volume as the vehicle accelerates forward. The pedestrian alert sound deactivates once the vehicle reaches 32 km/h (20 mph). The Leaf produces a beeping sound when operating in reverse. The vehicle is equipped with a switch that allows the driver to turn off the alert sound. The Leaf does not produce a sound when the vehicle is operating, but stopped.

[24] *Guidelines for Measure against Quietness Problem of HV*, [sic] MLIT and JASIC (2010). GRB Informal Group on Quiet Road Transport Vehicles (QRTV) Working papers of the 3rd informal meeting. Tokyo, 13–15 July 2010. *Available at: http://www.unece.org/trans/main/wp29/wp29wgs/wp29grb/QRTV_3.html.*

[25] The MLIT guidelines do not require that an EV or HV emit an alert sound when the vehicle is idling. Idling and stopped refer to the same operating scenario.

[26] The guidelines were developed by the Informal Group on Quiet Road Transport Vehicles (QRTV), which operates under the auspices of the Working Party on Noise (GRB). Papers relating to the informal group's six periodic meetings may be found at *http://live.unece.org/trans/main/wp29/wp29wgs/wp29grb/qrtv_1.html, http://live.unece.org/trans/main/wp29/wp29wgs/wp29grb/qrtv_2.html, http://live.unece.org/trans/main/wp29/wp29wgs/wp29grb/qrtv_3.html, http://live.unece.org/trans/main/wp29/wp29wgs/wp29grb/qrtv_4.html, http://live.unece.org/trans/main/wp29/wp29wgs/wp29grb/qrtv_5.html, and http://live.unece.org/trans/main/wp29/wp29wgs/wp29grb/qrtv_6.html.*

[27] A late 2010 status report on this work can be found at *http://www.sae.org/events/gim/presentations/2011/VSP.pdf.*

[28] *http://standards.sae.org/wip/j2889/1/.*

[29] Low frequency sounds have a low pitch like the notes on the lower end of a musical scale and high frequency sounds have a high pitch like the notes on the upper end of such a scale.

[30] *http://www.iso.org/iso/iso_catalogue/catalogue_tc/catalogue_detail.htm?csnumber=56019.*

The Chevrolet Volt, produced by General Motors, is equipped with a driver activated pedestrian alert system. The system, which is activated when the driver pulls back on the turn signal handle, emits a short horn pulse.

Automotive equipment manufacturers have begun developing speaker systems designed to produce alert sounds to install on EVs and HVs. Most of the systems have a single speaker that projects sound forward. The same speaker is used to provide an alert sound both when the vehicle is moving forward and when the vehicle is moving backward. Other systems currently under development would allow the pedestrian alert sound to be projected only in the direction of travel of the vehicle. Manufacturers of these systems indicate that the directional projection of warning sounds will reduce the amount of noise that the system must produce to provide acoustic cues to pedestrians of the presence of a nearby vehicle.

## II. Purpose and Need for Rulemaking

The purpose of the rulemaking mandated by the Pedestrian Safety Act is to require EVs and HVs, which tend to be quieter than the ICE vehicles, to be equipped with a pedestrian alert sound system that would activate in certain vehicle operating conditions to aid visually-impaired and other pedestrians in detecting the presence, direction, location, and operation of those vehicles. Taking this action is expected to reduce the number of incidents in which EVs and HVs strike pedestrians.

## III. The Alternatives

This notice briefly describes a variety of possible alternatives that are currently under consideration by the agency, and seeks input from the public about these alternatives and about whether other alternatives should be considered as we proceed with the rulemaking and the EA. In developing Alternatives 2 through 5, NHTSA considered, as it is required to do so, the Pedestrian Safety Act's requirements for establishing a PEDSAFE standard. Those requirements are set out above in section I of this notice.

These alternatives are based on agency research seeking to determine, with due concern for environmental considerations, what type or types of sound will be most appropriate and effective for aiding pedestrians in detecting, identifying and localizing [31] the sound of EVs and HVs both in the near future and in the more distant future as the percentage of EVs and HVs in the vehicle fleet increases. The agency notes that its research is ongoing and that outcome of that research could affect the array of alternatives from which a preferred alternative is selected for the notice of proposed rulemaking.

The alternatives currently under consideration are:

### *A. Alternative 1: ''No Action'' Alternative*

This alternative assumes, strictly for purposes of NEPA analysis, that NHTSA would not issue a rule requiring pedestrian alert sounds for any electric or hybrid motor vehicles.[32] NEPA requires agencies to consider a ''no action'' alternative in their NEPA analyses and to compare the effects of not taking action with the effects of the reasonable action alternatives to demonstrate the different environmental effects of the action alternatives. In defining this baseline alternative, the agency would consider what actions might be taken by other parties in the absence of action by this agency. In other words, the agency would consider what the world would be like if a Federal rule were not adopted. In this regard, the agency notes that manufacturers of electric vehicles have generally been equipping their vehicles with various types of pedestrian warning sounds,[33] but manufacturers of hybrid vehicles have generally not been doing so. NHTSA notes further that since the Pedestrian Safety Act directs the agency to issue a PEDSAFE standard for electric and hybrid vehicles, the statute does not permit the agency to take no action on this issue.[34]

### *B. Alternative 2: Recordings of Actual Internal Combustion Engine Sounds*

Under this regulatory alternative, recordings of sounds produced by ICE vehicles would be used to create the pedestrian alert sound. The sounds produced by an ICE vehicle would be recorded when the vehicle is operating at constant speeds, forward from 0 potentially up to 32 km/h (0 to 20 mph) and in reverse potentially up to 10 km/h (6 mph). Other components of a vehicle's noise output such as tire noise, aerodynamic noise, and air conditioning fan noise would not be included in the recording used for the alert sound because these sounds are also emitted by EVs and HVs. The sound system would be programmed so that the pedestrian alert sound would vary based on the speed and operating mode of the vehicle in which the system was installed. Regulatory compliance with this alternative might be determined by an objective test that measured the overall decibel level and the average one-third octave band level [35] of the sound to ensure that the sound mimics as nearly as possible that of the ICE vehicle from which it was recorded.[36] The results from the sound recordings would be compared to the sound profile of an ICE reference.

The advantage of a pedestrian warning sound consisting of a recording of an ICE vehicle is that the sound would have the same sound characteristics and volume levels of ICE vehicles currently in use. Further, ICE sounds are known and accepted by pedestrians. The agency anticipates that ICE-based and ICE-like synthetic sounds (i.e., sounds that are representative of an ICE vehicle, but are not from a recording of an ICE vehicle) played at current vehicle sound levels would not significantly change the overall sound profile of urban (low-speed) traffic noise, except for some loss of lower frequencies. The overall sound of traffic noise would be similar for ICE sounds if ICEs were replaced one-to-one with HVs/EVs.

An ICE vehicle recording would be reasonably recognizable to pedestrians as the sound of a motor vehicle. However, if the recording were played through low-fidelity speakers, it would tend to sound somewhat higher, thinner, and more metallic than an ICE

[31] Sound localization refers to determining the distance and direction of a detected sound.

[32] See 40 CFR 1502.2(e), 1502.14(d).

[33] Until NHTSA completes its rulemaking under the Pedestrian Safety Act, the agency cannot fully determine the extent to which any of those systems might be compliant.

[34] CEQ has explained that ''[T]he regulations require the analysis of the no action alternative even if the agency is under a court order or legislative command to act. This analysis provides a benchmark, enabling decision makers to compare the magnitude of environmental effects of the action alternatives. [See 40 CFR 1502.14(c).] * * * Inclusion of such an analysis in the EIS is necessary to inform Congress, the public, and the President as intended by NEPA. [See 40 CFR 1500.1(a).] ''*Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations,*'' 46 FR 18026 (1981)(emphasis added).

[35] An octave refers to the interval between one frequency and its double or its half. An octave relates exponential increases in the frequency spectrum to how humans perceive sound. A one-third octave band is an octave divided into thirds with the upper frequency limit being 2* (1.26) times the lower frequency. A one-third octave band roughly corresponds to a human's ability to analyze different frequencies of sound separately. A measure of the one-third octave level captures the sound pressure level, also referred to as decibel level, of the different frequencies that make up the frequency spectrum that is audible to humans.

[36] As noted elsewhere in this document, given the limitations of the speakers that are likely to be used to comply with the standard to be issued by this agency, the sound as broadcasted will differ from the sound as recorded.

vehicle.[37] This is because this type of speaker cannot reproduce the low frequency components of ICE sounds, but can effectively project non-ICE vehicle sounds that are comprised of components in the higher frequency ranges. On the other hand, a pedestrian alert sound based on an ICE vehicle recording would also limit acoustic variation among alert sounds, thereby reducing the possibility that a multitude of different alert sounds from different vehicle models would annoy or confuse pedestrians.

In view of its similarity to ICE vehicle sounds, an ICE vehicle recording is presumed to be recognizable at the same distance as ICE vehicles are recognizable. The drawback to using an ICE vehicle recording as a pedestrian alert sound is that non-ICE vehicle sounds could possibly be designed so as to provide better detectability for pedestrians, presumably at lower decibel levels.

*C. Alternative 3: Synthesized ICE-Equivalent Sounds*

In this alternative, simulated ICE vehicle sounds would be synthesized directly by a digital-signal processor programmed to create ICE vehicle-like alert sounds that would vary pitch and loudness in relation to the speed and operating mode of the vehicle. The synthetic sounds would be based on actual ICE vehicle sounds.

The resulting synthesized sounds would resemble those of Alternative 2, and thus have advantages and disadvantages similar to those of that alternative.

The synthesized sounds would have an additional advantage as a result of having fewer components along the frequency spectrum. This could allow for better detectability in ambient noise environments in which those frequency components are not present. To the extent that detectability was aided, the decibel level could be commensurately lowered to reduce the potential for any environmental impact.[38] This adjustment would be intended to ensure that the sound impact of EVs and HVs would be no greater than that of existing ICE vehicles.

The compliance test method for alternative 3 would be the same as the method used in alternative 2.

*D. Alternative 4: Combination of Synthesized Non-ICE Sounds and ICE Components to Aid Recognition*

This regulatory alternative would consist of a pedestrian alert sound combining some of the acoustic characteristics of sounds produced by ICE vehicles and some characteristics of non-ICE vehicle sounds engineered for enhanced detectability.

These types of sounds share some of same advantages and disadvantages of the sounds discussed in some of the other alternatives, especially Alternative 5.

One advantage of the combination of a synthesized sound and components of an ICE sound is that there is a greater likelihood that a pedestrian will recognize the sound as one coming from a motor vehicle.

Because this sound would not have a comparable ICE vehicle profile for which a safe detection distance at a given decibel level has been established, detectability of these sounds would likely need to be assessed through human subject testing. These combination ICE and non-ICE sounds would also vary pitch and loudness in relation to the speed and operating mode of the vehicle. Further, in addition to the issue of detectability, the agency must consider the issue of recognizability. It too likely could be assessed only through human-subject testing.

To the extent that the non-ICE elements permitted detection at lower decibel levels than the alternatives based on ICE sounds, the agency could specify such a lower decibel level in an effort to ensure that the potential for environmental impact would not be any greater than that for Alternatives 2 and 3. Because the sound for this alternative would contain acoustic characteristics of an ICE sound, it might prove more acceptable to the public than that for Alternative 5.

*E. Alternative 5: Synthesized Non-ICE Sounds Developed To Enhance Detectability*

Under this alternative, pedestrian alert sounds would be created based on psychoacoustic principles [39] using a digital-signal processor. Some characteristics common to these non-ICE vehicle sounds would include:

- Pitch shifting denoting vehicle speed change (in order to replicate a vehicle accelerating from 0 to 32 km/h (0 to 20 mph), a linear pitch change of approximately 40% is necessary, based on changes in vehicle speed);
- Pulsating quality, with pulse widths of 100 to 200 msec and about three to ten pulses per second interval;
- Inter-pulse intervals of no more than 150 msec;
- A fundamental tonal component in the 150 to 1000 Hz frequency range;
- At least three prominent harmonics in the 1 to 4 kHz frequency range;
- Four or more frequencies with average sound pressure exceeding 50 dB(A).

Sounds having the characteristics listed above might not resemble the sound of an ICE vehicle, although recordings of ICE vehicle noise can be processed through a digital signal processor to conform to the characteristics above while retaining a quality that would allow pedestrians to identify the sound as coming from a motor vehicle. Although the alert sound would not sound like an ICE vehicle, it would still vary pitch and loudness in relation to the speed and operating mode of the vehicle, which would enable pedestrians to identify the sound as that of a motor vehicle in operation.

An advantage to some synthetically developed alert sounds with no ICE vehicle references is that the sounds appear to offer a detection distance comparable to that of an ICE vehicle sound at a lower decibel level. If this alternative were selected, the agency would specify such a lower decibel level in an effort to ensure that the potential for environmental impact would not be any greater than that for Alternatives 2 and 3.

The detectability of a specific non-ICE sound, however, likely could be assessed only through human-subject testing because these non-ICE vehicle sounds do not have an ICE vehicle reference for which a decibel level corresponding to a safe detection distance has been measured. Further, in addition to the issue of detectability, the agency must consider the issue of recognizability. It too likely could be assessed only through human-subject testing.

Using non-ICE vehicle sounds as pedestrian alert sounds, however, could entail some disadvantages. If the open-endedness of this approach resulted in a wide variety of different alert sounds for different vehicle models, it could complicate the learning and recognizing of alert sounds and thereby confuse pedestrians. Further, there are questions as to whether all non-ICE vehicle sounds would be recognizable as those of a motor vehicle. Multiple different alert sounds with no common acoustic characteristics might have a negative impact on community noise levels.

[37] This problem would also affect all of the other action alternatives.

[38] The same step would be taken for Alternatives 4 and 5.

[39] Psychoacoustics is the field of science that studies how humans perceive and react to sounds.

*F. The Alternatives in General*

Each of the alternatives set forth above by NHTSA represents a different way in which NHTSA conceivably could balance the potentially competing considerations of recognizability, detectability, effectiveness, environmental noise impact and cost. For example, Alternative 2 places more weight on the recognizability of the alert sound as that of an ICE motor vehicle and minimization of any risk of an adverse noise impact on the community than Alternative 5 does. Conversely, the latter alternative places more weight on detectability than the former alternative does.

The agency may select one of the above-identified alternatives as its preferred alternative. Under NEPA, the purpose of and need for an agency's action inform the range of reasonable alternatives to be considered in its NEPA analysis. The above alternatives represent a broad range of approaches under consideration for setting the proposed PEDSAFE standard and whose environmental impacts we plan to evaluate under NEPA.

As detailed below, NHTSA invites comments to ensure that the agency considers a range of reasonable alternatives in setting a PEDSAFE standard and that the agency identifies the environmental impacts associated with each alternative. Comments may go beyond the approaches and information that NHTSA used in developing the above. The agency may modify the alternatives and environmental effects that will be analyzed in depth based upon the comments received during the scoping process and upon further agency analysis.

## IV. Scoping and Public Participation

The scoping process initiated by this notice seeks public comment on the range of alternatives and impacts to be considered in the EA and to identify the most important issues for in-depth analysis involving the potential environmental impacts of NHTSA's PEDSAFE standard.[40] NHTSA's NEPA analysis for the PEDSAFE standard will consider the direct, indirect and cumulative environmental impacts of the proposed standards and those of reasonable alternatives.

In preparing this notice of public scoping, NHTSA has consulted with agencies, including CEQ, Department of Energy, EPA, and the Department of Interior. Through this notice, NHTSA invites participation by the public and all Federal agencies, and by Indian Tribes, State and local agencies with jurisdiction by law or special expertise with respect to potential environmental impacts of the proposed PEDSAFE standard, and the public to participate in the scoping process.[41]

Specifically, NHTSA invites all stakeholders to participate in the scoping process by submitting written comments concerning the appropriate scope of NHTSA's NEPA analysis for the proposed PEDSAFE standard to the docket number identified in the heading of this notice, using any of the methods described in the **ADDRESSES** section of this notice. NHTSA does not plan to hold a public scoping meeting, because written comments will be effective in identifying and narrowing the issues for analysis.

NHTSA is especially interested in comments concerning the evaluation of community noise impacts. Information on some of the basic elements of evaluating those impacts can be found in ''Technology for a Quieter America,'' a 2010 report by the National Academy of Engineering (NEA) of the National Academies.[42] For example, chapter 2 of the report addresses community noise and chapter 3 addresses metrics for assessing environmental noise.

Specifically, NHTSA requests:

- Peer-reviewed scientific studies relevant to any environmental issues associated with this rulemaking.
- Reports analyzing the potential impacts within the United States, in particular geographic areas of the United States or in special habitats and environments like those in the National Park System.[43]
- Suggestions on how to assess the potential for this rulemaking to result in the emission of sound which, either because of its volume or nature, causes annoyance, as well as suggestions for how to limit that potential while achieving the safety purposes of the Pedestrian Safety Act. While the issue of volume could be addressed by placing a limit on the maximum volume of the alert noise, what steps could be taken to address the nature of the sound emitted?

To aid commenters in understanding the differing sound levels in different environments, we have set out below two tables from the introduction to NEA's report ''Technology for a Quieter America:'' [44] a 2010 report by the National Academy of Engineering (NEA):

COMPARISON OF A-WEIGHTED SOUND LEVELS IN COMMON OUTDOOR ENVIRONMENTS

| A-weighted sound level (decibels) | Typical outdoor setting | |
|---|---|---|
| 80 | | |
| | Noisy Urban Area (daytime) | |
| 70 | | |
| | Commercial Retail Area | |
| 60 | | Non-Park |
| | Suburban Area (daytime) | |
| 50 | | |

[40] See 40 CFR 1500.5(d), 1501.7, 1508.25.

[41] Consistent with NEPA and implementing regulations, NHTSA is sending this notice directly to: (1) Federal agencies having jurisdiction by law or special expertise with respect to the environmental impacts involved or authorized to develop and enforce environmental standards; (2) the Governors of every State, to share with the appropriate agencies and offices within their administrations and with the local jurisdictions within their States; (3) organizations representing state and local governments and Indian Tribes; and (4) other stakeholders that NHTSA reasonably expects to be interested in the NEPA analysis for the proposed pedestrian alert sound standards. See 42 U.S.C. 4332(2)(C); 49 CFR 520.21(g); 40 CFR 1501.7, 1506.6.

[42] The report can be found at: *http://www.nap.edu/openbook.php?record_id=12928&page=R1.* See also World Health Organization, Guidelines for Community Noise, edited by B. Berglund, T. Lindvall, and D. H. Schuela, Cluster of Sustainable Development and Healthy Environment, Department of the Protection of the Human Environment, Occupational and Environmental Health. Geneva, Switzerland, 1999.

[43] In these areas, there may be a special need to use quiet vehicles for purposes such as wildlife tours. See, for example, the brochure of the National Park Service on its program, the Natural Sounds Program, for protecting the acoustic environment of the areas in the National Park System. The brochure can be found at *http://www.nature.nps.gov/naturalsounds/PDF_docs/NSP_standard_brochure_final_10_1_08.pdf.*

[44] See page 6 of the report.

COMPARISON OF A-WEIGHTED SOUND LEVELS IN COMMON OUTDOOR ENVIRONMENTS—Continued

| A-weighted sound level (decibels) | Typical outdoor setting | |
|---|---|---|
| | Suburban Area (nighttime) | |
| 40 | | |
| 30 | Hawaiian volcanoes (crater overlook) | Park |
| 20 | | |
| 10 | Haleakala (in crater, no wind) | |
| 0 | | |

SOUND PRESSURE LEVELS GENERATED BY VARIOUS NOISE SOURCES

| Sound pressure level | dB(A) |
|---|---|
| Quiet library, soft whispers | 30 |
| Living room, refrigerator | 40 |
| Light traffic, normal conversation, quiet office | 50 |
| Air conditioner at 20 feet, sewing machine | 60 |
| Vacuum cleaner, hair dryer, noisy restaurant | 70 |
| Average city traffic, garbage disposals, alarm clock at 2 feet | 80 |
| Subway, motorcycle, truck traffic, lawn mower | 90 |
| Garbage truck, chain saw, pneumatic drill | 100 |
| Rock band concert in front of speakers, thunderclap | 120 |
| Gunshot blast, jet plane | 140 |
| Rocket launching pad | 180 |

NHTSA understands that there are a variety of potential alternatives that could be considered that fit within the purpose and need for the proposed rulemaking, as set forth in the Pedestrian Safety Act. Therefore, NHTSA seeks comments on how best to structure a reasonable alternative for purposes of evaluating it under NEPA. Specifically, NHTSA seeks comments on what criteria should be used to structure such alternative. When suggesting a possible alternative, please explain how it would satisfy the Pedestrian Safety Act's requirements and other provisions.

Two important purposes of scoping are identifying the issues that merit in-depth analysis and identifying and eliminating from detailed analysis minor issues that need only a brief discussion.[45] In light of these purposes, written comments should include an Internet citation (with a date last visited) to each study or report you cite in your comments if one is available. If a document you cite is not available to the public on-line, you should attach a copy to your comments. Your comments should indicate how each document you cite or attach to your comments is relevant to the NEPA analysis and indicate the specific pages and passages in the attachment that are most informative.

The more specific your comments are, and the more support you can provide by directing the agency to peer-reviewed scientific studies and reports as requested above, the more useful your comments will be to the agency. For example, if you identify an additional area of impact or environmental concern you believe NHTSA should analyze, or an analytical tool or model that you believe NHTSA should use to evaluate these environmental impacts, you should clearly describe it and support your comments with a reference to a specific peer-reviewed scientific study, report, tool or model. Specific, well-supported comments will help the agency prepare a NEPA analysis that is focused and relevant, and that will serve NEPA's overarching aims of making high quality information available to decisionmakers and the public by concentrating on important issues, ''rather than amassing needless detail.'' [46] By contrast, mere assertions that the agency should evaluate broad lists or categories of concerns, without support, will not assist the scoping process for the proposed standard.

Please be sure to reference the docket number identified in the heading of this notice in your comments. In addition to meeting the notice requirements in the implementing regulations issued by CEQ, NHTSA intends to provide notice to interested parties by e-mail. Thus, please also provide an e-mail address (or a mailing address if you decline e-mail communications).[47] These steps will help NHTSA to manage a large volume of material during the NEPA process. All comments and materials received, including the names and addresses of the commenters who submit them, will become part of the administrative record and will be posted on the Web at *http://www.nhtsa.dot.gov.*

Based on comments received during scoping, NHTSA expects to prepare an EA for public comment in conjunction with the proposal, which is to be issued by July 4, 2012, and a final EA to accompany the final rule, which is to be issued by January 4, 2014.

Separate **Federal Register** notices will announce the availability of the EA, which will be available for public comment, and the final NEPA document, which will be available for public inspection. NHTSA also plans to continue to post information about the pedestrian safety rulemaking, including information relating to the NEPA

[45] 40 CFR 1500.4(g), 1501.7(a).

[46] 40 CFR 1500.1(b).

[47] If you prefer to receive NHTSA's NEPA correspondence by U.S. mail, NHTSA intends to provide its NEPA publications via a CD readable on a personal computer.

process, on its Web site (*http://www.nhtsa.dot.gov*).

Issued: July 6, 2011.

**Christopher J. Bonanti,**

*Associate Administrator for Rulemaking.*

[FR Doc. 2011–17341 Filed 7–7–11; 11:15 am]

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### 50 CFR Part 17

**[Docket No. FWS–R4–ES–2011–0012; MO 92210–0–0008]**

## Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List the Bay Skipper as Threatened or Endangered

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of petition finding and initiation of status review.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, announce a 90-day finding on a petition to list the Bay skipper (*Euphyes bayensis*) as threatened or endangered under the Endangered Species Act of 1973, as amended (Act), and to designate critical habitat. Based on our review, we find that the petition presents substantial scientific or commercial information indicating that listing this species may be warranted. Therefore, with the publication of this notice, we are initiating a review of the status of the species to determine if listing the species is warranted. To ensure that this status review is comprehensive, we are requesting scientific and commercial data and other information regarding this species. Based on the status review, we will issue a 12-month finding on the petition, which will address whether the petitioned action is warranted, as provided in section 4(b)(3)(B) of the Act.

**DATES:** To allow us adequate time to conduct this review, we request that we receive information on or before September 12, 2011. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES** section, below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Daylight Time on this date. After September 12, 2011, you must submit information directly to the Field Office (see **FOR FURTHER INFORMATION CONTACT** section below). Please note that we might not be able to address or incorporate information that we receive after the above requested date.

**ADDRESSES:** You may submit information by one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.* In the box that reads ''Enter Keyword or ID,'' enter the docket number for this finding, which is FWS–R4–ES–2011–0012. Check the box that reads ''Open for Comment/Submission,'' and then click the Search button. You should then see an icon that reads ''Submit a Comment.'' Please ensure that you have found the correct rulemaking before submitting your comment.

(2) *U.S. Mail or Hand-Delivery:* Public Comments Processing, *Attn:* FWS–R4–ES–2011–0012; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all information we receive on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Request for Information section below for more details).

**FOR FURTHER INFORMATION CONTACT:** Stephen Ricks, Field Supervisor, Mississippi Ecological Services Field Office, 6578 Dogwood View Parkway, Jackson, MS, or by telephone 601–321–1122, or facsimile 601–965–4340. If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800–877–8339.

**SUPPLEMENTARY INFORMATION:**

### Request for Information

When we make a finding that a petition presents substantial information indicating that listing a species may be warranted, we are required to promptly review the status of the species (status review). For the status review to be complete and based on the best available scientific and commercial information, we request information on the Bay skipper from governmental agencies, Native American Tribes, the scientific community, industry, and any other interested parties. We seek information on:

(1) The species' biology, range, and population trends, including:

(a) Habitat requirements for feeding, breeding, and sheltering;

(b) Genetics and taxonomy;

(c) Historical and current range, including distribution patterns;

(d) Historical and current population levels, and current and projected trends; and

(e) Past and ongoing conservation measures for the species, its habitat, or both.

(2) The factors that are the basis for making a listing determination for a species under section 4(a) of the Act, which are:

(a) The present or threatened destruction, modification, or curtailment of its habitat or range;

(b) Overutilization for commercial, recreational, scientific, or educational purposes;

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

(e) Other natural or manmade factors affecting its continued existence.

If, after the status review, we determine that listing the Bay skipper is warranted, we will propose critical habitat (see definition in section 3(5)(A) of the Act), as per section 4 of the Act, to the maximum extent prudent and determinable at the time. Therefore, within the geographical range currently occupied by the Bay skipper, we request data and information on:

(1) What may constitute ''physical or biological features essential to the conservation of the species,''

(2) Where these features are currently found, and

(3) Whether any of these features may require special management considerations or protection.

In addition, we request data and information on ''specific areas outside the geographical area occupied by the species'' that are ''essential to the conservation of the species.'' Please provide specific comments and information as to what, if any, critical habitat you think we should propose for designation if the species is proposed for listing, and why such habitat meets the requirements of section 4 of the Act.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination. Section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or threatened species must be made ''solely on the basis of the best scientific and commercial data available.''

You may submit your information concerning this status review by one of the methods listed in the **ADDRESSES** section. If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy that includes personal

identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.*

Information and supporting documentation that we received and used in preparing this finding will be available for you to review at *http://www.regulations.gov,* or you may make an appointment during normal business hours at the U.S. Fish and Wildlife Service, Jackson, MS, Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

**Background**

Section 4(b)(3)(A) of the Act requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition and publish our notice of the finding promptly in the **Federal Register**.

Our standard for substantial scientific or commercial information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted'' (50 CFR 424.14(b)). If we find that substantial scientific or commercial information was presented, we are required to promptly commence a review of the status of the species, which will be subsequently summarized in our 12-month finding.

The ''substantial information'' standard for a 90-day finding differs from the Act's ''best scientific and commercial data'' standard that applies to a status review to determine whether a petitioned action is warranted. A 90-day finding does not constitute a status review under the Act. In a 12-month finding, we will determine whether a petitioned action is warranted after we have completed a thorough status review of the species, which is conducted following a substantial 90-day finding. Because the Act's standards for 90-day and 12-month findings are different, as described above, a substantial 90-day finding does not mean that the 12-month finding will result in a warranted finding.

*Previous Federal Actions*

The Bay skipper was identified as a candidate for protection under the Act in the November 21, 1991, **Federal Register** (56 FR 58804). It was assigned a Category 2 status designation, which was given to those species for which there was some evidence of vulnerability, but for which additional biological information was needed to support a proposed rule to list as endangered or threatened. Assigning categories to candidate species was discontinued in 1996 (Notice of Candidate Review; February 28, 1996; 61 FR 7596), and only species for which the Service has sufficient information on biological vulnerability and threats to support issuance of a proposed rule are now regarded as candidate species. Due to a lack of information on the Bay skipper, it was no longer considered as a candidate species as of 1996.

*Petition History*

On January 4, 2010, we received a petition dated December 29, 2009, from WildEarth Guardians and Xerces Society for Invertebrate Conservation requesting that the Bay skipper be listed as threatened or endangered and that critical habitat be designated under the Act. The petition clearly identified itself as such and included the requisite identification information for the petitioners, as required by 50 CFR 424.14(a). In a January 25, 2010, letter to the petitioners, we acknowledged receipt of the petition, and stated that due to prior workload and limited funding, we would not be able to address the petition at that time, but would complete the action when workload and funding allowed. On May 6, 2010, we received a 60-day notice of intent (NOI) to sue under the provisions of the Act from the petitioners, alleging that we failed to make a 90-day finding on the petition to list the Bay skipper as threatened or endangered and to designate critical habitat for the species within 90 days of receipt of the petition. No lawsuit has been filed to date.

This notice constitutes the 90-day finding on the January 4, 2010, petition to list the Bay skipper as threatened or endangered and that critical habitat be designated under the Act.

*Species Information*

The Bay skipper, a small butterfly, was described as *Euphyes bayensis* by Shuey (1989) from Bay St. Louis, Hancock County, Mississippi. Shuey (1993) reported on the phylogeny (the history of the evolution of a species) within the *Euphyes* genus, finding that *E. bayensis* is a species in the *Euphyes dion* complex. We accept the characterization of the Bay skipper as a species because the most recent taxonomic accounts currently consider the taxon as valid (*e.g.,* Pelham 2008, p. 93).

The Bay skipper has a wingspan of 1.5 to 1.75 inches (in) (3.7 to 4.4 centimeters (cm)). Males are black with a large orange patch on the top of the wings, and have a prominent black stigma (defined mark) on the forewing. The females are dark brown with yellow spots on their forewing and a yellow streak on their hindwing. The ventral (bottom) sides of both front and hind wings are a shade of brown that is paler than the dorsal side of the female and have pale yellow spots on the forewing, with two yellow streaks from the base to the margin (Shuey 1989; Vaughan and Shepherd 2005; Butterflies and Moths of North America (BMNA) 2009). The Bay skipper is similar in appearance to the Dion skipper (*E. dion*), but is distinguished by a brighter shade of orange and narrower black borders on the dorsal (top) side of the wings.

The life history and habitat requirements of the Bay skipper are poorly known. The adult butterfly has two flight periods: late May and September. The gap between the flight periods suggests that the larvae may aestivate (become dormant) in the summer. The larvae also hibernate during the winter. Aestivating and hibernating larvae are probably in the third or fourth instar (period between molts). The larval foodplant is likely sawgrass (*Cladium* sp.); however, this has not been verified (NatureServe 2009 as cited in Petition).

*The Bay skipper has been reported from only two locations:* Bay St. Louis, Hancock County, Mississippi, and the Anahuac National Wildlife Refuge (NWR) (part of the Texas Chenier Plains NWR Complex), Chambers and Jefferson Counties, Texas. It is possible that it occurs in other locations within sawgrass marsh habitat in other Gulf coastal States, but this has never been verified. The lack of records suggests it has a very limited range and is very rare (Vaughan and Shepherd 2005; NatureServe 2009). The Bay St. Louis locality was severely damaged by Hurricane Katrina in 2005, and it is unknown if the species continues to survive in that locality. The Anahuac NWR and surrounding areas were inundated by Hurricane Ike in 2008, and no Bay skippers have since been found at that location (NatureServe 2009; Petition citing David Sarkozi 2009, pers. comm.).

**Evaluation of Information for This Finding**

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations at 50 CFR 424 set forth the procedures for adding a species to, or removing a species from, the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

In considering what factors might constitute threats, we must look beyond the mere exposure of the species to the factor to determine whether the species responds to the factor in a way that causes actual impacts to the species. If there is exposure to a factor, but no response, or only a positive response, that factor is not a threat. If there is exposure and the species responds negatively, the factor may be a threat and we then attempt to determine how significant a threat it is. If the threat is significant, it may drive or contribute to the risk of extinction of the species such that the species may warrant listing as threatened or endangered as those terms are defined by the Act. This does not necessarily require empirical proof of a threat. The combination of exposure and some corroborating evidence of how the species is likely impacted could suffice. The mere identification of factors that could impact a species negatively may not be sufficient to compel a finding that listing may be warranted. The information must contain evidence sufficient to suggest that these factors may be operative threats that act on the species to the point that the species may meet the definition of threatened or endangered under the Act.

In making this 90-day finding, we evaluated whether information regarding threats to the Bay skipper, as presented in the petition and available in our files, is substantial, thereby indicating that the petitioned action may be warranted. Our evaluation of this information is presented below.

A. The Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range

Information Provided in the Petition

The petition asserts that the habitats of both known populations of the Bay skipper are threatened by sea level rise and extreme weather events, and that the Bay St. Louis population is threatened by development (WildEarth Guardians and Xerces Society 2009 (hereafter cited as Petition), p. 9). The petition asserts that the Comprehensive Conservation Plan (CCP) for the Texas Chenier Plains NWR Complex, which includes the Anahuac NWR (Service 2008), fails to mention or prescribe protections for the Bay skipper on the Anahuac NWR, and that many of the refuge's management actions (*e.g.,* herbicide use, livestock grazing, prescribed fires, rice farming, water control, land management involving conventional farm machinery) may affect the Bay skipper if conducted in its current or potential habitat (Petition 2009, pp. 10–11).

Evaluation of Information Provided in the Petition and Available in Service Files

Information in the Service files is consistent with many of the assertions made in the petition. Habitat for the Bay St. Louis population was severely damaged by Hurricane Katrina in 2005, and the population may have been impacted. The Anahuac NWR was inundated by Hurricane Ike in 2008. In other words, both of the areas where the Bay skipper is found have experienced hurricane impacts in recent years.

Tropical storms and hurricanes frequently occur in the northern Gulf of Mexico (NOAA 1999), and some researchers believe an increase in hurricane intensity, duration, and frequency can be attributed to warming sea temperatures (Karl *et al.* 2009, pp. 5–6). Impacts from these storm events could be compounded by projected sea level rise (Karl *et al.* 2009, pp. 5–6). The Bay skipper is likely to continue to be subject to hurricane impacts and resulting habitat modification and destruction in these areas.

We have no information in our files on potential impacts to the species from management actions on the Anahuac NWR or any information on development threats to the Bay St. Louis population. While the CCP does not specifically address protections for the Bay skipper, pesticide use has been prohibited on the NWR, and wetlands are protected. Herbicides are used on the refuge to combat exotic plant species (USFWS 2008; Chapter 3, p. 58; Chapter 4, p. 16).

In summary, in our evaluation of the petition and information in our files, we find that the petition provides substantial information indicating that listing the Bay skipper may be warranted due to present or threatened destruction, modification, or curtailment of the species' habitat or range by hurricanes or sea level rise.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Information Provided in the Petition

The petition asserts that collecting is a potential threat to the species (Petition 2009, p. 9). It also notes that small population size and limited distribution render the Bay skipper vulnerable to overutilization (Vaughn and Shepherd 2005).

Evaluation of Information Provided in the Petition and Available in Service Files

Although the petition notes that small population size and limited distribution render the Bay skipper vulnerable to overutilization, it does not provide information or evidence that collecting may be a threat now or in the foreseeable future. Furthermore, there is no information in our files on overutilization of the Bay skipper from collection. In our evaluation of the petition and information in our files, we have no substantial information indicating that listing the Bay skipper may be warranted due to overutilization.

C. Disease or Predation

Information Provided in the Petition

The petition notes that adult and larval butterflies are subject to predation by a wide variety of vertebrate and invertebrate wildlife (*e.g.,* birds, reptiles, amphibians, other insects), and that the likely small size of Bay skipper populations increases their vulnerability to extirpation due to disease or predation (Petition 2009, p. 9).

Evaluation of Information Provided in the Petition and Available in Service Files

Although the petition notes that adult and larval butterflies are subject to predation, it does not provide any evidence to support the assertion that disease or predation may be a threat to the Bay skipper now or in the foreseeable future, and we have no information in our files about potential impacts to the Bay skipper due to disease or predation. In our evaluation

of the petition and information in our files, we find that there is no substantial information indicating that listing the Bay skipper may be warranted due to disease or predation.

D. The Inadequacy of Existing Regulatory Mechanisms

Information Provided in the Petition

The petition asserts that the Bay skipper is not adequately protected by Federal or State laws or policies to prevent its endangerment or extinction.

Evaluation of Information Provided in the Petition and Available in Service Files

The Bay skipper is classified as an S1 species in both Texas and Mississippi. The S1 designation means that the species is considered ''critically imperiled—State level'' under the NatureServe construct. However, no formal or regulatory consideration is provided to the species or its habitat as a result of this classification (NatureServe 2009). The Anahuac NWR is covered under a CCP, but this is a guidance document and not a statute or regulation, and therefore not a regulatory mechanism. Possible effects to the Bay skipper from Refuge management activities are addressed under *Factor A. The Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range*. No other potential regulatory mechanisms are discussed in the petition and our review of readily available information indicated there are no existing regulations or laws providing for the protection of this species or its habitat. Because we have no information about existing regulatory mechanisms, we cannot conclude that regulatory mechanisms are inadequate. Therefore, we cannot find that the petition presents substantial information indicating that listing the Bay skipper may be warranted due to the inadequacy of existing regulatory mechanisms. However, we will investigate this issue further during the status review.

E. Other Natural or Manmade Factors Affecting the Species' Continued Existence

Information Provided in the Petition

The petition provides information that effects of climate change threaten the Bay skipper, including the increased frequency of extreme weather events, such as hurricanes, as well as rising sea levels. The effects of hurricanes and sea level rise were addressed above in *A. The Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range*. The petition further asserts that the Bay skipper could be harmed by local pesticide and herbicide use, specifically on the Anahuac NWR (Petition 2009, pp. 11–14).

Evaluation of Information Provided in the Petition and Available in Service Files

We acknowledge that butterflies and their larvae are vulnerable to pesticides; however, the petition does not provide any evidence to indicate that the Bay skipper is being impacted or is likely to be impacted by chemical use, and we have no information in our files about potential impacts to the Bay skipper due to chemical use. In summary, in our evaluation of the petition and information in our files, we find that the petition does not provide substantial information indicating that listing the Bay skipper may be warranted due to other natural or manmade factors affecting the species' continued existence. We will investigate the potential impacts of pesticide and herbicide use further during our status review.

**Finding**

On the basis of our determination under section 4(b)(3)(A) of the Act, we determine that the petition presents substantial scientific or commercial information indicating that listing the Bay skipper throughout its entire range may be warranted. This finding is based on information provided under factor A. The information provided under factors B, C, D, and E was not substantial.

Because we have found that the petition presents substantial information indicating that listing the Bay skipper may be warranted, we are initiating a status review to determine whether listing the Bay skipper under the Act is warranted.

**References Cited**

A complete list of references cited is available on the Internet at *http://www.regulations.gov* and upon request from the Mississippi Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

**Author**

The primary author of this notice is Paul Hartfield of the Mississippi Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

**Authority**

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: June 27, 2011.

**Gregory E. Siekaniec,**

*Acting Director, U.S. Fish and Wildlife Service.*

[FR Doc. 2011–17299 Filed 7–11–11; 8:45 am]

**BILLING CODE 4310–55–P**

# Notices

Federal Register
Vol. 76, No. 133
Tuesday, July 12, 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

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2011–0065]**

### Request for Extension of Approval of an Information Collection; Domestic Quarantine Notices

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Extension of approval of an information collection; comment request.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with regulations to prevent the spread of plant pests and diseases within the United States.

**DATES:** We will consider all comments that we receive on or before September 12, 2011.

**ADDRESSES:** You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2011-0065-0001.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2011–0065, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2011-0065* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

**FOR FURTHER INFORMATION CONTACT:** For information on the domestic quarantine regulations to prevent the spread of plant pests and diseases, contact Ms. Lynn Evans-Goldner, National Program Manager, Emergency and Domestic Programs, PPQ, APHIS, 4700 River Road Unit 160, Riverdale, MD 20737; (301) 734–7228. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

**SUPPLEMENTARY INFORMATION:**

*Title:* Domestic Quarantine Regulations.

*OMB Number:* 0579–0088.

*Type of Request:* Extension of approval of an information collection.

*Abstract:* Under the Plant Protection Act (7 U.S.C. 7701 *et seq.*) (PPA), the Secretary of Agriculture may prohibit or restrict the importation, entry, exportation, or movement in interstate commerce of any plant, plant product, biological control organism, noxious weed, means of conveyance, or other article to prevent a plant pest or noxious weed from being introduced into or disseminated within the United States. This authority has been delegated to the Animal and Plant Health Inspection Service (APHIS), which administers regulations to implement the PPA.

APHIS regulations in 7 CFR part 301, ''Domestic Quarantine Notices,'' prohibit or restrict the interstate movement of certain articles from infested areas to noninfested areas to prevent the spread of plant pests. Federal and State quarantines are necessary to regulate the movement of articles from infested areas to noninfested areas. For example, if an area in the United States has been placed under quarantine due to the Asian longhorned beetle, then certain plant products (regulated articles) that are susceptible to the Asian longhorned beetle can be moved from the quarantined area only under certain conditions (*i.e.,* after inspection and issuance of a certificate or limited permit). These measures help prevent the Asian longhorned beetle from spreading from the quarantined area to noninfested areas of the United States.

Administering these regulations requires APHIS to collect information from a variety of individuals who are involved in growing, packing, handling, and transporting plants and plant products. The information serves as the supporting documentation required for the issuance of forms and documents that authorize the movement of regulated plants and plant products and is vital to help prevent the spread of injurious plant pests within the United States. Collecting this information requires us to use a number of forms and documents, including certificates, limited permits, transit permits, and outdoor household article documents.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.,* permitting electronic submission of responses.

*Estimate of burden:* The public reporting burden for this collection of information is estimated to average 0.3271177 hours per response.

*Respondents:* State plant regulatory officials, State cooperators, and individuals involved in growing, packing, handling, and transporting plants and plant products.

*Estimated annual number of respondents:* 7,135.

*Estimated annual number of responses per respondent:* 229.88409.

*Estimated annual number of responses:* 1,640,223.

*Estimated total annual burden on respondents:* 536,546 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual

number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 6th day of July 2011.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2011–17462 Filed 7–11–11; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

### Agency Information Collection Activities: Proposed Collection; Comment Request—Food Distribution Forms

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

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on this information collection. This collection is a revision of a currently approved collection which FNS employs to determine public participation and the distribution of foods in the Food Distribution Programs.

**DATES:** Written comments must be received on or before September 12, 2011.

**ADDRESSES:** Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions that were used; (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 those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent to: Laura Castro, Branch Chief, Policy Branch, Food Distribution Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 500, Alexandria, VA 22302–1594. Comments may also be submitted via fax to the attention of Theresa Geldard at 703–305–2410 or via e-mail to *Theresa.Geldard@fns.usda.gov.* Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations.gov,* and follow the online instructions for submitting comments electronically.

All written comments will be open for public inspection at the office of the Food and Nutrition Service during regular business hours (8:30 a.m. to 5 p.m. Monday through Friday) at 3101 Park Center Drive, Room 500, Alexandria, Virginia 22302.

All responses to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will be a matter of public record.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of this information collection should be directed to Laura Castro at 703–305–2662.

**SUPPLEMENTARY INFORMATION:**

*Title:* Food Distribution Forms.

*Form Numbers:* FNS–7, 52, 53, 57, 152, 153, 155, 663, 667, and SF–425.

*OMB Number:* 0584–0293.

*Expiration Date:* December 31, 2012.

*Type of Request:* Revision of a currently approved collection.

*Abstract:* The Food Distribution Programs of the Department of Agriculture (USDA) assist American farmers and needy people by purchasing and delivering food to State agencies that, in turn, distribute them to organizations that assist those in need. Effective administration of Food Distribution Programs is dependent on the collection and submission of information from State and local agencies to FNS. This information includes, for example, the number of households served in the programs; the quantities of foods ordered, and where the food is to be delivered; verification of the receipt of a food order; and the amounts of USDA foods in inventory. FNS employs this information collection activity to obtain the data necessary to make those calculations. This is a revision of an information collection based on a final rule titled *Food Distribution Program on Indian Reservations (FDPIR): Amendments Related to the Food, Conservation, and Energy Act of 2008* published in 76 FR 18861 on April 6, 2011. This final rule codifies several policy changes to ensure FDPIR regulations are consistent with changes made by the 2008 Farm Bill to the Supplemental Nutrition Assistance Program (SNAP).

*Affected Public:* Respondent groups include: (1) Individuals and households; (2) businesses or other for-profit agencies; (3) not for profit organizations; and (4) State, local, and tribal governments.

*Estimated Number of Respondents:* The total estimated number of respondents is 469,041. This includes 457,000 individuals and households, 500 businesses and other for-profit companies, 11,211 private not-for-profit organizations, and 330 State, local, and tribal governments.

*Estimated Number of Responses per Respondent:* The total estimated average number of responses is 2.59 per respondent.

*Estimated Total Annual Responses:* 1,655,721.

*Estimated Time per Response:* The average response time is 0.27 hours per response.

*Estimated Total Annual Burden on Respondents:* See the table below for estimated total annual burden for each type of respondent.

| Affected public | Est. number of respondents | Number of responses per respondent | Total annual responses | Est. total hours per response | Est. total burden |
|---|---|---|---|---|---|
| **Reporting** | | | | | |
| State, Local, and Tribal Governments | 330.00 | 542.37 | 178,980.93 | 0.12 | 21,935.87 |
| Private For Profit | 500.00 | 9.12 | 4,560.00 | 1.04 | 4,740.00 |
| Private Not for Profit | 11,211.00 | 1.48 | 16,542.26 | 1.67 | 27,630.46 |
| Individual | 457,000.00 | 2.22 | 1,013,839.00 | 0.27 | 278,466.17 |
| Total Estimated Reporting Burden | 469,041.00 | 2.59 | 1,213,922.19 | 0.27 | 332,772.49 |

| Affected public | Est. number of respondents | Number of responses per respondent | Total annual responses | Est. total hours per response | Est. total burden |
|---|---|---|---|---|---|
| **Recordkeeping** | | | | | |
| State, Local, and Tribal Governments | 0.00 | 0.00 | 8,188.05 | 0.16 | 8,889.37 |
| Private For Profit | 0.00 | 0.00 | 182,576.00 | 0.27 | 45,536.25 |
| Private Not for Profit | 0.00 | 0.00 | 251,035.00 | 2.89 | 691,974.80 |
| Individual | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 |
| Total Estimated Recordkeeping Burden | 11,211.00 | | 441,799.05 | | 746,400.42 |
| **Total of Reporting and Recordkeeping** | | | | | |
| Reporting | 469,041.00 | 2.59 | 1,213,922.19 | 0.27 | 332,772.49 |
| Recordkeeping | 0.00 | 0.00 | 441,799.05 | 0.00 | 746,400.42 |
| Total | | 2.59 | 1,655,721.24 | 0.27 | 1,079,172.92 |

Dated: July 7, 2011.

**Audrey Rowe,**

*Administrator, Food and Nutrition Service.*

[FR Doc. 2011–17449 Filed 7–11–11; 8:45 am]

**BILLING CODE 3410–30–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Information Collection; Equal Opportunity Compliance Review Record

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice; request for comment.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, the Forest Service is seeking comments from all interested individuals and organizations on the new information collection, Equal Opportunity Compliance Review Record.

**DATES:** Comments must be received in writing on or before September 12, 2011 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

**ADDRESSES:** Comments concerning this notice should be addressed to Civil Rights, Mail Stop 1142, Forest Service, USDA, 1400 Independence Ave., SW., Washington, DC 20250–1142.

Comments also may be submitted via facsimile to 202–260–5054 or by e-mail to: *pjackman@fs.fed.us.*

The public may inspect comments received at USDA Forest Service, Civil Rights, 201 14th St., SW., Room 4SW, Washington, DC 20024 during normal business hours. Visitors are encouraged to call ahead to 202–205–8534 to facilitate entry to the building.

**FOR FURTHER INFORMATION CONTACT:** Pat Jackman, Civil Rights, 202–205–0989 or *pjackman@fs.fed.us.* Individuals who use a TTY may call 711 or the Federal Relay Service (FRS) at 1–800–877–8339, 24 hours a day, every day of the year, including holidays.

**SUPPLEMENTARY INFORMATION:**

*Title:* Equal Opportunity Compliance Review Record.

*OMB Number:* 0596–0215 renewal.

*Type of Request:* Renewal.

*Abstract:*

All Federal agencies must comply with equal opportunity laws:

- Title VI of the Civil Rights Act of 1964, as amended.
- Title IX of the Education Amendments Act of 1972.
- The Age Discrimination Act of 1975, as amended.
- Section 504 of the Rehabilitation Act of 1973, as amended.
- Executive orders prohibiting discrimination in the delivery of all programs and services to the public.

Federal agencies and entities receiving Federal financial assistance are prohibited from discriminating. Federal financial assistance is defined as, ''Federal monies given by grants, cooperative agreements, commercial special use permits, training, loan/temporary assignment of Federal personnel, or loan/use of Federal property at below market value.''

The equal opportunity laws require agencies to conduct compliance reviews to ensure that entities receiving Federal Financial Assistance from the government are adhering to the nondiscrimination statutes. The statutes require that prior to awarding support or issuing permits, the Federal government shall conduct pre-award reviews to ensure that potential recipients understand their responsibilities to provide services equitable pursuant to the law. Thereafter, during the partnership with the agency, ongoing monitoring will take place to ensure the public is being served without any barriers or discrimination.

Forest Service employees will use form FS–1700–6, Equal Opportunity Compliance Review Record, to collect information regarding actions taken by recipients of Federal financial assistance to ensure the public receives services without discrimination or barriers to access, and that recipients' employees understand their customer service role. Collection will occur during face-to-face meetings or telephone interviews conducted by Forest Service employees as part of the pre-award and post award process. The pre-award interview will take place prior to the award of a grant, signing of a cooperative agreement, letting of commercial special use permit, or similar activity. The post award interview will take place once every 5 years, or upon report/discovery of discrimination.

The information collected will only be shared with other Federal agencies who share in the financial assistance activities with the Forest Service. Monitoring reviews have been a responsibility of the Federal government since 1964. Without the ability to monitor recipients of Federal financial assistance, the Forest Service would not be able to ensure compliance with laws and statutes. The agency would not be aware of potential violations, thereby resulting in potential discriminatory practices.

*Estimate of Annual Burden:* 1 hour.

*Type of Respondents:* Recipients of Federal financial assistance.

*Estimated Annual Number of Respondents:* 11,000.

*Estimated Annual Number of Responses per Respondent:* One.

*Estimated Total Annual Burden on Respondents:* 11,000.

Comment is invited on: (1) Whether this collection of information is necessary for the stated purposes and the proper performance of the functions of the Agency, including whether the

information will have practical or scientific utility; (2) the accuracy of the Agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received in response to this notice, including names and addresses when provided, will be a matter of public record. Comments will be summarized and included in the request for Office of Management and Budget approval.

Dated: July 6, 2011.

**Kathleen Atkinson,**

*Associate Deputy Chief.*

[FR Doc. 2011–17444 Filed 7–11–11; 8:45 am]

**BILLING CODE 3410–11–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Cedar Gulch Mine, Rogue River-Siskiyou National Forest, Josephine County, OR

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of intent to prepare an environmental impact statement.

**SUMMARY:** The Forest Service will prepare a supplemental environmental impact statement (SEIS), to examine surface resource impacts connected with extracting gold from placer deposits within a 4.25-acre (approx.) area, in response to a mining claimant's proposed plan of operations. A Notice of Intent (NOI) was first published for this proposal under the name of Tracy Placer Mine, on April 21, 2006, Volume 71, No. 77, pages 20640–20642. A Notice of Availability was published for the DEIS on March 20, 2009, but due to unforeseen circumstances, the project was put on hold before a comment period was completed. The Forest Service is now preparing a SEIS to address changed conditions and minor changes to the alternatives since the DEIS was first made available. The name of the project is hereby changed to Cedar Gulch Mine to reflect the actual name of the placer claim, rather than the claim owner's name. This is in keeping with Forest Service policy. Proposed mining would occur along the south bank of Sucker Creek, about 11 miles southeast of Cave Junction, Oregon.

The purpose for preparing this SEIS is to forecast and disclose environmental consequences to surface resources, resulting from road use and mine operations, as well as to ascertain reasonable operational terms and conditions needed during development of locatable mineral resources of the United States (as authorized by the Mining Law of 1872, as amended).

**DATES:** The Draft SEIS is expected to be completed in October 2011, and the Final SEIS is expected January 2012.

**ADDRESSES:** A legal notice will be published in the newspaper of record at the time the DSEIS is released for comment. Addresses for comment will be included in the legal notice.

**FOR FURTHER INFORMATION CONTACT:** For technical information or questions, contact Karla Gallegos, Minerals Administrator, at (541) 471–6708.

**SUPPLEMENTARY INFORMATION:**

#### Scope of Environmental Analysis

The scope of this environmental analysis is limited to a review of proposed placer mine operations, including road access to the mine, with regard to potential environmental impacts to affected surface resources. The Forest Service, in implementing the Mining Law of 1872, does not have discretion to deny otherwise lawful locatable minerals mining (entry) where a reasonable plan of operations is proposed. However, Forest Service resource specialists working on this project do aim to fulfill all legally mandated environmental analysis and statement requirements, including thorough consideration of operating terms and conditions that decrease environmental effects. The application of operational terms and conditions are intended to direct mining operations and reclamation activities that minimize adverse effects on National Forest System surface resources (36 CFR 228.1).

#### Preliminary Issues

The interdisciplinary team assigned to this project has identified two significant issues. One of these issues, regarding potential for degradation of Sucker Creek water quality, validated the merit of preparing an SEIS. The two significant issues identified are:

(1) The degree of impact from proposed mine operations related to species listed as threatened under the Endangered Special Act, as amended (specifically coho salmon and the northern spotted owl) and

(2) The degree to which proposed mine operations might increase water temperature, turbidity, or both in Sucker Creek (especially with regard to the potential for a threatened violation of Clean Water Act requirements).

*Preliminary Alternatives*

Three alternatives will be analyzed in the forthcoming draft SEIS: 1), the no action alternative (as required by the National Environmental Policy Act, NEPA), 2), the miner's (claimant's) proposed action (plan of operations), and 3), an alternative mining plan incorporating reasonable terms and conditions that would minimize adverse environmental impacts on National Forest System surface resources.

*Responsible Official*

Roy Bergstrom, District Ranger, Wild Rivers Ranger District, is the Forest Service official responsible for decision-making.

*Nature of Decision To Be Made*

The responsible official will be accountable for disclosing important environmental consequences, identifying the environmentally preferable alternative, and selecting an alternative to implement. He will review the analysis contained in the Cedar Gulch Mine SEIS and make a decision regarding the terms and conditions that shall be required to operate, identifying where, when, and to what extent such terms and conditions are essential to protect surface resources.

Following completion of the draft SEIS, a comment period of no less than 45 calendar days will be allotted beginning on the day after the date EPA publishes the Notice of Availability in the **Federal Register**. At the end of this period, comments submitted to the Forest Service, together with names and addresses of those who responded, will be included in the public record for this proposal and as such will be available for public review. Forest Service officials will analyze, consider and respond to substantive comments submitted for the draft SEIS and will then publish substantive comments and accompanying responses in the final SEIS.

Dated: June 22, 2011.

**Roy Bergstrom,**

*District Ranger.*

[FR Doc. 2011–17414 Filed 7–11–11; 8:45 am]

**BILLING CODE 3410–11–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### San Juan National Forest Resource Advisory Committee

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The San Juan National Forest Resource Advisory Council (RAC) will meet in Durango, Colorado. The committee is meeting as authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) and in compliance with the Federal Advisory Committee Act. The purpose of the meeting is for the appointed Committee members to hear presentations for project proposals and make recommendations for allocations of Title II funds within Archuleta, Dolores and La Plata counties, Colorado.

**DATES:** The meeting will be held Tuesday, August 23, 9 a.m.–3 p.m.

**ADDRESSES:** The meeting will be held at the San Juan Public Lands Center, 15 Burnett Court, Durango, Colorado in the Sonoran Meeting Rooms. Written comments should be sent to Attn: San Juan National Forest RAC, 15 Burnett Court, Durango, CO 81301. Comments may also be sent via e-mail to *abond@fs.fed.us* or via facsimile to Attn: Ann Bond, RAC Coordinator at 970.385.1219.

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 *http://www.fs.fed.us/r2/sanjuan.*

**FOR FURTHER INFORMATION CONTACT:** Ann Bond, San Juan National Forest RAC Coordinator, 970.385.1219 or e-mail: *abond@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.

**SUPPLEMENTARY INFORMATION:** The meeting is open to the public, with legal notices published in local papers of records for the involved counties, along with public announcements. The following business will be conducted: The Committee members will hear project presentations, review project proposals and recommend allocation of Title II funds within Archuleta, Dolores and La Plata counties, Colorado.

Persons who wish to bring related matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting. A public comment period will be provided from 11–11:30 a.m.

Dated: June 29, 2011.

**Bill Dunkelberger,**

*Deputy Forest Supervisor, San Juan Public Lands, San Juan National Forest RAC DFO.*

[FR Doc. 2011–17413 Filed 7–11–11; 8:45 am]

**BILLING CODE 3410–11–P**

## DEPARTMENT OF AGRICULTURE

### Rural Utilities Service

### Announcement of Grant Application Deadlines and Funding Levels

**AGENCY:** Rural Utilities Service, USDA.

**ACTION:** Notice of Funds Availability (NOFA).

**SUMMARY:** The Rural Utilities Service (RUS), an agency of the United States Department of Agriculture, announces the Delta Health Care Services Grant Program application window for Fiscal Year 2011 funding of $2,994,000 in grant funds to be competitively awarded for the Delta Health Care Services Grant Program.

A NOFA was previously published on April 4, 2011, in the **Federal Register**, at 76 FR 18513 announcing the Delta Health Care Services Grant Program application window and the availability of $3,000,000 in grant funds that were provided in fiscal year 2010, to be competitively awarded for the Delta Health Care Services Grant Program.

We have been informed that, due to the serious flooding and devastating tornadoes in the Delta Region, a number of potential applicants could not complete an application in time to meet the application deadline of June 3, 2011 in the notice of funds availability previously published on April 4, 2011, in the **Federal Register**, at 76 FR 18513. We believe that it is in the best interests of the residents of the Delta Region to open a second application period to enable those potential applicants and others to have a chance to benefit from this grant program.

**DATES:** You may submit completed applications for grants according to the following deadlines:

- Paper copies must be postmarked and mailed, shipped, or sent overnight *no later* than August 11, 2011 to be eligible for FY 2011 grant funding. Late or incomplete applications will not be eligible for FY 2011 grant funding.
- Electronic copies must be received by August 11, 2011 to be eligible for FY 2011 grant funding. Late or incomplete applications will not be eligible for FY 2011 grant funding.

**ADDRESSES:** You may obtain application guides and materials for the Delta Health Care Services grants the following ways:

- The Internet at the RUS Telecommunications Programs Web site: *http://www.rurdev.usda.gov/utp_deltahealthcare.html*
- You may also request application guides and materials from RUS by contacting, RUS Office of the Program Advisor at (202) 720–8427.

You may submit:

- Completed paper applications for Delta Health Care Services grants to the Rural Utilities Service, U.S. Department of Agriculture, 1400 Independence Ave., SW., Room 2919, STOP 1541, Washington, DC 20250–1550. Applications should be marked ''Attention: Program Advisor—Telecommunications Program.''
- Electronic grant applications at *http://www.grants.gov/(Grants.gov),* following the instructions you find on that Web site.

**FOR FURTHER INFORMATION CONTACT:** Craig R. Wulf, Program Advisor—Telecommunications Program, Rural Utilities Service, 1400 Independence Ave., SW, Room 2919, STOP 1541, Washington, DC 20250–1550; telephone: 202–720–8427, fax: 202–720–2734.

**EO 13175 Consultations and Coordination With Indian Tribal Governments**

To introduce tribes and tribal leaders in the Delta Region to this program USDA hosted a teleconference on December 7, 2010. USDA extended an invitation to Tribal Leaders of the six Federally recognized Tribes in Mississippi, Louisiana, and Alabama on November 30, 2010. Through this call USDA aimed to review, discuss, and open the door for consultation on this program, in case the tribes brought forward any unanticipated concerns regarding the draft NOFA provisions of the Delta Health Care Services Grant Program, authorized under Section 379G of the Consolidated Farm and Rural Development Act. Three of the six tribes participated on the teleconference on December 7, 2010. It was explained that eligible grant applicants are limited to consortiums or groups of regional institutions of higher education, academic health and research institutes, and economic development entities located in the Delta Region that have experience in addressing the health care issues in the region. It was also articulated that eligible consortiums may include participation with Indian Tribes. The Tribal Leaders did not express any perceived negative impact regarding the draft, and were given

appropriate Rural Development contact information should they have any future concerns regarding the NOFA. As a result of this teleconference, USDA has assessed the impact of this NOFA on Indian Tribal Governments in the Delta Region, and has concluded that this NOFA will not negatively affect the Federally recognized Tribes in the region, or impose substantial direct compliance costs on Indian Tribal Governments, nor preempt tribal law.

**Paperwork Reduction Act**

The Paperwork Reduction Act requires Federal Agencies to seek and obtain Office of Management and Budget (OMB) approval before undertaking a collection of information directed to ten or more persons. In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the agency conducted an analysis to determine the universe of respondents that could meet the eligibility requirements to apply for the Delta Health Care Services Grant Program. It was determined that the eligible number of entities in the Delta Region was fewer than nine and in accordance with 5 CFR part 1320 the agency has not obtained OMB approval of the information collection associated with this NOFA.

**SUPPLEMENTARY INFORMATION:**

**Overview**

*Federal Agency:* Rural Utilities Service (RUS).

*Funding Opportunity Title:* Delta Health Care Services Grant Program.

*Announcement Type:* Initial announcement.

*Catalog of Federal Domestic Assistance (CFDA) Number:* 10.874.

*Due Date for Applications:* August 11, 2011.

**Items in Supplementary Information**



**I. Funding Opportunity**

Advanced telecommunications services play a vital role in the economic development, education, and health care of rural America. The Delta Health Care Services Grant Program is designed to provide financial assistance to address the continued unmet health needs in the Delta Region through cooperation among health care professionals, institutions of higher education, research institutions, and other individuals and entities in the Delta Region. Grant funds may be utilized for the development of health care services; health education programs; health care job training programs; and for the development and expansion of public health-related facilities in the Delta Region. Grants will be awarded to eligible entities in the Delta Region serving communities of no more than 50,000 inhabitants to help to address the longstanding and unmet health needs of the region.

**II. Definitions**

The terms and conditions provided in this NOFA are applicable to and for purposes of this NOFA only.

*Consortium* means a combination or group of regional institutions of higher education, academic health and research institutes, and economic development entities located in the Delta Region that have experience in addressing the health care issues in the region.

*Delta Region* means the 252 counties and parishes within the states of Alabama, Arkansas, Illinois, Kentucky, Louisiana, Mississippi, Missouri, and Tennessee that are served by the Delta Regional Authority. (The Delta Region may be adjusted by future Federal statute.)

*Distance learning* means a telecommunications link to an end user through the use of equipment to: Provide educational programs, instruction, or information originating in one area, whether rural or not, to students and teachers who are located in rural areas; or connect teachers and students located in one rural area with teachers and students that are located in a different rural area.

*Institution of Higher Education* means either a postsecondary (post-high school) educational institution that awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree, or a postsecondary vocational institution that provides a program of training to prepare students for gainful employment in a recognized occupation.

*Rural area* means any area of the United States not included within (a) the boundaries of any incorporated or unincorporated city, village, or borough having a population in excess of 50,000 inhabitants and (b) any urbanized area contiguous and adjacent to a city or town described in clause (a).

*RUS, or the Agency,* means the Rural Utilities Service.

*Telemedicine* means a telecommunications link to an end user through the use of eligible equipment which electronically links medical professionals at separate sites in order to exchange health care information in audio, video, graphic, or other format for the purpose of providing improved health care services primarily to residents of rural areas.

**III. Award Information**

Each entity applying which is not exempted must be registered in the Central Contractors Registration (CCR) prior to submitting an application or Plan for financial assistance and maintain an active CCR registration (review and update on an annual basis) and provide its Dun and Bradstreet (D&B) Data Universal Numbering System (DUNS) number.

RUS is making $2,994,000 available for competitive grants in the Delta Region. The minimum grant amount is $50,000.

Delta Health Care Services grants cannot be renewed. Award documents specify the term of each award. The Agency will make awards and execute documents appropriate to the project prior to any advance of funds to successful applicants. The Agency will consider a one-time request to extend the period for up to 1 year during which grant funding is available.

**IV. Eligibility Information**

*A. Who is eligible for grants?*

1. A Consortium, as defined in section II of this NOFA.

2. The Consortium, itself, does not have to be legally organized. However, at least one member of the Consortium must be legally organized as an incorporated organization, or other legal entity, and have legal authority to contract with the Government. Individuals are not eligible for Delta Health Care Services Grant Program financial assistance directly.

3. At least one member of the Consortium must have legal capacity and authority to carry out the purposes of the projects in its application, and to enter into contracts and to otherwise

comply with applicable Federal statutes and regulations.

4. The Consortium must include at least three entities that: (1) Are regional institutions of higher education, academic health and research institutes, or economic development entities; (2) are located in the Delta Region; and (3) have experience in addressing the health care issues in the Delta Region.

5. The Consortium does not need one entity from each of the three categories, that is, one entity that is a regional institution of higher education, one that is an academic health and research institute, and one entity that is an economic development entity. It may include entities from all three categories, two of the categories, or only one of the categories, so long as there are at least three entities.

6. The Consortium can include additional entities that are not of the type included in the definition of Consortium, and are not located in the Delta Region, so long as the Consortium includes at least three entities that are of the type included in paragraph 4 above.

7. A member of the Consortium may serve as the lead representative for the applicant. A lead representative does not have to be located in a rural area.

*B. What are the basic eligibility requirements for a project?*

1. To be eligible for a grant, the project must serve, and grant funds must be expended in, a rural area in the Delta Region, as defined in this NOFA. However, the applicant need not propose to serve the entire Delta Regional Authority area.

2. Grant funds may be used to finance any of the following:

a. Develop health care services;

b. Develop health education programs;

c. Develop health care job training programs;

d. Develop and expand public health-related facilities in the Delta Region to address longstanding and unmet health needs of the region.

3. Applicants are strongly encouraged to emphasize distance learning and/or telemedicine projects in their proposed use of grant funds.

4. All facilities constructed or leased with grant funds must be new equipment.

5. The total amount for salaries and wages, administrative expenses, and recurring operating costs may not exceed 20 percent of the grant funds.

6. Matching contribution: There is no requirement for matching funds in this program.

7. Facilities constructed or acquired before the completed application is approved by RUS are not eligible for grant funds.

8. Grant funds must be used in rural areas in the Delta Region for eligible purposes, as defined in this section.

**V. Application and Submission Information**

*A. Where To Get Application Information*

The application guide and copies of necessary forms and samples for the Delta Health Care Services Grant Program are available from these sources:

- The Internet at *http://www.rurdev.usda.gov/utp_deltahealthcare.html*
- *http://www.grants.gov*, or,
- For paper copies of these materials: call (202) 720–8427.

*B. How and Where To Submit an Application*

You may file an application in either paper or electronic format. Whether you file a paper or an electronic application, you will need a DUNS number.

1. *DUNS Number.*

As required by the OMB, all applicants for grants must supply a Dun and Bradstreet Data Universal Numbering System (DUNS) number when applying. The Standard Form 424 (SF–424) contains a field for you to use when supplying your DUNS number. Obtaining a DUNS number costs nothing and requires a short telephone call to Dun and Bradstreet. Please see *http://www.grants.gov/applicants/request_duns_number.jsp* for more information on how to obtain a DUNS number or how to verify your organization's number.

2. *Central Contractor Registration (CCR).*

(a) In accordance with 2 CFR part 25, applicants, whether applying electronically or by paper, must be registered in the CCR prior to submitting an application. Applicants may register for the CCR at *https://www.uscontractorregistration.com/* or by calling 1–877–252–2700. Completing the CCR registration process takes up to five business days, and applicants are strongly encouraged to begin the process well in advance of the deadline specified in this notice.

(b) The CCR registration must remain active, with current information, at all times during which an entity has an application under consideration by an agency or has an active Federal Award. To remain registered in the CCR database after the initial registration, the applicant is required to review and update, on an annual basis from the date of initial registration or subsequent updates, its information in the CCR database to ensure it is current, accurate and complete.

For paper applications, send or deliver the applications by the U.S. Postal Service (USPS) or courier delivery services to the RUS receipt point set forth below. RUS will not accept applications by fax or e-mail. Mail or ensure delivery of an original paper application (no stamped, photocopied, or initialed signatures) and one copy by the July 15, 2011, to the following address: Program Advisor, Telecommunications Program, Rural Utilities Service, 1400 Independence Avenue, SW., STOP 1541, Room 2919, Washington, DC 20250–1550. The application and any materials sent with it become Federal records by law and cannot be returned to you.

*C. Submission From Applicants Who Submitted Applications Under the Notice of Funds Availability Which Was Published on April 4, 2011, in the Federal Register, at 76 FR 18513*

1. An applicant who submitted an application under the aforementioned notice of funds availability may submit a new application under this NOFA for a project other than that previously submitted.

2. An applicant may resubmit their original application for consideration under this NOFA so long as the application meets the requirements of this NOFA. Such applications will be first considered under the aforementioned notice of funds availability, and after all funding has been awarded under said notice, will be considering all qualifying new applications under this NOFA.

*D. What constitutes a completed application?*

1. Detailed information on each item required can be found in the Delta Health Care Services Grant Program application guide. The program's application guide provides specific guidance on each of the items listed and also provides all necessary forms and sample worksheets.

2. A completed application must include the following: Documentation, studies, reports, and information listed below, in form satisfactory to RUS. Applications should be prepared in conformance with applicable USDA regulations including 7 CFR parts 3015, 3016, and 3019. Applicants must use the application guide for this program containing instructions and all necessary forms, as well as other important information, in preparing

their application. Completed applications must include the following:

a. *An Application for Federal Assistance.* A completed Standard Form (SF) 424.

b. *Evidence of eligibility.* Evidence of the applicant's eligibility to apply under this Notice, demonstrating that the applicant is a consortium as defined in this Notice.

c. *A project abstract.* A one page summary not to exceed one page, suitable for dissemination to the public and to Congress.

d. *Executive summary.* An executive summary of the project describing its purpose, not to exceed two pages.

e. *Scoring documentation.* The grant applicant must address and provide documentation on how it meets each of the scoring criteria, specifically the rurality of the project area and communities served, the community needs and benefits derived from the project, and project management and organization capability.

f. *Service area maps.* Maps with sufficient detail to show the area that will benefit from the proposed facilities and services, and the location of facilities purchased with grant funds.

g. *Scope of work.* The scope of work must include (1) the specific activities and services, such as programs and training, to be performed under the project, (2) the facilities to be purchased or constructed, in addition to who will carry out the activities and services, and specific time frames for completion and (3) documentation regarding how the applicant solicited input for the project from local governments, public health care providers, and other entities in the Delta Region.

h. *Budget.* The applicant must provide a budget showing the line item costs for all capital and operating expenditures eligible for the grant funds, and other sources of funds necessary to complete the project.

i. *Financial information and sustainability.* The applicant must provide current financial statements and a narrative description demonstrating sustainability of the project, all of which show sufficient resources and expertise to undertake and complete the project and how the project will be sustained following completion.

j. *Statement of experience.* The applicant must provide a written narrative describing its demonstrated capability and experience in addressing the health care issues in the Delta Region and in managing and operating a project similar to the proposed project.

k. *Evidence of legal authority and existence.* At least one member of the Consortium must provide evidence of its legal existence and authority to enter into a grant agreement with the Rural Utilities Service and perform the activities proposed under the grant application.

l. *Compliance with other Federal statutes.* The applicant must provide evidence or certification that it is in compliance with all applicable Federal statutes and regulations, including, but not limited to the following (sample certifications are provided in the application guide.):

(1) Equal Opportunity and Nondiscrimination;

(2) Architectural barriers;

(3) Flood hazard area precautions;

(4) Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970;

(5) Drug-Free Workplace Act of 1998 (41 U.S.C. 701 *et seq.*);

(6) Debarment, Suspension; and Other Responsibility Matters—Primary Covered Transactions;

(7) Lobbying for Contracts, Grants, Loans, and Cooperative Agreements (31 U.S.C. 1352).

m. *Environmental impact and historic preservation.* The applicant must provide details of the project's impact on the environment and historic preservation, and comply with 7 CFR part 1794, which contains the Agency's policies and procedures for implementing a variety of Federal statutes, regulations, and executive orders generally pertaining to the protection of the quality of the human environment. This must be contained in a separate section entitled ''Environmental Impact of the Project'' and must include the Environmental Questionnaire/Certification describing the impact of the project. The Environmental Questionnaire/Certification is available on the RUS Telecommunications Programs Website at: *http://www.rurdev.usda.gov/utp_deltahealthcare.html.* Submission of the Environmental Questionnaire/Certification alone does not constitute compliance with 7 CFR part 1794.

n. Each application must include an acknowledgement from each member of the Consortium that it is a member of the Consortium. This acknowledgement must be on each entity's letterhead and signed by an authorized representative of the entity.

## VI. Application Review Information

### *A. Criteria*

1. Grant applications are scored competitively and subject to the criteria listed below.

2. Grant application scoring criteria are detailed in the Delta Health Care Services Grant Application Guide. There are 100 points available, broken down as follows:

a. The Rurality of the Project area and communities served. (up to 40 points);

b. The Community Needs and Benefits Derived from the project. (up to 45 points); and

c. The Project Management and Organization capability. (up to 15 points).

### *B. Grant Review standards*

1. All applications for grants must be delivered to RUS at the address specified in this notice, or submitted electronically to *http://www.grants.gov/* (Grants.gov) to be eligible for funding. RUS will review each application for conformance with the provisions of this part. RUS may contact the applicant for additional information or clarification.

2. Applications conforming with this part will be evaluated competitively by RUS employees, and will be awarded points as described in the Delta Health Care Services Grant Application Guide. Applications will be ranked and grants awarded in rank order until all grant funds are expended.

3. Regardless of the score an application receives, if RUS determines that the Project is technically or financially infeasible, the Agency will notify the applicant, in writing, and the application will be returned and will not be considered for funding.

### *C. Scoring Guidelines*

1. The applicant's self scores in Rurality will be checked and, if necessary, corrected by RUS.

2. The Community Needs and Benefits derived from the project score will be determined by RUS based on information presented in the application. The Community Needs and Benefits score is a subjective score based on the reviewer's assessment of the supporting arguments made in the application. The score aims to assess how the project's purpose and goals benefit the residents in the Delta Region.

3. The Project Management and Organization Capability score will be determined by RUS based on information presented in the application. RUS will evaluate the applicant's experience, past performance, and accomplishments addressing health care issues to ensure effective project implementation.

### *D. Selection Process*

Grant applications are ranked by final score. RUS selects applications based on those rankings, subject to availability of funds. Rural Development has the authority to limit the number of

applications selected in any one state, or from any applicant.

**VII. Award Administration Information**

*A. Award Notices*

RUS recognizes that each funded project is unique, and therefore may attach conditions to different projects' award documents. The Agency generally notifies applicants whose projects are selected for awards by faxing an award letter. The Agency follows the award letter with a grant agreement that contains all the terms and conditions for the grant. An applicant must execute and return the grant agreement, accompanied by any additional items required by the grant agreement.

*B. Administrative and National Policy Requirements*

The items listed in Section V of this notice and the Delta Health Care Services Grant Application Guide and accompanying materials implement the appropriate administrative and national policy requirements.

*C. Performance Reporting*

All recipients of Delta Health Care Services Grant Program financial assistance must provide annual performance activity reports to RUS until the project is complete and the funds are expended. A final performance report is also required; the final report may serve as the last annual report. The final report must include an evaluation of the success of the project.

*D. Recipient and Subrecipient Reporting*

The applicant must have the necessary processes and systems in place to comply with the reporting requirements for first-tier sub-awards and executive compensation under the Federal Funding Accountability and Transparency Act of 2006 in the event the applicant receives funding unless such applicant is exempt from such reporting requirements pursuant to 2 CFR part 170, § 170.110(b). The reporting requirements under the Transparency Act pursuant to 2 CFR part 170 are as follows:

1. First Tier Sub-Awards of $25,000 or more in non-Recovery Act funds (unless they are exempt under 2 CFR part 170) must be reported by the Recipient to *http://www.fsrs.gov* no later than the end of the month following the month the obligation was made.

2. The Total Compensation of the Recipient's Executives (5 most highly compensated executives) must be reported by the Recipient (if the Recipient meets the criteria under 2 CFR part 170) to *http://www.ccr.gov* by the end of the month following the month in which the award was made.

3. The Total Compensation of the Subrecipient's Executives (5 most highly compensated executives) must be reported by the Subrecipient (if the Subrecipient meets the criteria under 2 CFR part 170) to the Recipient by the end of the month following the month in which the subaward was made.

**VIII. Agency Contacts**

A. *Web site: http://www.rurdev.usda.gov/Utilities_LP.html.* The Web site maintains up-to-date resources and contact information for the Delta Health Care Services Grant Program.

B. *Phone:* 202–720–8427.

C. *Fax:* 202–720–2734.

D. *Main point of contact:* Program Advisor, Telecommunications Program, RUS.

Dated: July 6, 2011.

**Jonathan Adelstein,**

*Administrator, Rural Utilities Service.*

[FR Doc. 2011–17458 Filed 7–11–11; 8:45 am]

**BILLING CODE P**

## BROADCASTING BOARD OF GOVERNORS

### Government in the Sunshine Act Meeting Notice

**DATE AND TIME:** Thursday, July 14, 2011, 4 p.m.

**PLACE:** Cohen Building, Room 3321, 330 Independence Ave., SW., Washington, DC 20237.

**SUBJECT:** Notice of Meeting of the Broadcasting Board of Governors.

**SUMMARY:** The Broadcasting Board of Governors (BBG) will be meeting at the time and location listed above. The BBG will receive and consider recommendations regarding the reorganization of the IBB and BBG staffs, the revision of Agency grant agreements, and actions in response to regional review studies. The BBG will receive reports from: Individual Governors regarding recent activities or trips; the BBG's Strategy and Budget Committee and Governance Committee; the International Broadcasting Bureau Director; and the Voice of America, the Office of Cuba Broadcasting, Radio Free Europe/Radio Liberty, Radio Free Asia, and the Middle East Broadcasting Networks regarding programming coverage updates. The meeting is open to public observation via streamed webcast, both live and on-demand, on the BBG's public Web site at *http://www.bbg.gov.*

**CONTACT PERSON FOR MORE INFORMATION:** Persons interested in obtaining more information should contact Paul Kollmer-Dorsey at (202) 203–4545.

**Paul Kollmer-Dorsey,**

*Deputy General Counsel.*

[FR Doc. 2011–17566 Filed 7–8–11; 4:15 pm]

**BILLING CODE 8610–01–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–827]**

### Certain Cased Pencils From the People's Republic of China: Continuation of Antidumping Duty Order

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

**DATES:** *Effective Date:* July 12, 2011.

**SUMMARY:** As a result of the determinations by the Department of Commerce (''Department'') and the International Trade Commission (''ITC'') that revocation of the antidumping duty order on certain cased pencils from the People's Republic of China (''PRC'') would likely lead to a continuation or recurrence of dumping and material injury to an industry in the United States, the Department is publishing a notice of continuation of the antidumping duty order.

**FOR FURTHER INFORMATION CONTACT:** Mahnaz Khan or Yasmin Nair, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0914 and (202) 482–3813, respectively.

**SUPPLEMENTARY INFORMATION:** On November 1, 2010, the Department published in the **Federal Register** the notice of initiation of the third sunset review of the antidumping duty order on certain cased pencils from the PRC, pursuant to section 751(c)(2) of the Tariff Act of 1930, as amended (''the Act''). *See Initiation of Five-Year (''Sunset'') Review,* 75 FR 67082 (November 1, 2010).

As a result of its review, the Department determined that revocation of the antidumping duty order on certain cased pencils from the PRC would likely lead to a continuation or recurrence of dumping and, therefore, notified the ITC of the magnitude of the margins likely to prevail should the order be revoked. *See Certain Cased Pencils from the People's Republic of*

*China: Final Results of the Expedited Third Sunset Review of the Antidumping Duty Order,* 76 FR 12323 (March 7, 2011).

On July 1, 2011, the ITC determined, pursuant to section 751(c)(1) of the Act, that revocation of the antidumping duty order on certain cased pencils from the PRC would likely lead to a continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. *See Cased Pencils from China,* 76 FR 38697 (July 1, 2011), and *USITC Publication 4239* (June 2011), Cased Pencils from China, Investigation No. 731–TA–669 (Third Review).

**Scope of the Order**

Imports covered by the order are shipments of certain cased pencils of any shape or dimension (except as described below) which are writing and/or drawing instruments that feature cores of graphite or other materials, encased in wood and/or man-made materials, whether or not decorated and whether or not tipped (*e.g.,* with erasers, etc.) in any fashion, and either sharpened or unsharpened. The pencils subject to the order are currently classifiable under subheading 9609.10.00 of the Harmonized Tariff Schedule of the United States (''HTSUS''). Specifically excluded from the scope of the order are mechanical pencils, cosmetic pencils, pens, non-cased crayons (wax), pastels, charcoals, chalks, and pencils produced under U.S. patent number 6,217,242, from paper infused with scents by the means covered in the above-referenced patent, thereby having odors distinct from those that may emanate from pencils lacking the scent infusion. Also excluded from the scope of the order are pencils with all of the following physical characteristics: (1) *Length:* 13.5 or more inches; (2) *sheath diameter:* not less than one-and-one quarter inches at any point (before sharpening); and (3) *core length:* Not more than 15 percent of the length of the pencil.

In addition, pencils with all of the following physical characteristics are excluded from the scope of the order: Novelty jumbo pencils that are octagonal in shape, approximately ten inches long, one inch in diameter before sharpening, and three-and-one eighth inches in circumference, composed of turned wood encasing one-and-one half inches of sharpened lead on one end and a rubber eraser on the other end.

Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

**Continuation of the Order**

As a result of these determinations by the Department and the ITC that revocation of the antidumping duty order would likely lead to a continuation or recurrence of dumping and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, the Department hereby orders the continuation of the antidumping order on certain cased pencils from the PRC. U.S. Customs and Border Protection will continue to collect antidumping duty cash deposits at the rates in effect at the time of entry for all imports of subject merchandise. The effective date of the continuation of the order will be the date of publication in the **Federal Register** of this notice of continuation. Pursuant to sections 751(c)(2) and 751(c)(6) of the Act, the Department intends to initiate the next five-year review of the order not later than 30 days prior to the fifth anniversary of the effective date of continuation.

This five-year (sunset) review and this notice are in accordance with section 751(c) of the Act and published pursuant to section 777(i)(1) of the Act.

Dated: July 6, 2011.

**Ronald K. Lorentzen,**

*Deputy Assistant Secretary for Import Administration.*

[FR Doc. 2011–17499 Filed 7–11–11; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–549–822]**

### Certain Frozen Warmwater Shrimp From Thailand: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination

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

**SUMMARY:** On March 4, 2011, the Department of Commerce (the Department) published the preliminary results of the administrative review of the antidumping duty order on certain frozen warmwater shrimp (shrimp) from Thailand. This review covers 152 producers/exporters of the subject merchandise to the United States. The period of review (POR) is February 1, 2009, through January 31, 2010.

Based on our analysis of the comments received on the preliminary results, we have made certain changes in the margin calculations. Therefore, the final results differ from the preliminary results. The final weighted-average dumping margins for the reviewed firms are listed below in the section entitled ''Final Results of Review.''

**DATES:** *Effective Date:* July 12, 2011.

**FOR FURTHER INFORMATION CONTACT:** Blaine Wiltse or Holly Phelps, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–6345 or (202) 482–0656, respectively.

**SUPPLEMENTARY INFORMATION:**

**Background**

This review covers 152 producers/exporters. The respondents which the Department selected for individual examination are Marine Gold Products, Ltd. (MRG) and Pakfood Public Company Limited and its affiliated subsidiaries (collectively, ''Pakfood'').[1] The respondents which were not selected for individual examination are listed in the ''Final Results of Review'' section of this notice.

On March 4, 2011, the Department published in the **Federal Register** the preliminary results of administrative review of the antidumping duty order on shrimp from Thailand. *See Certain Frozen Warmwater Shrimp From Thailand: Preliminary Results of Antidumping Duty Administrative Review and Preliminary No Shipment Determination,* 76 FR 12033 (Mar. 4, 2011) (*Preliminary Results*). We invited parties to comment on the *Preliminary Results.*

In April 2011, we received case and rebuttal briefs from the Ad Hoc Shrimp Trade Action Committee (the petitioner), the American Shrimp Processors Association and the Louisiana Shrimp Association (collectively, ''the processors''), MRG, and Pakfood.

The Department has conducted this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

**Scope of the Order**

The scope of this order includes certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,[2]

[1] These subsidiaries are: Asia Pacific (Thailand) Company Ltd., Chaophraya Cold Storage Co., Ltd., Okeanos Co., Ltd., Okeanos Food Co., Ltd., and Takzin Samut Co., Ltd.

[2] ''Tails'' in this context means the tail fan, which includes the telson and the uropods.

deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of this order, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTSUS), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannemei*), banana prawn (*Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of this order. In addition, food preparations, which are not ''prepared meals,'' that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of this order.

Excluded from the scope are: (1) Breaded shrimp and prawns (HTSUS subheading 1605.20.10.20); (2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell-on or peeled (HTSUS subheadings 0306.23.00.20 and 0306.23.00.40); (4) shrimp and prawns in prepared meals (HTSUS subheading 1605.20.05.10); (5) dried shrimp and prawns; (6) canned warmwater shrimp and prawns (HTSUS subheading 1605.20.10.40); (7) certain dusted shrimp; and (8) certain battered shrimp. Dusted shrimp is a shrimp-based product: (1) That is produced from fresh (or thawed-from-frozen) and peeled shrimp; (2) to which a ''dusting'' layer of rice or wheat flour of at least 95 percent purity has been applied; (3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; (4) with the non-shrimp content of the end product constituting between four and ten percent of the product's total weight after being dusted, but prior to being frozen; and (5) that is subjected to IQF freezing immediately after application of the dusting layer. Battered shrimp is a shrimp-based product that, when dusted in accordance with the definition of dusting above, is coated with a wet viscous layer containing egg and/or milk, and par-fried.

The products covered by this order are currently classified under the following HTSUS subheadings: 0306.13.00.03, 0306.13.00.06, 0306.13.00.09, 0306.13.00.12, 0306.13.00.15, 0306.13.00.18, 0306.13.00.21, 0306.13.00.24, 0306.13.00.27, 0306.13.00.40, 1605.20.10.10, and 1605.20.10.30. These HTSUS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of this order is dispositive.

**Period of Review**

The POR is February 1, 2009, through January 31, 2010.

**Determination of No Shipments**

As noted in the *Preliminary Results*, we received no-shipment claims from 14 companies named in the *Initiation Notice*, and we confirmed the claims from 12 of these companies with U.S. Customs and Border Protection (CBP). Because we find that the record indicates that these 12 companies did not export subject merchandise to the United States during the POR, we determine that they had no reviewable transactions during the POR. These companies are:

(1) American Commercial Transport, Inc.
(2) Ampai Frozen Food Co., Ltd.
(3) Far East Cold Storage Co., Ltd.
(4) Grobest Frozen Foods Co., Ltd.
(5) Inter-Oceanic Resources Co., Ltd.
(6) Leo Transport Corporation Ltd.[3]
(7) Mahachai Food Processing Co., Ltd.
(8) S. Khonkaen Food Industry Public Co., Ltd.
(9) Siam Marine Frozen Foods Co., Ltd.
(10) Siam Ocean Frozen Foods Co. Ltd.
(11) Thai Union Manufacturing Co., Ltd.
(12) V. Thai Food Product Co., Ltd.[4]

*See Preliminary Results,* 76 FR at 12035–12036.

As we stated in the *Preliminary Results*, our former practice concerning respondents submitting timely no-shipment certifications was to rescind the administrative review with respect to those companies if we were able to confirm the no-shipment certifications through a no-shipment inquiry with CBP. *See Antidumping Duties; Countervailing Duties; Final rule*, 62 FR 27296, 27393 (May 19, 1997); *see also Stainless Steel Sheet and Strip in Coils from Taiwan: Final Results of Antidumping Duty Administrative Review*, 75 FR 76700, 76701 (Dec. 9, 2010). As a result, in such circumstances, we normally instructed CBP to liquidate any entries from the no-shipment company at the deposit rate in effect on the date of entry.

In our May 6, 2003, clarification of the ''automatic assessment'' regulation, we explained that, where respondents in an administrative review demonstrate that they had no knowledge of sales through resellers to the United States, we would instruct CBP to liquidate such entries at the all-others rate applicable to the proceeding. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003) (*Assessment Policy Notice*).

As noted in the *Preliminary Results*, because ''as entered'' liquidation instructions do not alleviate the concerns which the May 2003 clarification was intended to address, we find it appropriate in this case to instruct CBP to liquidate any existing entries of merchandise produced by the above listed companies and exported by other parties at the all-others rate. In addition, we continue to find that it is more consistent with the May 2003 clarification not to rescind the review in part in these circumstances but, rather, to complete the review with respect to the 12 companies listed above and issue appropriate instructions to CBP based on the final results of this administrative review. *See* the ''Assessment Rates'' section of this notice below.

With respect to the two companies which submitted deficient statements of no shipments during the POR, A. Wattanachai Frozen Products Co., Ltd. (Wattanachai) and Calsonic Kansei (Thailand) Co., Ltd.'s (Calsonic), we continue to find that there is insufficient evidence on the record of this review to conclude that these companies made no shipments of subject merchandise to the United States during the POR. Therefore, we are continuing to include both companies in this administrative review for the final results.

**Cost of Production**

As discussed in the *Preliminary Results*, we conducted an investigation to determine whether MRG and Pakfood

[3] This company was listed in the *Initiation Notice* as Leo Transports.

[4] This company was listed in the *Initiation Notice* as V Thai Food Product.

made home market sales of the foreign like product during the POR at prices below their costs of production (COP) within the meaning of section 773(b) of the Act. *See Preliminary Results*, 76 FR at 12039–12040. For these final results, we performed the cost test following the same methodology as in the *Preliminary Results*.

We found 20 percent or more of each respondent's sales of a given product during the reporting period were at prices less than the weighted-average COP for this period. Thus, we determined that these below-cost sales were made in ''substantial quantities'' within an extended period of time and at prices which did not permit the recovery of all costs within a reasonable period of time in the normal course of trade. *See* sections 773(b)(1)–(2) of the Act.

Therefore, for purposes of these final results, we continue to find that MRG and Pakfood made below-cost sales not in the ordinary course of trade. Consequently, we disregarded these sales for each respondent and used the remaining sales as the basis for determining NV pursuant to section 773(b)(1) of the Act. For those U.S. sales of subject merchandise for which there were no home market sales in the ordinary course of trade, we compared constructed export prices or export prices, as appropriate, to constructed value in accordance with section 773(a)(4) of the Act.

**Analysis of Comments Received**

All issues raised in the case briefs by parties to this administrative review, are listed in the Appendix to this notice and addressed in the Issues and Decision Memorandum (Decision Memo), which is adopted by this notice. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum, which is on file in the Central Records Unit, room 7046, of the main Department building.

In addition, a complete version of the Decision Memo can be accessed directly on the Web at *http://ia.ita.doc.gov/frn/*. The paper copy and electronic version of the Decision Memo are identical in content.

**Changes Since the Preliminary Results**

Based on our analysis of the comments received, we have made certain changes in the margin calculations. These changes are discussed in the relevant sections of the Decision Memo.

**Final Results of Review**

We determine that the following weighted-average margin percentages exist for the period February 1, 2009, through January 31, 2010:

| Manufacturer/exporter | Percent margin |
|---|---|
| Marine Gold Products, Ltd | *0.41 |
| Pakfood Public Company Limited/Asia Pacific (Thailand) Co., Ltd./ Chaophraya Cold Storage Co., Ltd./Okeanos Co. Ltd./ Okeanos Food Co. Ltd./Takzin Samut Co., Ltd | 0.73 |

* (*de minimis*.)

*Review-Specific Average Rate Applicable to the Following Companies:* [5]

| Manufacturer/exporter | Percent margin |
|---|---|
| A. Wattanachai Frozen Products Co., Ltd | 0.73 |
| A.S. Intermarine Foods Co., Ltd | 0.73 |
| ACU Transport Co., Ltd | 0.73 |
| American Commercial Transport (Thailand) | * |
| Ampai Frozen Food Co., Ltd | * |
| Apex Maritime (Thailand) Co., Ltd | 0.73 |
| Apex Maritime Thailand | 0.73 |
| Asian Seafoods Coldstorage Public Co., Ltd./Asian Seafoods Coldstorage (Suratthani) Co./STC Foodpak Ltd | 0.73 |
| Assoc. Commercial Systems | 0.73 |
| B.S.A. Food Products Co., Ltd | 0.73 |
| Bangkok Dehydrated Marine Product Co., Ltd | 0.73 |
| Best Fruits | 0.73 |
| C.P. Merchandising Co., Ltd | 0.73 |
| C Y Frozen Food Co., Ltd | 0.73 |
| Calsonic Kansei (Thailand) Co., Ltd | 0.7 |
| Century Industries Co., Ltd | 0.73 |
| Chaivaree Marine Products Co., Ltd | 0.73 |
| Chaiwarut Co., Ltd | 0.73 |
| Charoen Pokphand Foods Public Co., Ltd | 0.73 |
| Chue Eie Mong Eak | 0.73 |
| Conair Intertraffic Co., Ltd | 0.73 |
| Core Seafood Processing Co., Ltd | 0.73 |
| Crystal Frozen Foods Co., Ltd. and/or Crystal Seafood | 0.73 |
| Daedong (Thailand) Co. Ltd | 0.73 |
| Daiei Taigen (Thailand) Co., Ltd | 0.73 |
| Daiho (Thailand) Co., Ltd | 0.73 |
| Dextrans Worldwide (Thailand) Ltd | 0.73 |
| Dragon International Furniture Co., Ltd | 0.73 |
| Earth Food Manufacturing Co., Ltd | 0.73 |
| Enburg Food Thai Co., Ltd | 0.73 |

[5] This rate is based on the margins calculated for those companies selected for individual review, excluding *de minimis* margins or margins based entirely on adverse facts available.

| Manufacturer/exporter | Percent margin |
|---|---|
| Extra Maritime Co., Ltd | 0.73 |
| F.A.I.T. Corporation Limited | 0.73 |
| Far East Cold Storage Co., Ltd | * |
| Findus (Thailand) Ltd | 0.73 |
| Fortune Frozen Foods (Thailand) Co., Ltd | 0.73 |
| Frozen Marine Products Co., Ltd | 0.73 |
| Fujitsu General (Thailand) Co., Ltd | 0.73 |
| Gallant Ocean (Thailand) Co., Ltd./Gallant Seafoods Corporation | 0.73 |
| Golden Sea Frozen Foods Co., Ltd | 0.73 |
| Good Fortune Cold Storage Co., Ltd | 0.73 |
| Good Luck Product Co., Ltd | 0.73 |
| Great Food (Dehydration) Co., Ltd | 0.73 |
| Grobest Frozen Foods Co., Ltd | * |
| Gulf Coast Crab Intl | 0.73 |
| H.A.M. International Co., Ltd | 0.73 |
| Heng Seafood Limited Partnership | 0.73 |
| Herba Bangkok S.L | 0.73 |
| Heritrade Co., Ltd | 0.73 |
| HIC (Thailand) Co., Ltd | 0.73 |
| I.T. Foods Industries Co., Ltd | 0.73 |
| Inter-Furnitech Co., Ltd | 0.73 |
| Inter-Oceanic Resources Co., Ltd | * |
| Inter-Pacific Marine Products Co., Ltd | 0.73 |
| Inter-Taste Foods Co., Ltd | 0.73 |
| K Fresh | 0.73 |
| K. D. Trading Co., Ltd | 0.73 |
| KF Foods | 0.73 |
| K.L. Cold Storage Co., Ltd | 0.73 |
| K & U Enterprise Co., Ltd | 0.73 |
| Kiang Huat Sea Gull Trading Frozen Food Public Co., Ltd | 0.73 |
| Kingfisher Holdings Ltd | 0.73 |
| Kibun Trdg | 0.73 |
| Klang Co., Ltd | 0.73 |
| Kitchens of the Ocean (Thailand) Ltd | 0.73 |
| Kongphop Frozen Foods Co., Ltd | 0.73 |
| Kosamut Frozen Foods Co., Ltd | 0.73 |
| Lee Heng Seafood Co., Ltd | 0.73 |
| Leo Transports | * |
| Maersk Line | 0.73 |
| Magnate & Syndicate Co., Ltd | 0.73 |
| Mahachai Food Processing Co., Ltd | * |
| May Ao Co., Ltd./May Ao Foods Co., Ltd | 0.73 |
| Meyer Industries Ltd | 0.73 |
| Namprik Maesri Ltd. Part | 0.73 |
| Narong Seafood Co., Ltd | 0.73 |
| National Starch and Chemical Thailand Ltd | 0.73 |
| Noble Marketing Co., Ltd | 0.73 |
| NR Instant Produce Co., Ltd | 0.73 |
| Oki Data Manufacturing (Thailand) Co., Ltd | 0.73 |
| Ongkorn Cold Storage Co., Ltd./Thai-Ger Marine Co., Ltd | 0.73 |
| Orion Electric Co., Ltd | 0.73 |
| Pacific Queen Co., Ltd | 0.73 |
| Penta Impex Co., Ltd | 0.73 |
| Pinwood Nineteen Ninety Nine | 0.73 |
| Pioneer Manufacturing (Thailand) Co., Ltd | 0.73 |
| Piti Seafoods Co., Ltd | 0.73 |
| Premier Frozen Products Co., Ltd | 0.73 |
| Preserved Food Specialty Co., Ltd | 0.73 |
| Protainer International Co., Ltd | 0.73 |
| Queen Marine Food Co., Ltd | 0.73 |
| Rayong Coldstorage (1987) Co., Ltd | 0.73 |
| S&D Marine Products Co., Ltd | 0.73 |
| S&P Aquarium | 0.73 |
| S&P Syndicate Public Company Ltd | 0.73 |
| S. Chaivaree Cold Storage Co., Ltd | 0.73 |
| S. Khonkaen Food Industry Public Co., Ltd. and/or S. Khonkaen Food Ind Public | * |
| SMP Foods Products Co., Ltd | 0.73 |
| Samui Foods Company Limited | 0.73 |
| Sea Bonanza Food Co., Ltd | 0.73 |
| Seafoods Enterprise Co., Ltd | 0.73 |
| Seafresh Fisheries/Seafresh Industry Public Co., Ltd | 0.73 |
| Siam Food Supply Co., Ltd | 0.73 |
| Siam Intersea Co., Ltd | 0.73 |
| Siam Marine Products Co. Ltd | 0.73 |

| Manufacturer/exporter | Percent margin |
|---|---|
| Siam Marine Frozen Foods Co., Ltd | * |
| Siam Ocean Frozen Foods Co. Ltd | * |
| Siam Union Frozen Foods | 0.73 |
| Siamchai International Food Co., Ltd | 0.73 |
| Smile Heart Foods Co. Ltd | 0.73 |
| Southport Seafood Company Limited | 0.73 |
| Suntechthai Intertrading Co., Ltd | 0.73 |
| Surapon Nichirei Foods Co., Ltd | 0.73 |
| Surapon Seafoods Public Co., Ltd./Surapon Foods Public Co., Ltd./Surat Seafoods Co., Ltd | 0.73 |
| Suratthani Marine Products Co., Ltd | 0.73 |
| Suree Interfoods Co., Ltd | 0.73 |
| T.H.I. Group (Bangkok) Co., Ltd | 0.73 |
| T.P. Food Canning Ltd., Part | 0.73 |
| T.S.F. Seafood Co., Ltd | 0.73 |
| Tanaya International Co., Ltd | 0.73 |
| Tanaya Intl | 0.73 |
| Teppitak Seafood Co., Ltd | 0.73 |
| Tey Seng Cold Storage Co., Ltd | 0.73 |
| Tep Kinsho Foods Co., Ltd | 0.73 |
| Thai Agri Foods Public Co., Ltd | 0.73 |
| Thai Frozen Foods Co., Ltd | 0.73 |
| Thai Lee Agriculture Co., Ltd | 0.73 |
| Thai Mahachai Seafood Products Co., Ltd | 0.73 |
| Thai Ocean Venture Co., Ltd | 0.73 |
| Thai Onono Public Co., Ltd | 0.73 |
| Thai Patana Frozen | 0.73 |
| Thai Prawn Culture Center Co., Ltd | 0.73 |
| Thai Royal Frozen Food Co. Ltd | 0.73 |
| Thai Spring Fish Co., Ltd | 0.73 |
| Thai Union Frozen Products Public Co., Ltd./Thai Union Seafood Co., Ltd | 0.73 |
| Thai Union Manufacturing Co., Ltd. and/or Thai Union Mfg | * |
| Thai World Imp & Exp Co | 0.73 |
| Thai Yoo Ltd., Part | 0.73 |
| Thaveevong Industry Co., Ltd | 0.73 |
| The Siam Union Frozen Foods Co., Ltd | 0.73 |
| The Union Frozen Products Co., Ltd./Bright Sea Co., Ltd | 0.73 |
| Trang Seafood Products Public Co., Ltd | 0.73 |
| Transamut Food Co., Ltd | 0.73 |
| Tung Lieng Trdg | 0.73 |
| United Cold Storage Co., Ltd | 0.73 |
| V Thai Food Product Co. Ltd | * |
| Wann Fisheries Co., Ltd | 0.73 |
| Xian-Ning Seafood Co., Ltd | 0.73 |
| Yeenin Frozen Foods Co., Ltd | 0.73 |
| YHS Singapore Pte | 0.73 |
| ZAFCO TRDG | 0.73 |

* No shipments or sales subject to this review.

**Assessment Rates**

The Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries.

Pursuant to 19 CFR 351.212(b)(1), because MRG and Pakfood reported the entered value for certain of their U.S. sales, we have calculated importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of the sales for which entered value was reported. To determine whether the duty assessment rates are *de minimis,* in accordance with the requirement set forth in 19 CFR 351.106(c)(2), we have calculated importer-specific *ad valorem* ratios based on the entered value.

For the remainder of MRG's and Pakfood's U.S. sales, we note that these companies did not report the entered value for the U.S. sales in question. Therefore, we have calculated importer-specific per-unit duty assessment rates by aggregating the total amount of antidumping duties calculated for the examined sales and dividing this amount by the total quantity of those sales. With respect to MRG's and Pakfood's U.S. sales of shrimp with sauce for which no entered value was reported, we have included the total quantity of the merchandise with sauce in the denominator of the calculation of the importer-specific rate because CBP will apply the per-unit duty rate to the total quantity of merchandise entered, including the sauce weight. To determine whether the duty assessment rates are *de minimis,* in accordance with the requirement set forth in 19 CFR 351.106(c)(2), we have calculated importer-specific *ad valorem* ratios based on the estimated entered value.

For the companies which were not selected for individual review, we have assigned these companies Pakfood's rate for the final results, as this rate is the only calculated rate above *de minimis.*

Pursuant to 19 CFR 351.106(c)(2), we will instruct CBP to liquidate without regard to antidumping duties any entries for which the assessment rate is *de minimis* (*i.e.,* less than 0.50 percent). The Department intends to issue assessment instructions to CBP 15 days after the date of publication of these final results of review.

The Department clarified its ''automatic assessment'' regulation on

May 6, 2003. *See Assessment Policy Notice.* This clarification will apply to entries of subject merchandise during the POR produced by companies included in these final results of review for which the reviewed companies did not know their merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate established in the *Section 129 Determination*[6] if there is no rate for the intermediate company(ies) involved in the transaction.

**Cash Deposit Requirements**

The following cash deposit requirements will be effective for all shipments of subject merchandise[7] entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided for by section 751(a)(2)(C) of the Act: (1) The cash deposit rates for the reviewed companies will be the rates shown above, except if the rate is less than 0.50 percent, *de minimis* within the meaning of 19 CFR 351.106(c)(1), the cash deposit will be zero; (2) for previously reviewed or investigated companies not listed above, as well as those companies listed in the ''Determination of No Shipments'' section, above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, or the less-than-fair-value investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 5.34 percent, the all-others rate made effective by the *Section 129 Determination.* These deposit requirements shall remain in effect until further notice.

**Notification to Importers**

This notice serves as a final reminder to importers of their responsibility, under 19 CFR 351.402(f)(2), to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

**Notification to Interested Parties**

This notice serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing these results of review in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: July 5, 2011.

**Ronald K. Lorentzen,**

*Deputy Assistant Secretary for Import Administration.*

**Appendix—Issues in Decision Memorandum**

*General Issues*

1. Offsets for Negative Margins
2. Setting the Date for Window Period Sales
3. Allegation of a Particular Market Situation in Thailand
4. Calculation of the Rate Applied to Non-Selected Companies
5. Clerical Errors in the Preliminary Results
6. Treatment of Sauce and Glaze in the Calculation of Gross Unit Price

*Company-Specific Comments*

7. Calculation of General and Administrative Expenses for Pakfood Public Company Limited and its Affiliates
8. Calculation of Cost of Manufacturing for Pakfood

[FR Doc. 2011–17485 Filed 7–11–11; 8:45 am]

**BILLING CODE 3510–DS–P**

[6] *See Implementation of the Findings of the WTO Panel in United States Antidumping Measure on Shrimp from Thailand: Notice of Determination under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Thailand,* 74 FR 5638 (Jan. 30, 2009) (*Section 129 Determination*).

[7] On April 26, 2011, the Department amended the scope of the antidumping duty orders on certain frozen warmwater shrimp from Brazil, India, the People's Republic of China, Thailand, and the Socialist Republic of Vietnam to include dusted shrimp within the scope of the orders. *See Certain Frozen Warmwater Shrimp From Brazil, India, the People's Republic of China, Thailand, and the Socialist Republic of Vietnam: Amended Antidumping Duty Orders in Accordance with Final Court Decision,* 76 FR 23277, 23279 (Apr. 26, 2011). Accordingly, for all entries made on or after April 26, 2011, we will instruct CBP to collect cash deposits on imports of the subject merchandise (including dusted shrimp) entered, or withdrawn from warehouse, for consumption at the rates noted above.

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XA560**

### Pacific Fishery Management Council; Public Meeting

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

**ACTION:** Notice of public meeting (conference call).

**SUMMARY:** The Pacific Fishery Management Council (Pacific Council) Cost Recovery Committee (CRC) will convene a meeting that is open to the public via conference call and the internet using ''Microsoft Live Meeting'' to share documents.

**DATES:** The meeting will be held Friday, July 29, 2011 from 8:30 a.m. until 12 noon, PDT.

**ADDRESSES:** A listening station will be provided at Pacific Fishery Management Council, Large Conference Room, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384. *Telephone:* 503–820–2280.

To Join the Meeting Electronically and to listen to the conference call, contact Kris Kleinschmidt at 503–820–2280 for the telephone number and access code.

To view the documents, go to the *CRC Live Meeting link* located at: *https://www.livemeeting.com/cc/pacificfishery/join?id=4K2M7J&role=attend.*

**FOR FURTHER INFORMATION CONTACT:** Regarding the committee work contact Jim Seger, Staff Officer; *telephone:* 503–820–2280. For further information regarding listening in on the conference call, contact Kris Kleinschmidt at 503–820–2280. For additional assistance accessing the live streaming service, you may send an e-mail to *Sandra.Krause@noaa.gov.*

**SUPPLEMENTARY INFORMATION:** The primary purpose of the meeting is to develop advice for the Council on development of a cost recovery methodology for the recently implemented groundfish trawl rationalization program. The Committee will (1) discuss the federal and state materials put forward at the June 2011 Pacific Council meeting in the context of the Committee charge, and (2) develop a CRC recommendation to the Pacific Council for the September Council meeting on a process to complete a Council recommendation on a cost recovery program. Other topics

may be discussed as time allows, at the discretion of the CRC Chair.

Although non-emergency issues not contained in the meeting agenda may come before the CRC for discussion, those issues may not be the subject of formal action during this meeting. CRC action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the CRC intent to take final action to address the emergency.

**Special Accommodations**

This meeting is accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Carolyn Porter at 503–820–2280 at least five days prior to the meeting date.

Dated: July 7, 2011.

**Tracey L. Thompson,**

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

[FR Doc. 2011–17446 Filed 7–11–11; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XA558**

### Nominations to the Marine Fisheries Advisory Committee

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

**ACTION:** Notice; request for nominations.

**SUMMARY:** Nominations are being sought for appointment by the Secretary of Commerce to serve on the Marine Fisheries Advisory Committee (MAFAC or Committee) beginning in January 2012. MAFAC is the only Federal advisory committee with the responsibility to advise the Secretary of Commerce (Secretary) on all matters concerning living marine resources that are the responsibility of the Department of Commerce. The Committee makes recommendations to the Secretary to assist in the development and implementation of Departmental regulations, policies and programs critical to the mission and goals of the NMFS. Nominations are encouraged from all interested parties involved with or representing interests affected by NMFS actions in managing living marine resources. Nominees should possess demonstrable expertise in a field related to the management of living marine resources and be able to fulfill the time commitments required for two annual meetings. Individuals serve for a term of three years for no more than two consecutive terms if re-appointed. NMFS is seeking qualified nominees to fill upcoming vacancies being created by term limits.

**DATES:** Nominations must be postmarked or have an e-mail date stamp on or before August 26, 2011.

**ADDRESSES:** Nominations should be sent to Dr. Mark Holliday, Executive Director, MAFAC, Office of Policy, NMFS F–14451, 1315 East-West Highway, Silver Spring, MD 20910.

**FOR FURTHER INFORMATION CONTACT:** Mark Holliday, MAFAC Executive Director; (301) 479–8004; *e-mail: Mark.Holliday@noaa.gov.*

**SUPPLEMENTARY INFORMATION:** The establishment of MAFAC was approved by the Secretary on December 28, 1970, and subsequently chartered under the Federal Advisory Committee Act, 5 U.S.C. App. 2, on February 17, 1971. The Committee meets twice a year with supplementary subcommittee meetings as determined necessary by the Committee Chairperson. No less that 15 and no more than 21 individuals may serve on the Committee. Membership is comprised of highly qualified, diverse individuals representing commercial and recreational fisheries interests, environmental organizations, academic institutions, governmental, tribal and consumer groups, and other living marine resource interest groups from a balance of U.S. geographical regions, including Puerto Rico, the Western Pacific, and U.S. Virgin Islands.

A MAFAC member cannot be a Federal employee, a member of a Regional Fishery Management Council, a registered Federal lobbyist or a State employee. Selected candidates must pass security checks and submit financial disclosure forms. Membership is voluntary, and except for reimbursable travel and related expenses, service is without pay.

Each nomination submission should include the nominee's name, a cover letter describing the nominee's qualifications and interest in serving on the Committee, curriculum vitae or resume of the nominee, and no more than three supporting letters describing the nominee's qualifications and interest in serving on the Committee. Self-nominations are acceptable. The following contact information should accompany each nominee's submission: name, address, telephone number, fax number, and e-mail address (if available).

Nominations should be sent to (see **ADDRESSES**) and must be received by August 26, 2011. The full text of the Committee Charter and its current membership can be viewed at the NMFS' web page at *http://www.nmfs.noaa.gov/mafac.htm.*

Dated: July 6, 2011.

**Eric C. Schwaab,**

*Assistant Administrator for Fisheries, National Marine Fisheries Service.*

[FR Doc. 2011–17504 Filed 7–11–11; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF DEFENSE

### Department of the Navy

### Secretary of the Navy Advisory Panel Meeting

**AGENCY:** Department of the Navy, DoD.

**ACTION:** Notice of meeting.

**SUMMARY:** The Secretary of the Navy (SECNAV) Advisory Panel will meet to discuss energy use within the Department of the Navy.

**DATES:** The meeting will be held on August 17, 2011, and will be open to the public from 9 a.m. to 5 p.m.

**ADDRESSES:** The meeting will be held in room 4D447, in the Pentagon.

*Access:* Public access is limited due to Pentagon Security requirements. Any individual wishing to attend will need to contact Commander Marc Gage at 703–695–3042 no later than August 10, 2011. Members of the public who do not have Pentagon access will be required to provide their name, date of birth and social security number by August 10, 2011, in order to obtain a visitor badge. Public transportation is recommended as public parking is not available. Members of the public wishing to attend this event must enter through the Pentagon's Metro Entrance between 8:30 a.m. and 8:45 a.m. At this entrance, they will be required to present two forms of identification in order to receive a visitors badge and meet their escort. Members obtaining visitor badges will then be escorted to room 4D447 to attend the Advisory Panel meeting. Members of the Public shall remain with designated escorts at all times while on the Pentagon Reservation. Members of the public will be escorted back to the Pentagon Metro Entrance at 5 p.m.

**FOR FURTHER INFORMATION CONTACT:** Commander Marc Gage, SECNAV Advisory Panel, Deputy Under Secretary of the Navy (Plans, Policy, Oversight,

and Integration), 1000 Navy Pentagon, Washington, DC 20350, 703–695–3042.

**SUPPLEMENTARY INFORMATION:** Individuals or interested groups may submit written statements for consideration by the SECNAV Advisory Panel at any time or in response to the agenda of a scheduled meeting. All requests must be submitted to the Designated Federal Officer at the address detailed below.

If the written statement is in response to the agenda mentioned in this meeting notice then the statement, if it is to be considered by the Panel for this meeting, must be received at least five days prior to the meeting in question.

The Designated Federal Officer will review all timely submissions with the SECNAV Advisory Panel Chairperson, and ensure they are provided to members of the Panel before the meeting that is the subject of this notice.

To contact the Designated Federal Officer, write to: Designated Federal Officer, SECNAV Advisory Panel, Deputy Under Secretary of the Navy (Plans, Policy, Oversight, and Integration), 1000 Navy Pentagon, Washington, DC 20350.

Dated: July 5, 2011.

**L.R. Almand,**

*Office of the Judge Advocate General, U.S. Navy, Alternate Federal Register Liaison Officer.*

[FR Doc. 2011–17418 Filed 7–11–11; 8:45 am]

**BILLING CODE 3810–FF–P**

## DEPARTMENT OF EDUCATION

### Notice of Submission for OMB Review

**AGENCY:** Department of Education.

**ACTION:** Comment request.

**SUMMARY:** The Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

**DATES:** Interested persons are invited to submit comments on or before August 11, 2011.

**ADDRESSES:** Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503, be faxed to (202) 395–5806 or e-mailed to *oira_submission@omb.eop.gov* with a cc: to *ICDocketMgr@ed.gov*. Please note that written comments received in response to this notice will be considered public records.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. The OMB is particularly interested in comments which: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Dated: July 7, 2011.

**Darrin A. King,**

*Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.*

### Office of Elementary and Secondary Education

*Type of Review:* Extension.

*Title of Collection:* Impact Aid Program Application for Section 8003 Assistance.

*OMB Control Number:* 1810–0687.

*Agency Form Number(s):* N/A.

*Frequency of Responses:* Annually.

*Affected Public:* State, Local, or Tribal Government, State Educational Agencies or Local Educational Agencies.

*Total Estimated Number of Annual Responses:* 501,839.

*Total Estimated Annual Burden Hours:* 142,942.

*Abstract:* The U.S. Department of Education is requesting approval for the Application for Assistance under Section 8003 of Title VIII of the Elementary and Secondary Education Act, as amended. This application is for a grant program otherwise known as Impact Aid Basic Support Payments. Local Educational Agencies whose enrollments and revenues are adversely impacted by Federal activities use this form to request financial assistance. Regulations for the Impact Aid Program are found at 34 CFR part 222.

The statute and regulations for this program require a variety of data from applicants annually to determine eligibility for the grants and the amount of grant payment under the statutory formula. The least burdensome method of collecting this required information is for each applicant to submit these data through a web-based electronic application hosted on the Department of Education's G5 website.

Copies of the information collection submission for OMB review may be accessed from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or from the Department's website at *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 4529. When you access the information collection, click on ''Download Attachments '' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to the Internet address *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2011–17493 Filed 7–11–11; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### Notice of Submission for OMB Review

**AGENCY:** Department of Education.

**ACTION:** Comment request.

**SUMMARY:** The Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

**DATES:** Interested persons are invited to submit comments on or before August 11, 2011.

**ADDRESSES:** Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503, be faxed to (202) 395–5806 or e-mailed to *oira_submission@omb.eop.gov* with a cc: to *ICDocketMgr@ed.gov*. Please note

that written comments received in response to this notice will be considered public records.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. The OMB is particularly interested in comments which: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Dated: July 7, 2011.

**Darrin A. King,**

*Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.*

**Office of Elementary and Secondary Education**

*Type of Review:* Extension.

*Title of Collection:* Migrant Education Program (MEP) Migrant Student Information Exchange (MSIX) User Application.

*OMB Control Number:* 1810–0686.

*Agency Form Number(s):* N/A.

*Frequency of Responses:* Once.

*Affected Public:* Individuals and Households; State, Local, or Tribal Government, State Educational Agencies or Local Educational Agencies.

*Total Estimated Number of Annual Responses:* 10,452.

*Total Estimated Annual Burden Hours:* 3,476.

*Abstract:* State educational agencies (SEAs) with Migrant Education Programs collect information from state and local education officials who desire access to the Migrant Student Information Exchange (MSIX) system. The form verifies the applicant's need for MSIX data and authorizes the user's access to that data. The burden hours associated with the data collection are required to meet the statutory mandate in Sec. 1308(b) of Elementary and Secondary Education Act, as amended by No Child Left Behind, which is to facilitate the electronic exchange by the SEAs of a set of minimum data elements to address the educational and related needs of migratory children.

Copies of the information collection submission for OMB review may be accessed from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or from the Department's Web site at *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 4553. When you access the information collection, click on ''Download Attachments '' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to the Internet address *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2011–17496 Filed 7–11–11; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### Notice of Proposed Information Collection Requests

**AGENCY:** Department of Education.

**ACTION:** Comment Request.

**SUMMARY:** The Department of Education (the Department), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the reporting burden on the public and helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, 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 12, 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: July 6, 2011.

**Darrin A. King,**

*Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.*

**Office of Postsecondary Education**

*Type of Review:* Reinstatement.

*Title of Collection:* Robert C. Byrd Honors Scholarship Program Performance Report.

*OMB Control Number:* 1840–0598.

*Agency Form Number(s):* N/A.

*Frequency of Responses:* Annually.

*Affected Public:* State, Local, or Tribal Government, State Educational Agencies or Local Educational Agencies.

*Total Estimated Number of Annual Responses:* 57.

*Total Estimated Number of Annual Burden Hours:* 570.

*Abstract:* The information collected in the Final Performance Report ensures that State Education Agencies (SEA) are making scholarships available in accordance with the legislations and regulations that govern the Robert C. Byrd Honors scholarship Program. The Department will use the information to monitor and evaluate the compliance of SEAs.

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 4642. 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, D.C 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. 2011–17497 Filed 7–11–11; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### Notice of Proposed Information Collection Requests

**AGENCY:** Department of Education.

**ACTION:** Comment Request.

**SUMMARY:** The Department of Education (the Department), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the reporting burden on the public and helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, 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 12, 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: July 7, 2011.

**Darrin A. King,**

*Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.*

**Office of Elementary and Secondary Education**

*Type of Review:* Extension.

*Title of Collection:* Annual Report of Children in State Agency and Locally Operated Institutions for Neglected and Delinquent Children.

*OMB Control Number:* 1810–0060.

*Agency Form Number(s):* N/A.

*Frequency of Responses:* Annually.

*Affected Public:* Federal Government; State, Local, or Tribal Government, State Educational Agencies or Local Educational Agencies.

*Total Estimated Number of Annual Responses:* 3,552.

*Total Estimated Number of Annual Burden Hours:* 4,564.

*Abstract:* An annual survey is conducted to collect data on (1) The number of children enrolled in educational programs of State-operated institutions for neglected or delinquent (N or D) children, community day programs for N or D children, and adult correctional institutions and (2) the October caseload of N or D children in local institutions.

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 4662. 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. 2011–17495 Filed 7–11–11; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### Application for New Awards; Charter Schools Program (CSP); Grants for Replication and Expansion of High-Quality Charter Schools

**AGENCY:** Department of Education, Office of Innovation and Improvement, DoE.

**ACTION:** Notice.

*Overview Information:*

Charter Schools Program (CSP) Grants for Replication and Expansion of High-Quality Charter Schools Notice inviting applications for new awards for fiscal year (FY) 2011.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.282M.

**DATES:** *Applications Available:* July 12, 2011.

*Date of Pre-Application Meeting:* July 25, 2011.

*Deadline for Transmittal of Applications:* August 11, 2011.

**Full Text of Announcement**

*I. Funding Opportunity Description*

*Purpose of Program:* The purpose of the CSP is to increase national understanding of the charter school model and to expand the number of high-quality charter schools available to students across the Nation by providing financial assistance for the planning, program design, initial implementation, and expansion of charter schools; and to evaluate the effects of charter schools, including their effects on students, student academic achievement, staff, and parents.

The purpose of this competition (CFDA 84.282M) is to award grants to eligible applicants to enable them to replicate or expand high-quality charter schools with demonstrated records of success, including success in increasing

student academic achievement. Eligible applicants may use their CSP funds to expand the enrollment of one or more existing charter schools by substantially increasing the number of available seats per school, or to open one or more new charter schools that are based on the charter school model for which the eligible applicant has presented evidence of success.

*Priorities:* This notice includes one absolute priority, three competitive preference priorities, and one invitational priority. The absolute and competitive preference priorities are from the notice of final priorities, requirements, definitions, and selection criteria for this program, published elsewhere in this issue of the **Federal Register**.

*Absolute Priority:* For FY 2011 and any subsequent year in which we make awards based on the list of unfunded applicants from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3) we consider only applications that meet this priority.

This priority is:

Experience Operating or Managing High-Quality Charter Schools

This priority is for projects that will provide for the replication or expansion of high-quality charter schools by applicants that currently operate or manage more than one high-quality charter school (as defined in this notice).

*Competitive Preference Priorities:* For FY 2011 and any subsequent year in which we make awards based on the list of unfunded applicants from this competition, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i) we will award 10 points to an application that meets *Competitive Preference Priority 1;* an additional 5 points to an application that meets *Competitive Preference Priority 2;* and up to an additional 5 points to an application that meets *Competitive Preference Priority 3,* depending on how well the application meets the priority. The maximum amount of points an application can receive under these priorities is 20 points.

**Note:** In order to receive preference under these competitive preference priorities, the applicant must identify the priority or priorities that it believes it meets and provide documentation supporting its claims.

These priorities are:

Competitive Preference Priority 1—Low-Income Demographic (10 Points)

To meet this priority, an applicant must demonstrate that at least 60 percent of all students in the charter schools it currently operates or manages are individuals from low-income families (as defined in this notice).

Competitive Preference Priority 2—School Improvement (5 Points)

To meet this priority, an applicant must demonstrate that its proposed replication or expansion of one or more high-quality charter schools will occur in partnership with, and will be designed to assist, one or more local educational agencies (LEAs) in implementing academic or structural interventions to serve students attending schools that have been identified for improvement, corrective action, closure, or restructuring under section 1116 of the Elementary and Secondary Education Act of 1965, as amended (ESEA), and as described in the notice of final requirements for the School Improvement Grants, published in the **Federal Register** on October 28, 2010 (75 FR 66363).

Competitive Preference Priority 3—Promoting Diversity (up to 5 Points)

This priority is for applicants that demonstrate a record of (in the schools they currently operate or manage), as well as an intent to continue (in schools that they will be creating or substantially expanding under this grant), taking active measures to—

(a) Promote student diversity, including racial and ethnic diversity, or avoid racial isolation;

(b) Serve students with disabilities at a rate that is at least comparable to the rate at which these students are served in public schools in the surrounding area; and

(c) Serve English learners at a rate that is at least comparable to the rate at which these students are served in public schools in the surrounding area.

In support of this priority, applicants must provide enrollment data as well as descriptions of existing policies and activities undertaken or planned to be undertaken.

**Note:** An applicant addressing this priority is invited to discuss how the proposed design of its project will encourage approaches by charter schools that help bring together students of different backgrounds, including students from different racial and ethnic backgrounds, to attain the benefits that flow from a diverse student body. The applicant should discuss in its application how it would ensure that those approaches are permissible under current law.

*Invitational Priority:* For FY 2011 and any subsequent year in which we make awards based on the list of unfunded applicants from this competition, 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:

Students With Disabilities and English Learners

The Secretary is particularly interested in applications that demonstrate through participant, achievement, and outcome data for students with disabilities, English learners, or both—

(1) Prior success in improving educational achievement and outcomes for these students; and

(2) That the charter school model the applicant proposes to replicate or expand serves these students at rates that are comparable to the enrollment rates of students with disabilities, English learners, or both, in the LEAs in which their schools operate.

*Definitions:*

*Charter management organization (CMO)* is a nonprofit organization that operates or manages multiple charter schools by centralizing or sharing certain functions and resources among schools.

*Educationally disadvantaged students* includes, but is not necessarily limited to, individuals from low-income families (as defined elsewhere in this notice), English learners, migratory children, children with disabilities, and neglected or delinquent children.

*High-quality charter school* is a school that shows evidence of strong academic results for the past three years (or over the life of the school, if the school has been open for fewer than three years), based on the following factors:

(1) Increasing student academic achievement and attainment for all students, including, as applicable, educationally disadvantaged students served by the charter schools operated or managed by the applicant.

(2) Either (i) Demonstrated success in closing historic achievement gaps for the subgroups of students described in section 1111(b)(2)(C)(v)(II) of the ESEA at the charter schools operated or managed by the applicant, or

(ii) No significant achievement gaps between any of the subgroups of students described in section 1111(b)(2)(C)(v)(II) of the ESEA at the charter schools operated or managed by the applicant and significant gains in student academic achievement have been made with all populations of students served by the charter schools operated or managed by the applicant.

(3) Achieved results (including performance on statewide tests, annual student attendance and retention rates,

high school graduation rates, college attendance rates, and college persistence rates where applicable and available) for low-income and other educationally disadvantaged students served by the charter schools operated or managed by the applicant that are above the average academic achievement results for such students in the State.

(4) No significant compliance issues (as defined in this notice), particularly in the areas of student safety and financial management.

*Individual from a low-income family* means an individual who is determined by an SEA or LEA to be a child, ages 5 through 17, from a low-income family, on the basis of (a) data used by the Secretary to determine allocations under section 1124 of the ESEA, (b) data on children eligible for free or reduced-price lunches under the Richard B. Russell National School Lunch Act, (c) data on children in families receiving assistance under part A of title IV of the Social Security Act, (d) data on children eligible to receive medical assistance under the Medicaid program under Title XIX of the Social Security Act, or (e) an alternate method that combines or extrapolates from the data in items (a) through (d) of this definition (see 20 U.S.C. 6537(3)).

*Replicate* means to open one or more new charter schools that are based on the charter school model or models for which the applicant has presented evidence of success.

*Significant compliance issue* means a violation that did, will, or could lead to the revocation of a school's charter.

*Substantially expand* means to increase the student count of an existing charter school by more than 50 percent or to add at least two grades to an existing charter school over the course of the grant.

*Program Authority:* 20 U.S.C. 7221–7221j; Consolidated Appropriations Act, 2010, Division D, Title III, Public Law 111–117; Department of Defense and Full-Year Continuing Appropriations Act, 2011, Division B, Title VIII, Public Law 112–10.

*Applicable Regulations:* (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 76, 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 only to institutions of higher education.

**Note:** The regulations in 34 CFR part 99 apply only to an educational agency or institution.

*II. Award Information*

*Type of Award:* Discretionary grants.

*Estimated Available Funds:* The FY 2011 appropriation for the Charter Schools Program is $255,518,938, of which the Department plans to use up to $25,000,000 for this competition.

Contingent upon the availability of funds, and the quality of the applications, we may make additional awards later in FY 2011 and in FY 2012 from the list of unfunded applicants from this competition.

*Estimated Range of Awards:* $200,000 to $3,000,000 per year.

*Estimated Average Size of Awards:* $1,600,000 per year.

*Estimated Number of Awards:* 8–15.

**Note:** The Department is not bound by any estimates in this notice. The estimated range, size, and number of awards are based on a single 12-month budget period. However, the Department may choose to fund more than 12 months of a project using the FY 2011 funds.

*Project Period:* Up to 60 months.

*III. Eligibility Information*

1. *Eligible Applicants:* Non-profit charter management organizations (CMOs) and other entities that are not for-profit entities. Eligible applicants may also apply as a group or consortium.

2. *Cost-Sharing or Matching:* This competition does not require cost-sharing or matching.

3. *Other:*

(a) *Reasonable and Necessary Costs:* The Secretary may elect to impose maximum limits on the amount of grant funds that may be awarded per charter school replicated, per charter school substantially expanded, and/or per new school seat created.

For this competition the maximum limit per new school seat is $3,000 with a maximum per new school created of $800,000. The maximum limit per new school seat in an expanding school is $1,500 with a maximum per expanded school of $800,000.

**Note:** Applicants must ensure that all costs included in the proposed budget are reasonable and necessary in light of the goals and objectives of the proposed project. Any costs determined by the Secretary to be unreasonable or unnecessary will be removed from the final approved budget.

(b) *Other CSP Grants:* A charter school that receives funds under this competition is ineligible to receive funds for the same purpose under section 5202(c)(2) of the ESEA, including for planning and program design or the initial implementation of a charter school (*i.e.,* CFDA 84.282A or 84.282B).

A charter school that has received CSP funds for replication previously, or that has received funds for planning or initial implementation of a charter school (*i.e.,* CFDA 84.282A or 84.282B), may not use funds under this grant for the same purpose. However, such charter schools may be eligible to receive funds under this competition to substantially expand the charter school beyond the existing grade levels or student count.

*IV. Application and Submission Information*

1. *Address to Request Application Package:*

Erin Pfeltz or Richard Payton, U.S. Department of Education, 400 Maryland Avenue, SW., room 4W255, Washington, DC 20202–5970. *Telephone:* (202) 205–3525 or (202) 453–7698 or by *e-mail: erin.pfeltz@ed.gov* or *richard.payton@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.

*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. The Secretary strongly encourages applicants to limit part III to the equivalent of no more than 60 pages, using the following standards:

- A ''page'' is 8.5″ × 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, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- 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:* Times New Roman, Courier, Courier New, or Arial.

The 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 12, 2011.

*Date of Pre-Application Meeting:* The Department will hold a pre-application meeting for prospective applicants on July 25, 2011 from 2:30 p.m. to 4:30 p.m. at the U.S. Department of Education, Barnard Auditorium, 400 Maryland Avenue, SW., Washington, DC. Interested parties are invited to participate in this meeting to discuss the purpose of the program, absolute and competitive priorities, selection criteria, application requirements, submission requirements, and reporting requirements. Interested parties may participate in this meeting either by conference call or in person. This site is accessible by Metro on the Blue, Orange, Green, and Yellow lines at the Seventh Street and Maryland Avenue exit of the L'Enfant Plaza station. After the meeting, program staff will be available from 4:30 p.m. to 5 p.m., Washington, DC time, on that same day to provide information and technical assistance through individual consultation.

Individuals interested in attending this meeting are encouraged to pre-register by e-mailing their name, organization, and contact information with the subject heading Pre-Application Meeting to *CharterSchools@ed.gov.* There is no registration fee for attending this meeting.

For further information about the pre-application meeting, contact Erin Pfeltz or Richard Payton, U.S. Department of Education, 400 Maryland Avenue, SW., room 4W255, Washington, DC 20202–5970. *Telephone:* (202) 205–3525 or (202) 453–7698 or by *e-mail: erin.pfeltz@ed.gov* or *richard.payton@ed.gov.*

Assistance to Individuals With Disabilities at the Pre-Application Meeting

The meeting site is accessible to individuals with disabilities. If you will need an auxiliary aid or service to participate in the meeting (*e.g.,* interpreting service, assistive listening device, or materials in an alternate format), notify the contact person listed in this notice at least one week before the scheduled meeting date. Although we will attempt to meet a request we receive after that date, we may not be able to make available the requested auxiliary aid or service because of insufficient time to arrange it.

*Deadline for Transmittal of Applications:* August 11, 2011.

Applications for grants under this program must be submitted electronically using the *Grants.gov* Apply site (*http://www.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.

4. *Intergovernmental Review:* This program 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 program.

5. *Funding Restrictions:* Grantees under this program must use the grant funds to replicate or substantially expand the charter school model or models for which the applicant has presented evidence of success. Grant funds must be used to carry out allowable activities, as described in section 5204(f)(3) of the ESEA (20 U.S.C. 7221c(f)(3)).

Pursuant to section 5204(f)(3) of the ESEA, grantees under this program must use the grant funds for—

(A) Post-award planning and design of the educational program, which may include: (i) Refinement of the desired educational results and of the methods for measuring progress toward achieving those results; and (ii) professional development of teachers and other staff who will work in the charter school; and

(B) Initial implementation or expansion of the charter school, which may include: (i) Informing the community about the school; (ii) acquiring necessary equipment and educational materials and supplies; (iii) acquiring or developing curriculum materials; and (iv) other initial operational costs that cannot be met from State or local sources.

**Note:** A grantee may use up to 20 percent of grant funds for initial operational costs associated with the expansion or improvement of the grantee's oversight or management of its charter schools, provided that: (i) The specific charter schools being created or substantially expanded under the grant are the intended beneficiaries of such expansion or improvement, and (ii) such expansion or improvement is intended to improve the grantee's ability to manage or oversee the charter schools created or substantially expanded under the grant.

We reference other 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 program 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 CSP Grants for Replication and Expansion of High-Quality Charter Schools, CFDA number 84.282M, 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 CSP Grants for Replication and Expansion of High-Quality Charter Schools at *http://www.Grants.gov.* You must search for the downloadable application package for this program by the CFDA number. Do not include the CFDA number's alpha suffix in your search (*e.g.*, search for 84.326, not 84.326A).

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 program 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 prevent 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: Erin Pfeltz, U.S. Department of Education, 400 Maryland Avenue, SW., room 4W255, Washington, DC 20202–5970. *Fax:* (202) 205–5630.

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 84.282M, 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 Number 84.282M, 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. *Application Requirements:* Applicants applying for CSP grant funds must address both the following application requirements, which are based on the statutory requirements under the program, and the selection criteria described in this notice. An applicant may choose to respond to the application requirements in the context of its responses to the selection criteria.

(a) Describe the objectives of the project for replicating or substantially expanding high-quality charter schools and the methods by which the applicant will determine its progress toward achieving those objectives.

(b) Describe how the applicant currently operates or manages the charter schools for which it has presented evidence of success, and how the proposed new or substantially expanded charter schools will be operated or managed. Include a description of central office functions, governance, daily operations, financial management, human resources management, and instructional management. If applying as a group or consortium, describe the roles and responsibilities of each member of the group or consortium and how each member will contribute to this project.

(c) Describe how the applicant will ensure that each proposed new or substantially expanded charter school receives its commensurate share of Federal education funds that are allocated by formula each year, including during the first year of operation of the school and any year in which the school's enrollment substantially expands significantly.

(d) Describe the educational program to be implemented in the proposed new or substantially expanded charter schools, including how the program will enable all students (including educationally disadvantaged students) to meet State student academic achievement standards, the grade levels or ages of students to be served, and the curriculum and instructional practices to be used.

(e) Describe the administrative relationship between the charter school or schools to be replicated or substantially expanded by the applicant and the authorized public chartering agency.

(f) Describe how the applicant will provide for continued operation of the proposed new or substantially expanded charter school or schools once the Federal grant has expired.

(g) Describe how parents and other members of the community will be involved in the planning, program design, and implementation of the proposed new or substantially expanded charter school or schools.

(h) Include a request and justification for waivers of any Federal statutory or regulatory provisions that the applicant believes are necessary for the successful operation of the proposed new or substantially expanded charter schools.

(i) Describe how the grant funds will be used, including how these funds will be used in conjunction with other Federal programs administered by the Secretary, and with any matching funds.

(j) Describe how all students in the community, including students with disabilities, English learners, and other educationally disadvantaged students, will be informed about the proposed new or substantially expanded charter

schools and given an equal opportunity to attend such schools.

(k) Describe how the proposed new or substantially expanded charter schools that are considered to be LEAs under State law, or the LEAs in which the new or substantially expanded charter schools are located, will comply with sections 613(a)(5) and 613(e)(1)(B) of the Individuals with Disabilities Education Act.

(l) Provide information on any significant compliance issues identified within the past three years for each school managed by the applicant, including compliance issues in the areas of student safety, financial management, and statutory or regulatory compliance.

(m) For each charter school currently operated or managed by the applicant, provide the following information: the year founded, the grades currently served, the number of students, the address, the percentage of students in each subgroup of students described in section 1111(b)(2)(C)(v)(II) of the ESEA, results on the State assessment for the past three years (if available) by subgroup, attendance rates, student attrition rates for the past three years, and (if the school operates a 12th grade) high school graduation rates and college attendance rates (maintaining standards to protect personally identifiable information).

(n) Provide objective data showing applicant quality. In particular, the Secretary requires the applicant to provide the following data:

(1) Performance (school-wide and by subgroup) for the past three years (if available) on statewide tests of all charter schools operated or managed by the applicant as compared to all students in other schools in the State or States at the same grade level, and as compared with other schools serving similar demographics of students (maintaining standards to protect personally identifiable information);

(2) Annual student attendance and retention rates (school-wide and by subgroup) for the past three years (or over the life of the school, if the school has been open for fewer than three years), and comparisons with other similar schools (maintaining standards to protect personally identifiable information); and

(3) Where applicable and available, high school graduation rates, college attendance rates, and college persistence rates (school-wide and by subgroup) for the past three years (if available) of students attending schools operated or managed by the applicant, and the methodology used to calculate these rates (maintaining standards to protect personally identifiable information). When reporting data for schools in States that may have particularly demanding or low standards of proficiency, applicants are invited to discuss how their academic success might be considered against applicants from across the country.

(o) Provide such other information and assurances as the Secretary may require.

2. *Selection Criteria.* The selection criteria for this program are from the notice of final priorities, requirements, definitions, and selection criteria for this program published elsewhere in this issue of the **Federal Register**, and from section 34 CFR 75.210. We may apply one or more of these criteria, alone or in combination with one or more selection criteria from section 34 CFR 75.210, in any year in which we award grants for the replication and expansion of high-quality charter schools. The maximum possible score for all the criteria in this section is 100 points. The maximum possible score for each criterion is indicated in parentheses following the criterion.

In evaluating an application, the Secretary considers the following criteria:

(a) *Quality of the eligible applicant (50 points).* In determining the quality of the applicant, the Secretary considers the following factors:

(1) The degree, including the consistency over the past three years, to which the applicant has demonstrated success in significantly increasing student academic achievement and attainment for all students, including, as applicable, educationally disadvantaged students served by the charter schools operated or managed by the applicant (20 points).

(2) Either (i) The degree, including the consistency over the past three years, to which the applicant has demonstrated success in closing historic achievement gaps for the subgroups of students described in section 1111(b)(2)(C)(v)(II) of the ESEA at the charter schools operated or managed by the applicant, or

(ii) The degree, including the consistency over the past three years, to which there have not been significant achievement gaps between any of the subgroups of students described in section 1111(b)(2)(C)(v)(II) of the ESEA at the charter schools operated or managed by the applicant and to which significant gains in student academic achievement have been made with all populations of students served by the charter schools operated or managed by the applicant (15 points).

(3) The degree, including the consistency over the past three years, to which the applicant has achieved results (including performance on statewide tests, annual student attendance and retention rates, high school graduation rates, college attendance rates, and college persistence rates where applicable and available) for low-income and other educationally disadvantaged students served by the charter schools operated or managed by the applicant that are significantly above the average academic achievement results for such students in the State (15 points).

(b) *Contribution in assisting educationally disadvantaged students (10 points).*

The contribution the proposed project will make in assisting educationally disadvantaged students served by the applicant to meet or exceed State academic content standards and State student academic achievement standards, and to graduate college- and career-ready. When responding to this selection criterion, applicants must discuss the proposed locations of schools to be created or substantially expanded and the student populations to be served.

(c) *Quality of the project design (10 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 the extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified, measurable, and attainable. Applicants proposing to open schools serving substantially different populations than those currently served by the model for which they have demonstrated evidence of success must address the attainability of outcomes given this difference.

(d) *Quality of the management plan and personnel (25 points).*

The Secretary considers the quality of the management plan and personnel to replicate and substantially expand high-quality charter schools. In determining the quality of the management plan and personnel for the proposed project, the Secretary considers:

(1) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks.

(2) The business plan for improving, sustaining, and ensuring the quality and performance of charter schools created or substantially expanded under these grants beyond the initial period of Federal funding in areas including, but

not limited to, facilities, financial management, central office, student academic achievement, governance, oversight, and human resources of the charter schools.

(3) A multi-year financial and operating model for the organization, a demonstrated commitment of current and future partners, and evidence of broad support from stakeholders critical to the project's long-term success.

(4) The plan for closing charter schools supported, overseen, or managed by the applicant that do not meet high standards of quality.

(5) The qualifications, including relevant training and experience, of the project director, chief executive officer or organization leader, and key project personnel, especially in managing projects of the size and scope of the proposed project.

(e) *Quality of the evaluation plan (5 points).*

The Secretary considers the quality of the evaluation to be conducted of the proposed project. In determining the quality of the evaluation, the Secretary considers the extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data.

3. *Review and Selection Process:* 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).

4. *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.

*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 goal of the CSP is to support the creation and development of a large number of high-quality charter schools that are free from State or local rules that inhibit flexible operation, are held accountable for enabling students to reach challenging State performance standards, and are open to all students. The Secretary has two performance indicators to measure progress towards this goal: (1) The number of charter schools in operation around the Nation, and (2) the percentage of fourth- and eighth-grade charter school students who are achieving at or above the proficient level on State examinations in mathematics and reading/language arts. Additionally, the Secretary has established the following measure to examine the efficiency of the CSP: Federal cost per student in implementing a successful school (defined as a school in operation for three or more consecutive years).

All grantees will be expected to submit an annual performance report documenting their contribution in assisting the Department in meeting these performance measures.

5. *Continuation Awards:* In making a continuation award, 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 grant, 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 Contacts*

**FOR FURTHER INFORMATION CONTACT:** Erin Pfeltz or Richard Payton, U.S. Department of Education, 400 Maryland Avenue, SW., room 4W255, Washington, DC 20202–5970. *Telephone:* (202) 205–3525 or (202) 453–7698 or by *e-mail: erin.pfeltz@ed.gov* or *richard.payton@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 one of the program contact persons 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: July 7, 2011.

**James H. Shelton, III,**

*Assistant Deputy Secretary for Innovation and Improvement.*

[FR Doc. 2011–17490 Filed 7–11–11; 8:45 am]

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## DEPARTMENT OF EDUCATION

**RIN 1855–ZA08**

**[CFDA Number 84.282M]**

### Final Priorities, Requirements, and Selection Criteria; Charter Schools Program (CSP) Grants for Replication and Expansion of High-Quality Charter Schools

**AGENCY:** Office of Innovation and Improvement, Department of Education.

**ACTION:** Notice of final priorities, requirements, definitions, and selection criteria.

**SUMMARY:** The Assistant Deputy Secretary for Innovation and Improvement announces priorities, requirements, definitions, and selection criteria under the CSP–Replication and Expansion of High-Quality Charter Schools grant program. The Assistant Deputy Secretary may use these priorities, requirements, definitions, and selection criteria for competitions in fiscal year (FY) 2011 and later years. We intend to use these priorities, requirements, definitions, and selection criteria to award grants to eligible applicants to enable them to replicate or substantially expand high-quality charter schools with demonstrated records of success, including success in increasing student academic achievement.

**DATES:** *Effective Date:* These priorities, requirements, definitions, and selection criteria are effective August 11, 2011.

**FOR FURTHER INFORMATION CONTACT:** Erin Pfeltz, U.S. Department of Education, 400 Maryland Avenue, SW., room 4W255, Washington, DC 20202–5970. *Telephone:* (202) 205–3525 or by *e-mail: erin.pfeltz@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 purpose of the CSP is to increase national understanding of the charter school model and to expand the number of high-quality charter schools available to students across the Nation by providing financial assistance for the planning, program design, initial implementation, and expansion of charter schools; and to evaluate the effects of charter schools, including their effects on students, student academic achievement, staff, and parents.

The purpose of the CSP–Replication and Expansion of High-Quality Charter Schools grant program (CFDA 84.282M) is to award grants to eligible applicants to enable them to replicate or expand high-quality charter schools with demonstrated records of success, including success in increasing student academic achievement.

*Program Authority:* 20 U.S.C. 7221–7221j; Consolidated Appropriations Act, 2010, Division D, Title III, Public Law 111–117; Department of Defense and Full-Year Continuing Appropriations Act, 2011, Division B, Title VIII, Public Law 112–10.

We published a notice of proposed priorities, requirements, definitions, and selection criteria (NPP) for the CSP–Replication and Expansion of High-Quality Charter Schools grant program in the **Federal Register** on March 25, 2011 (76 FR 16754). That notice contained background information and our reasons for proposing the particular priorities, requirements, definitions, and selection criteria.

There are differences between the priorities, requirements, definitions, and selection criteria proposed 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 the NPP, three 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, or selection criteria.

*Analysis of Comments and Changes:* An analysis of the comments and any changes in the priorities, requirements, definitions, and selection criteria since publication of the NPP follows.

**Priority 2—Low-Income Demographic**

*Comment:* One commenter suggested that we modify this priority to require an applicant to demonstrate that at least 50 percent (rather than 60 percent, as proposed in the NPP) of all students in the charter schools it currently operates or manages are individuals from low-income families.

*Discussion:* We decline to make the requested change because we intend for this program to focus on serving educationally disadvantaged students, which include individuals from low-income families (as defined in this notice). The definition of *individual from a low-income family* includes an individual determined by a State educational agency (SEA) or local educational agency (LEA) to be a child between the ages of 5 and 17 from a low-income family on the basis of data on children eligible for free or reduced-price lunches under the Richard B. Russell National School Lunch Act. The 60 percent threshold in this priority is consistent with the average percentage of students in large urban school districts receiving free- or reduced-price lunches (as reported by the Council of Great City Schools, *http://www.cgcs.org/about/fact_sheet.aspx*). Our definition of *individual from a low-income family* includes free or reduced-price lunch as one indicator. We believe that it is appropriate to align the threshold for the percentage of students from low-income families served by the applicant's current charter schools in *Priority 2—Low-Income Demographic* with the average percentage of students in large urban school districts receiving free- or reduced-price lunches so that schools funded under this competition will be able to serve students residing in such districts as well as students in districts that have a higher poverty percentage.

*Changes:* None.

**Priority 4—Promoting Diversity**

*Comment:* One commenter suggested that we revise the language in *Priority 4—Promoting Diversity.* Specifically, the commenter expressed concern that the language, which focuses on promoting racial and ethnic diversity and avoiding racial isolation, would, in effect, encourage applicants to use classifications based on race and ethnicity to achieve some predetermined racial and ethnic mix in their programs.

*Discussion:* This priority is based on the ''Promoting Diversity'' priority established in the Department's

Supplemental Priorities, which were published in the **Federal Register** on December 15, 2010 (75 FR 78486), and is designed to serve the same purpose (e.g., to focus on the racial and ethnic diversity of students in order to promote cross-racial understanding, break down racial stereotypes, and prepare students for an increasingly diverse workforce and society). Nevertheless, we have added a note to the priority to clarify the purpose of the priority and ensure that proposals to meet the priority comply with current law.

In addition, on further review of this priority, we believe that certain wording changes in the priority are appropriate. First, we believe that we can make the language more consistent with the ''Promoting Diversity'' priority from the Supplemental Priorities by referring to ''student diversity'' rather than ''diversity in their student bodies.'' In addition, to eliminate any possibility that the language might encourage applicants to create charter schools with disproportionate enrollments, we believe it is appropriate to require that an applicant take active measures to serve students with disabilities and English learners at a rate at least comparable to the rate at which these students are served in public schools in the surrounding area—rather than at a rate equal to or higher than the rate at which these students are served in public schools in the surrounding area.

*Changes:* We have added a Note following *Priority 4—Promoting Diversity* to provide further information for applicants on responding to Priority 4. This note invites an applicant to discuss how the project will encourage approaches by charter schools that help bring together students of different backgrounds to attain the benefits that flow from a diverse student body and how it will ensure that those approaches to promoting diversity among its schools are permissible under current law.

In addition we have revised paragraph (a) of the priority to refer to promoting ''student diversity'' rather than ''diversity in their student bodies.'' Finally, we have revised the standard in paragraphs (b) and (c) to require applicants to demonstrate, in order to meet the priority, a record of, and intent to continue, taking active measures to serve students with disabilities (paragraph (b)) and English learners (paragraph (c)) at a rate that is at least comparable to the rate at which these students are served in public schools in the surrounding area.

*Comment:* One commenter suggested that we revise *Proposed Priority 4—Promoting Diversity* so that an applicant can meet the priority if the applicant meets any one of the three listed factors in the priority.

*Discussion:* We decline to revise this priority as requested because we want to maintain flexibility to use the priority differently, depending on the objectives in a specific competition. For example, if we designate this priority as an absolute priority or an ''all or nothing'' competitive preference priority, an applicant would need to meet all of the factors under the priority in order to meet the priority. In contrast, if we elect to use this priority as a competitive preference priority under which applicants can receive up to a certain number of points, then an applicant might very well be able to receive competitive preference points under the priority if it satisfies one or some, but not all of, the factors listed in the priority.

*Changes:* None.

*Comment:* One commenter recommended that we designate certain proposed priorities as absolute, competitive, or invitational.

*Discussion:* This notice is designed only to establish the priorities that we may choose to use in CSP Replication and Expansion of High-Quality Charter School grant competitions in fiscal year 2011 and future years. As noted elsewhere in this notice, we do not designate whether a priority will be absolute, competitive, or invitational in this notice. When inviting applications for a competition using one or more priorities, we will designate the type of each priority through a notice in the **Federal Register**.

*Changes:* None.

*Comment:* One commenter encouraged the Department to make State and school subgroup data more readily accessible so that applicants will be better able to address *Priority 4—Promoting Diversity* and the *Proposed Requirements.*

*Discussion:* At present, the Department is looking into ways we can make more data at the State, district and school levels, with information on subgroups, available to the public in a manner that protects the privacy of individuals.

*Changes:* None.

*Requirements*

*Comment:* One commenter suggested that the Department establish a maximum limit of approximately $600,000 for the start-up of new schools under the CSP Replication and Expansion of High-Quality Charter Schools grants program.

*Discussion:* In the *Reasonable and Necessary Costs* section (paragraph (c)) of the *Proposed Program Requirements,* the Secretary reserves the right to impose a maximum limit on the amount of funds that may be awarded per charter school replicated, per charter school substantially expanded, or per new school seat created. We decline to make the change requested by the commenter regarding the establishment of a fixed maximum limit for the start-up of new schools because the requirements in this notice may be used in future competitions. In order to be able to respond to future needs or new information on the start-up costs of new or expanding charter schools, we believe it is prudent to preserve the Secretary's flexibility in making the determination of a maximum amount, or whether one is needed, on a competition-by-competition basis.

*Changes:* None.

*Comment:* None.

*Discussion:* Upon further review of paragraph (j) in the *Application Requirements,* we have determined that the paragraph does not clearly state that the applicant should describe how all students in the community will be informed, and given an equal opportunity to attend, the proposed new or substantially expanded schools.

*Changes:* We have inserted ''all'' into paragraph (j) of the *Application Requirements section,* before ''students in the community''.

*Comment:* None.

*Discussion:* Upon further review of the Application Requirements, we have determined that applicants should be aware that small data groups can lead to the disclosure of personally identifiable information (PII).

*Changes:* In paragraphs (m), (n)(2), and (n)(3) of the Application Requirements section, we have inserted ''maintaining standards to protect personally identifiable information'' as a parenthetical.

*Comment:* None.

*Discussion:* Upon further review of paragraph (n)(3) in the *Application Requirements,* we have determined that the National Center for Education Statistics report to which we referred as an example of the scale of State proficiency standards is of limited value to applicants because the data in the report are based on State standards in 2007. Given that there is not a more recent version of this report, and because we do not want to provide a static example while State standards continue to change, we believe it is appropriate to remove this example.

*Changes:* We have removed the parenthetical referencing the ''report available at *http://nces.ed.gov/nationsreportcard/pdf/studies/*

*2010456.pdf''* from paragraph (n)(3) of the *Application Requirements* section.

*Final Priorities:*

The Assistant Deputy Secretary for Innovation and Improvement establishes the following four priorities for the CSP Replication and Expansion of High-Quality Charter Schools grants program. We may apply one or more of these priorities in any year in which this program is in effect.

Priority 1—Experience Operating or Managing High-Quality Charter Schools.

This priority is for projects that will provide for the replication or expansion of high-quality charter schools by applicants that currently operate or manage more than one high-quality charter school (as defined in this notice).

*Priority 2—Low-Income Demographic.*

To meet this priority, an applicant must demonstrate that at least 60 percent of all students in the charter schools it currently operates or manages are individuals from low-income families (as defined in this notice).

*Priority 3—School Improvement.*

To meet this priority, an applicant must demonstrate that its proposed replication or expansion of one or more high-quality charter schools will occur in partnership with, and will be designed to assist, one or more LEAs in implementing academic or structural interventions to serve students attending schools that have been identified for improvement, corrective action, closure, or restructuring under section 1116 of the Elementary and Secondary Education Act of 1965, as amended (ESEA), and as described in the notice of final requirements for School Improvement Grants, published in the **Federal Register** on October 28, 2010 (75 FR 66363).

Priority 4—Promoting Diversity.

This priority is for applicants that demonstrate a record of (in the schools they currently operate or manage), as well as an intent to continue (in schools that they will be creating or substantially expanding under this grant), taking active measures to—

(a) Promote student diversity, including racial and ethnic diversity, or avoid racial isolation;

(b) Serve students with disabilities at a rate that is at least comparable to the rate at which these students are served in public schools in the surrounding area; and

(c) Serve English learners at a rate that is at least comparable to the rate at which these students are served in public schools in the surrounding area.

In support of this priority, applicants must provide enrollment data as well as descriptions of existing policies and activities undertaken or planned to be undertaken.

**Note:** An applicant addressing this priority is invited to discuss how the proposed design of its project will encourage approaches by charter schools that help bring together students of different backgrounds, including students from different racial and ethnic backgrounds, to attain the benefits that flow from a diverse student body. The applicant should discuss in its application how it would ensure that those approaches are permissible under current law.

*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 PROGRAM REQUIREMENTS:*

The Assistant Deputy Secretary for Innovation and Improvement establishes the following program requirements for the CSP Replication and Expansion of High-Quality Charter Schools grants program. We may apply one or more of these requirements in any year in which this program is in effect.

(a) *Eligibility:* To be eligible for an award, an applicant must meet the statutory requirements. The requirement listed below is statutory; we are including it here for clarity:

Eligible applicants for this program are non-profit charter management organizations (CMOs) and other not-for-profit entities. Eligible applicants may also apply as a group or consortium.

(b) *Funding Restrictions:* Grantees under this program must use the grant funds to replicate or substantially expand the charter school model or models for which the applicant has presented evidence of success. Grant funds must be used to carry out allowable activities, as described in section 5204(f)(3) of the ESEA (20 U.S.C. 7221c(f)(3)).

**Note:** A grantee may use up to 20 percent of grant funds for initial operational costs associated with the expansion or improvement of the grantee's oversight or management of its charter schools, provided that: (i) The specific charter schools being created or substantially expanded under the grant are the intended beneficiaries of such expansion or improvement, and (ii) such expansion or improvement is intended to improve the grantee's ability to manage or oversee the charter schools created or substantially expanded under the grant.

(c) *Reasonable and Necessary Costs:* The Secretary may elect to impose a maximum limit on the amount of grant funds that may be awarded per charter school replicated, per charter school substantially expanded, or per new charter school seat created.

**Note:** Applicants must ensure that all costs included in the proposed budget are reasonable and necessary in light of the goals and objectives of the proposed project. Any costs determined by the Secretary to be unreasonable or unnecessary will be removed from the final approved budget.

(d) *Other CSP Grants:* A charter school that receives funds under this competition is ineligible to receive funds for the same purpose under section 5202(c)(2) of the ESEA, including for planning and program design or the initial implementation of a charter school (*i.e.,* CFDA 84.282A or 84.282B).

A charter school that has received CSP funds for replication previously, or that has received funds for planning or initial implementation of a charter school (*i.e.,* CFDA 84.282A or 84.282B), may not use funds under this grant for the same purpose. However, such charter schools may be eligible to receive funds under this competition to substantially expand the charter school beyond the existing grade levels or student count.

*Final Application Requirements:*

The Assistant Deputy Secretary for Innovation and Improvement establishes the following application requirements for the CSP Replication and Expansion of High-Quality Charter Schools grants. We may apply one or more of these application requirements in any year in which this program is in effect. An applicant may choose to respond to these application requirements in the context of its responses to the selection criteria.

(a) Describe the objectives of the project for replicating or substantially expanding high-quality charter schools and the methods by which the applicant

will determine its progress toward achieving those objectives.

(b) Describe how the applicant currently operates or manages the charter schools for which it has presented evidence of success, and how the proposed new or substantially expanded charter schools will be operated or managed. Include a description of central office functions, governance, daily operations, financial management, human resources management, and instructional management. If applying as a group or consortium, describe the roles and responsibilities of each member of the group or consortium and how each member will contribute to the proposed project.

(c) Describe how the applicant will ensure that each proposed new or substantially expanded charter school receives its commensurate share of Federal education funds that are allocated by formula each year, including during the first year of operation of the school and any year in which the school's enrollment substantially expands.

(d) Describe the educational program to be implemented in the proposed new or substantially expanded charter schools, including how the program will enable all students (including educationally disadvantaged students) to meet State student academic achievement standards, the grade levels or ages of students to be served, and the curriculum and instructional practices to be used.

(e) Describe the administrative relationship between the charter school or schools to be replicated or substantially expanded by the applicant and the authorized public chartering agency.

(f) Describe how the applicant will provide for continued operation of the proposed new or substantially expanded charter school or schools once the Federal grant has expired.

(g) Describe how parents and other members of the community will be involved in the planning, program design, and implementation of the proposed new or substantially expanded charter school or schools.

(h) Include a request and justification for waivers of any Federal statutory or regulatory provisions that the applicant believes are necessary for the successful operation of the proposed new or substantially expanded charter schools.

(i) Describe how the grant funds will be used, including how these funds will be used in conjunction with other Federal programs administered by the Secretary, and with any matching funds.

(j) Describe how all students in the community, including students with disabilities, English learners, and other educationally disadvantaged students, will be informed about the proposed new or substantially expanded charter schools and given an equal opportunity to attend such schools.

(k) Describe how the proposed new or substantially expanded charter schools that are considered to be LEAs under State law, or the LEAs in which the new or substantially expanded charter schools are located, will comply with sections 613(a)(5) and 613(e)(1)(B) of the Individuals with Disabilities Education Act.

(l) Provide information on any significant compliance issues identified within the past three years for each school managed by the applicant, including compliance issues in the areas of student safety, financial management, and statutory or regulatory compliance.

(m) For each charter school currently operated or managed by the applicant, provide the following information: The year founded, the grades currently served, the number of students, the address, the percentage of students in each subgroup of students described in section 1111(b)(2)(C)(v)(II) of the ESEA, results on the State assessment for the past three years (if available) by subgroup, attendance rates, student attrition rates for the past three years, and (if the school operates a 12th grade) high school graduation rates and college attendance rates (maintaining standards to protect personally identifiable information).

(n) Provide objective data showing applicant quality. In particular, the Secretary requires the applicant to provide the following data:

(1) Performance (school-wide and by subgroup) for the past three years (if available) on statewide tests of all charter schools operated or managed by the applicant as compared to all students in other schools in the State or States at the same grade level, and as compared with other schools serving similar demographics of students;

(2) Annual student attendance and retention rates (school-wide and by subgroup) for the past three years (or over the life of the school, if the school has been open for fewer than three years), and comparisons with other similar schools (maintaining standards to protect personally identifiable information); and

(3) Where applicable and available, high school graduation rates, college attendance rates, and college persistence rates (school-wide and by subgroup) for the past three years (if available) of students attending schools operated or managed by the applicant, and the methodology used to calculate these rates (maintaining standards to protect personally identifiable information). When reporting data for schools in States that may have particularly demanding or low standards of proficiency, applicants are invited to discuss how their academic success might be considered against applicants from across the country.

(o) Provide such other information and assurances as the Secretary may require.

*Definitions:*

The Assistant Deputy Secretary for Innovation and Improvement establishes the following definitions for the CSP Replication and Expansion of High-Quality Charter Schools grants. We may apply one or more of these definitions in any year in which this program is in effect.

*Charter management organization (CMO)* is a nonprofit organization that operates or manages multiple charter schools by centralizing or sharing certain functions and resources among schools.

*Educationally disadvantaged students* includes, but is not necessarily limited to, individuals from low-income families (as defined elsewhere in this notice), English learners, migratory children, children with disabilities, and neglected or delinquent children.

*High-quality charter school* is a school that shows evidence of strong academic results for the past three years (or over the life of the school, if the school has been open for fewer than three years), based on the following factors:

(1) Increasing student academic achievement and attainment for all students, including, as applicable, educationally disadvantaged students served by the charter schools operated or managed by the applicant.

(2) Either (i) Demonstrated success in closing historic achievement gaps for the subgroups of students, described in section 1111(b)(2)(C)(v)(II) of the ESEA at the charter schools operated or managed by the applicant, or

(ii) No significant achievement gaps between any of the subgroups of students described in section 1111(b)(2)(C)(v)(II) of the ESEA at the charter schools operated or managed by the applicant and significant gains in student academic achievement with all populations of students served by the charter schools operated or managed by the applicant.

(3) Achieved results (including performance on statewide tests, annual student attendance and retention rates, high school graduation rates, college attendance rates, and college persistence

rates where applicable and available) for low-income and other educationally disadvantaged students served by the charter schools operated or managed by the applicant that are above the average academic achievement results for such students in the State.

(4) No significant compliance issues (as defined in this notice), particularly in the areas of student safety and financial management.

*Individual from a low-income family* means an individual who is determined by an SEA or LEA to be a child, age 5 through 17, from a low-income family, on the basis of (a) data used by the Secretary to determine allocations under section 1124 of the ESEA, (b) data on children eligible for free or reduced-price lunches under the Richard B. Russell National School Lunch Act, (c) data on children in families receiving assistance under part A of title IV of the Social Security Act, (d) data on children eligible to receive medical assistance under the Medicaid program under Title XIX of the Social Security Act, or (e) an alternate method that combines or extrapolates from the data in items (a) through (d) of this definition (see 20 U.S.C. 6537(3)).

*Replicate* means to open one or more new charter schools that are based on the charter school model or models for which the applicant has presented evidence of success.

*Significant compliance issue* means a violation that did, will, or could lead to the revocation of a school's charter.

*Substantially expand* means to increase the student count of an existing charter school by more than 50 percent or to add at least two grades to an existing charter school over the course of the grant.

*Final Selection Criteria:*

The Assistant Deputy Secretary for Innovation and Improvement establishes the following selection criteria for the CSP Replication and Expansion of High-Quality Charter Schools grants program. We may apply one or more of these criteria, alone or in combination with one or more selection criteria from 34 CFR 75.210 and section 5204 of the ESEA, in any year in which we award grants for the replication and expansion of high-quality charter schools. In the notice inviting applications or the application package, or both, we will announce the maximum possible points assigned to each criterion.

(a) *Quality of the eligible applicant.* In determining the quality of the applicant, the Secretary considers the following factors:

(1) The degree, including the consistency over the past three years, to which the applicant has demonstrated success in significantly increasing student academic achievement and attainment for all students, including, as applicable, educationally disadvantaged students served by the charter schools operated or managed by the applicant.

(2) Either (i) The degree, including the consistency over the past three years, to which the applicant has demonstrated success in closing historic achievement gaps for the subgroups of students, described in section 1111(b)(2)(C)(v)(II) of the ESEA at the charter schools operated or managed by the applicant, or

(ii) The degree, including the consistency over the past three years, to which there have not been significant achievement gaps between any of the subgroups of students described in section 1111(b)(2)(C)(v)(II) of the ESEA at the charter schools operated or managed by the applicant and to which significant gains in student academic achievement made with all populations of students served by the charter schools operated or managed by the applicant.

(3) The degree, including the consistency over the past three years, to which the applicant has achieved results (including performance on statewide tests, annual student attendance and retention rates, high school graduation rates, college attendance rates, and college persistence rates where applicable and available) for low-income and other educationally disadvantaged students served by the charter schools operated or managed by the applicant that are significantly above the average academic achievement results for such students in the State.

(b) *Contribution in assisting educationally disadvantaged students.*

The contribution the proposed project will make in assisting educationally disadvantaged students served by the applicant to meet or exceed State academic content standards and State student academic achievement standards, and to graduate college- and career-ready. When responding to this selection criterion, applicants must discuss the proposed locations of schools to be created or substantially expanded and the student populations to be served.

(c) *Quality of the project design.*

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 the extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified, measurable, and attainable. Applicants proposing to open schools serving substantially different populations than those currently served by the model for which they have demonstrated evidence of success must address the attainability of outcomes given this difference.

(d) *Quality of the management plan and personnel.*

The Secretary considers the quality of the management plan and personnel to replicate and substantially expand high-quality charter schools. In determining the quality of the management plan and personnel for the proposed project, the Secretary considers:

(1) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks.

(2) The business plan for improving, sustaining, and ensuring the quality and performance of charter schools created or substantially expanded under these grants beyond the initial period of Federal funding in areas including, but not limited to, facilities, financial management, central office, student academic achievement, governance, oversight, and human resources of the charter schools.

(3) A multi-year financial and operating model for the organization, a demonstrated commitment of current and future partners, and evidence of broad support from stakeholders critical to the project's long-term success.

(4) The plan for closing charter schools supported, overseen, or managed by the applicant that do not meet high standards of quality.

(5) The qualifications, including relevant training and experience, of the project director, chief executive officer or organization leader, and key project personnel, especially in managing projects of the size and scope of the proposed project.

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 priorities, requirements, definitions, and selection criteria, we invite applications through a notice in the **Federal Register.**

*Executive Order 12866:* 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 final regulatory action.

The potential costs associated with this final 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 final regulatory action, we have determined that the benefits of the final priorities, requirements, definitions, and selection criteria justify the costs.

We have determined, also, that this final regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

*Summary of potential costs and benefits:*

The impact of the Charter Schools Program in opening new charter schools around the country has been well-established. CSP Grants for the Replication and Expansion of High-Quality Charter Schools program gives the best CMOs in the country a chance to replicate their high-performing charter schools and serve more students. The priorities, requirements, definitions, and selection criteria announced in this notice will ensure that the highest-quality applicants receive funds and are able to serve the students most in need.

*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 program 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: July 7, 2011.

**James H. Shelton, III,**

*Assistant Deputy Secretary for Innovation and Improvement.*

[FR Doc. 2011–17491 Filed 7–11–11; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket Nos. TS11–6–000; OA96–35–001]**

### Maine Public Service Company; Notice of Filing

Take notice that on June 22, 2011, Maine Public Service Company submitted a filing notifying the Commission of its relinquishment, effective December 21, 2010, of the waiver it previously received of the Standards of Conduct requirements of Order No. 889 in Docket No. OA96–35–000, *Midwest Energy, Inc., et al.,* 77 FERC ¶ 61,208 (1996) (Waiver Order).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible online at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

*Comment Date:* 5 p.m. Eastern Time on July 27, 2011.

Dated: July 6, 2011.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2011–17473 Filed 7–11–11; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 2524–019]**

### Grand River Dam Authority; Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Amendment of License.

b. *Project No:* 2524–019.

c. *Date Filed:* January 21, 2011.

d. *Applicant:* Grand River Dam Authority.

e. *Name of Project:* Salina Pumped Storage Project.

f. *Location:* The project is located on the Saline Creek arm Lake Hudson in Mayes County, Oklahoma.

g. *Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Gretchen Zumwalt-Smith, General Counsel, Grand River Dam Authority, P.O. Box 409, Vinita, OK 73401–0409. Tel: (918) 256–5545.

i. *FERC Contact:* Any questions on this notice should be addressed to Vedula Sarma at (202) 502–6190 or *vedula.sarma@ferc.gov.*

j. *Deadline for filing comments and or motions:* July 21, 2011.

Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov/docs-filing/efiling.asp*). Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system (*http://www.ferc.gov/*

*docs-filing/ecomment.asp)* and must include name and contact information at the end of comments. The Commission strongly encourages electronic filings.

All documents (original and seven copies) filed by paper should be sent to: Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Please include the project number (P–2524–019) on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all interveners filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

k. *Description of Application:* The licensee proposes to relocate the current Chimney Rock substation to a new location within the project boundary for greater safety and reliability. The major construction related work items for the relocation include (a) Extending the double-circuit 161-kV transmission line from Chimney Rock substation to new Saline Creek substation, (b) installing a new 161 kV transmission line from Saline Creek substation to existing 161 kV bus top of Chimney Rock powerhouse, (c) installing protective relays for 161 kV line at Salina pumped storage powerhouse, and (d) installing underground 13.2 kV station lines from Saline Creek substation to Chimney Rock powerhouse.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site using the ''eLibrary'' link at *http://elibrary.ferc.gov/idmws/search/fercgensearch.asp*. Enter the docket number excluding the last three digits (P–2524) in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Any filings must bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers.

p. Agency Comments: Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Dated: July 6, 2011.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2011–17478 Filed 7–11–11; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Project No. 2329–089]**

## FPL Energy Maine Hydro LLC; Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Amendment of License.

b. *Project No:* 2329–089.

c. *Date Filed:* June 3, 2011.

d. *Applicant:* FPL Energy Maine Hydro LLC.

e. *Name of Project:* Wyman Project.

f. *Location:* The project is located on the Kennebec River in Somerset County, Maine.

g. *Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Chad P. Clark, Vice President, FPL Energy Maine Hydro LLC, 26 Katherine Drive, Hallowell, ME 04347. Tel: (207) 629–1818.

i. *FERC Contact:* Any questions on this notice should be addressed to Vedula Sarma at (202) 502–6190 or *vedula.sarma@ferc.gov*.

j. *Deadline for filing comments and or motions:* August 5, 2011.

Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov/docs-filing/efiling.asp*). Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system (*http://www.ferc.gov/docs-filing/ecomment.asp)* and must include name and contact information at the end of comments. The Commission strongly encourages electronic filings.

All documents (original and seven copies) filed by paper should be sent to: Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Please include the project number (P–2329–089) on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all interveners filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

k. *Description of Application:* The licensee proposes to replace the project's Unit 1 turbine runner with a more efficient runner. The proposed upgrade would increase the nameplate capacity of the turbine from 34,000 hp (25.5 MW) to 42,400 hp (31.8 MW) and its hydraulic capacity would increase from 2,834 cfs to 3,010 cfs. The licensee also states that as-built nameplate rating of Unit 1 generator is 27 MW instead of

31.05 MW, and Unit 2 hydraulic capacity is 3,030 cfs instead of 2,984 cfs. The proposed upgrade of Unit 1 and the revised as-built ratings would increase the project's installed capacity from 83.7 MW to 85.2 MW and the hydraulic capacity would increase by 2.5%, from 8,828 cfs to 9,050 cfs.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site using the ''eLibrary'' link at *http://elibrary.ferc.gov/idmws/search/fercgensearch.asp*. Enter the docket number excluding the last three digits (P–2329) in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Any filings must bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers.

p. *Agency Comments:* Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Dated: July 6, 2011.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2011–17477 Filed 7–11–11; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Project No. 13509–001]**

## Turnagain Arm Tidal Electric Energy Project; Notice of Intent To File License Application, Filing of Pre-Application Document (PAD), Commencement of Pre-Filing Process, and Scoping; Request for Comments on the PAD and Scoping Document, and Identification of Issues and Associated Study Requests

a. *Type of Filing:* Notice of Intent to File License Application for a New License and Commencing Pre-filing Process.

b. *Project No.:* 13509–001.

c. *Dated Filed:* May 11, 2011.

d. *Submitted By:* Turnagain Arm Tidal Energy Corporation.

e. *Name of Project:* Turnagain Arm Tidal Electric Energy Project.

f. *Location:* Of the Upper Cook Inlet off the south shore of Fire Island to Point Possession on the northern Kenai Peninsula in the boroughs of Anchorage and Kenai Peninsula, Alaska.

g. *Filed Pursuant to:* 18 CFR part 5 of the Commission's Regulations.

h. *Potential Applicant Contact:* Dominic Lee, P. E., Turnagain Arm Tidal Energy Corporation, 821 N Street, Suite 207, Anchorage, AK 99501.

i. *FERC Contact:* Kim Nguyen at (202) 502–6105 or e-mail at *kim.nguyen@ferc.gov*.

j. *Cooperating agencies:* Federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item o below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See* 94 FERC ¶ 61,076 (2001).

k. With this notice, we are initiating informal consultation with: (a) The U.S. Fish and Wildlife Service and/or NOAA Fisheries under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR Part 402 and (b) the State Historic Preservation Officer, as required by section 106, National Historical Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. Turnagain Arm Tidal Energy Corporation filed with the Commission a Pre-Application Document (PAD; including a proposed process plan and schedule), pursuant to 18 CFR 5.6 of the Commission's regulations.

m. A copy of the PAD is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site (*http://www.ferc.gov*), using the ''eLibrary'' link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCONlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in paragraph h.

Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. With this notice, we are soliciting comments on the PAD and Commission's staff Scoping Document 1 (SD1), as well as study requests. All comments on the PAD and SD1, and study requests should be sent to the address above in paragraph h. In addition, all comments on the PAD and SD1, study requests, requests for cooperating agency status, and all communications to and from Commission staff related to the merits of the potential application must be filed with the Commission. Documents may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp*. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

o. All filings with the Commission must include on the first page, the project name, Turnagain Arm Tidal Electric Energy Project, and number P–13509–001, and bear the appropriate heading: ''Comments on Pre-Application Document,'' ''Study Requests,'' ''Comments on Scoping Document 1,'' ''Request for Cooperating Agency Status,'' or ''Communications to and from Commission Staff.'' Any individual or entity interested in submitting study requests, commenting on the PAD or SD1, and any agency requesting cooperating status must do so by September 9, 2011.

p. We will be preparing an Environmental Impact Statement (EIS).

**Scoping Meetings**

Commission staff will hold two scoping meetings in the vicinity of the project at the time and place noted below. The daytime meeting will focus on resource agency, Indian tribes, and non-governmental organization concerns, while the evening meeting is primarily for receiving input from the public. We invite all interested individuals, organizations, and agencies to attend one or both of the meetings, and to assist staff in identifying particular study needs, as well as the scope of environmental issues to be addressed in the environmental document. The times and locations of these meetings are as follows:

*Daytime Scoping Meeting*

*Date and Time:* Tuesday, August 8, 2011, 9 a.m.

*Location:* Public Conference Room of the Z. J. Loussac Library, 3600 W. 36th Avenue, Anchorage, AK 99503

*Phone Number:* (907) 343–2975

*Evening Scoping Meeting*

*Date and Time:* Tuesday, August 8, 2011, 6:30 p.m.

*Location:* Wilda Marston Theater of the Z. J. Loussac Library

SD1 which outlines the subject areas to be addressed in the environmental document, was mailed to the individuals and entities on the Commission's mailing list. Copies of SD1 will be available at the scoping meetings, or may be viewed on the web at *http://www.ferc.gov*, using the ''eLibrary'' link. Follow the directions for accessing information in paragraph m. Based on all oral and written comments, a Scoping Document 2 (SD2) may be issued. SD2 may include a revised process plan and schedule, as well as a list of issues, identified through the scoping process.

**Environmental Site Review**

The potential applicant and Commission staff will conduct an Environmental Site Review of the project on Wednesday, August 9, 2011, at 9 a.m., meeting at the Wilda Marston Theater entryway of the Z. J. Loussac Library, 3600 W. 36th Avenue, Anchorage, AK 99503. All participants are responsible for their own transportation. Anyone with questions about the site visit should contact Ms. Tammie Smith at (907) 274–7571 on or before August 1, 2011.

**Meeting Objectives**

At the scoping meetings, staff will: (1) Initiate scoping of the issues; (2) review and discuss existing conditions and resource management objectives; (3) review and discuss existing information and identify preliminary information and study needs; (4) review and discuss the process plan and schedule for pre-filing activity that incorporates the time frames provided for in Part 5 of the Commission's regulations and, to the extent possible, maximizes coordination of federal, state, and tribal permitting and certification processes; and (5) discuss the appropriateness of any federal or state agency or Indian tribe acting as a cooperating agency for development of an environmental document.

Meeting participants should come prepared to discuss their issues and/or concerns. Please review the PAD in preparation for the scoping meetings. Directions on how to obtain a copy of the PAD and SD1 are included in item n. of this document.

**Meeting Procedures**

The meetings will be recorded by a stenographer and will be placed in the public records of the project.

Dated: July 6, 2011.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2011–17475 Filed 7–11–11; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Project No. 2678–005]**

## Pacific Gas and Electric Company; Notice of Intent To File License Application, Filing of Pre-Application Document (Pad), Commencement of Pre-Filing Process, and Scoping; Request for Comments on the Pad and Scoping Document, and Identification of Issues and Associated Study Requests

a. *Type of Filing:* Notice of Intent to File License Application for a Subsequent License and Commencing Pre-filing Process.

b. *Project No.:* 2678–005.

c. *Dated Filed:* April 29, 2011.

d. *Submitted By:* Pacific Gas and Electric Company.

e. *Name of Project:* Narrows No. 2 Transmission Line Project.

f. *Location:* Nevada and Yuba Counties, California.

g. *Filed Pursuant to:* 18 CFR Part 5 of the Commission's Regulations.

h. *Potential Applicant Contact:* Paul Maben, Pacific Gas and Electric Company, 5555 Florin Perkins Road, Sacramento, CA 95826. Tel: (209) 736–6644.

i. *FERC Contact:* Mary Greene at (202) 502–8865 or e-mail at *mary.greene@ferc.gov.*

j. *Cooperating agencies:* Federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item o below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See* 94 FERC ¶ 61,076 (2001).

k. *With this notice, we are initiating informal consultation with:* (a) The U.S. Fish and Wildlife Service under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR part 402 and (b) the State Historic Preservation Officer, as required by section 106, National Historical Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. Pacific Gas and Electric Company filed with the Commission a Pre-Application Document (PAD; including a proposed process plan and schedule),

pursuant to 18 CFR 5.6 of the Commission's regulations.

m. A copy of the PAD is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site (*http://www.ferc.gov*), using the ''eLibrary'' link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in paragraph h.

Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. With this notice, we are soliciting comments on the PAD and Commission's staff Scoping Document 1 (SD1), as well as study requests. All comments on the PAD and SD1, and study requests should be sent to the address above in paragraph h. In addition, all comments on the PAD and SD1, study requests, requests for cooperating agency status, and all communications to and from Commission staff related to the merits of the potential application must be filed with the Commission. Documents may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

All filings with the Commission must include on the first page, the project name (Narrows No. 2 Transmission Line Project) and number (P–2678–005), and bear the appropriate heading: ''Comments on Pre-Application Document,'' ''Study Requests,'' ''Comments on Scoping Document 1,'' ''Request for Cooperating Agency Status,'' or ''Communications to and from Commission Staff.'' Any individual or entity interested in submitting study requests, commenting on the PAD or SD1, and any agency requesting cooperating status must do so by September 4, 2011.

o. Although our current intent is to prepare a single EA, there is a possibility that a subsequent EA or an environmental impact statement (EIS) may be required. Nevertheless, this scoping document will satisfy the NEPA scoping requirements, irrespective of whether an EA or EIS is issued by the Commission.

Because of the limited scope of environmental issues associated with the Narrows No. 2 Transmission Line Project we do not anticipate holding formal public or agency scoping meeting near the project site. Instead, we will conduct paper scoping for the project.

Scoping Document 1 (SD1), which outlines the subject areas to be addressed in the environmental document, was mailed to the individuals and entities on the Commission's mailing list. Follow the directions for accessing information in paragraph n. Based on all oral and written comments, a Scoping Document 2 (SD2) may be issued. SD2 may include a revised process plan and schedule, as well as a list of issues, identified through the scoping process.

Dated: July 6, 2011.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2011–17474 Filed 7–11–11; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket No. PR09–2–001]**

## Ohio Valley Hub, LLC; Notice of Motion for Extension of Rate Case Filing Deadline

Take notice that on June 30, 2011, Ohio Valley Hub, LLC (OVH) filed a request for an extension consistent with the Commission's revised policy of periodic review from a triennial to a five year period. The Commission in Order No. 735 modified its policy concerning periodic reviews of rates charges by section 311 and Hinshaw pipelines to extend the cycle for such reviews from three to five years.[1] Therefore, OVH requests that the date for its next rate filing be extended to August 13, 2013, which is five years from the date of OVH's most recent rate filing with this Commission.

Any person desiring to participate in this rate proceeding must file a motion to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, July 12, 2011.

Dated: July 6, 2011.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2011–17476 Filed 7–11–11; 8:45 am]

**BILLING CODE 6717–01–P**

[1] Contract Reporting Requirements of Intrastate Natural Gas Companies, Order No. 735, 131 FERC ¶ 61,150 (May 20, 2010).

## FEDERAL ACCOUNTING STANDARDS ADVISORY BOARD

### Notice of Issuance of Statement of Federal Financial Accounting Standards 41, Deferral of the Effective Date of SFFAS 38, Accounting for Federal Oil and Gas Resources, and Issuance of Final Technical Bulletin 2011–1, Accounting for Federal Natural Resources Other Than Oil and Gas

**AGENCY:** Federal Accounting Standards Advisory Board.

**ACTION:** Notice.

*Board Action:* Pursuant to 31 U.S.C. 3511(d), the Federal Advisory Committee Act (Pub. L. 92–463), as amended, and the FASAB Rules of Procedure, as amended in October, 2010, notice is hereby given that the Federal Accounting Standards Advisory Board (FASAB) has issued Statement of Federal Financial Accounting Standards 41, Accounting for Federal Natural Resources Other than Oil and Gas.

The Standard is available on the FASAB Web site at *http://www.fasab.gov/board-activities/documents-for-comment/exposure-drafts-and-documents-for-comment/.*

The Federal Accounting Standards Advisory Board (FASAB) also announces the issuance of final Technical Bulletin 2011–1, Accounting for Federal Natural Resources Other than Oil and Gas.

*The Technical Bulletin is available on the FASAB Web site at http://www.fasab.gov/pdffiles/handbook tech bulletin 20111.pdf.*

Copies of SFFAS 41 and Technical Bulletin 2011–1 can also be obtained by contacting FASAB at (202) 512–7350.

**FOR FURTHER INFORMATION CONTACT:** Wendy Payne, Executive Director, at (202) 512–7350.

**Authority:** Federal Advisory Committee Act, Pub. L. 92–463.

Dated: July 6, 2011.

**Charles Jackson,**

*Federal Register Liaison Officer.*

[FR Doc. 2011–17384 Filed 7–11–11; 8:45 am]

**BILLING CODE 1610–02–P**

## FEDERAL COMMUNICATIONS COMMISSION

### Information Collection Approved by the Office of Management and Budget

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice.

**SUMMARY:** The Federal Communications Commission has received Office of Management and Budget (OMB) approval for the following public information collection(s) pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). An agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number, and no person is required to respond to a collection of information unless it displays a currently valid OMB control number. Comments concerning the accuracy of the burden estimate(s) and any suggestions for reducing the burden should be directed to the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.

**FOR FURTHER INFORMATION CONTACT:** Ginny Kennedy, Wireline Competition Bureau, Telecommunications Access Policy Division at 202–418–7400 or e-mail at *Ginny.Kennedy@fcc.gov*

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 3060–0774.

*OMB Approval Date:* June 23, 2011.

*Expiration Date:* June 30, 2014.

*Title:* Parts 36 and 54, Federal-State Joint Board on Universal Service.

*Form Number:* N/A.

*Estimated Annual Burden:* 7,577,634 responses; .084 hours–125 hours (average); 1,152,255 hours total per year.

*Obligation to Respond:* Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 151–154, 201–205, 218–220, 214, 254, 303(r), 403 and 410.

*Nature and Extent of Confidentiality:* There is no need for confidentiality. However, respondents may request materials or information submitted to the Commission be withheld from public inspection under 47 CFR 0.459 of the Commission's rules.

*Needs and Uses:* The Office of Management and Budget (OMB) approved the revision to the subject collection. In this revision, the Commission made mathematical corrections, rule part consolidations, and eliminated one item to avoid duplicity (information was being reported on the same rule provision under a different OMB control number). Redundant or unnecessary information was removed. OMB approved a 127.200 hour burden reduction adjustment. In the Telecommunications Act of 1996 (1996 Act), Congress directed the Commission to implement a new set of universal service support mechanisms that are explicit and sufficient to advance the universal service principles enumerated in 47 U.S.C. 254.

Federal Communications Commission.

**Bulah P. Wheeler,**

*Deputy Manager, Office of the Secretary, Office of Managing Director.*

[FR Doc. 2011–17431 Filed 7–11–11; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL COMMUNICATIONS COMMISSION

### Information Collection Being Reviewed by the Federal Communications Commission

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Federal Communications Commission (FCC), as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act (PRA) of 1995. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

**DATES:** Written PRA comments should be submitted on or before September 12, 2011. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

**ADDRESSES:** Direct all PRA comments to Cathy Williams, FCC, via e-mail *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

**FOR FURTHER INFORMATION CONTACT:** For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 3060–0174.

*Title:* Sections 73.1212, 76.1615 and 76.1715, Sponsorship Identification.

*Form Number:* N/A.

*Type of Review:* Extension of a currently approved collection

*Respondents:* Business or other for-profit entities; Individuals or households.

*Number of Respondents and Responses:* 22,761 respondents and 1,831,610 responses.

*Estimated Time per Response:* .0011 to .2011 hours.

*Frequency of Response:* Recordkeeping requirement; Third party disclosure; On occasion reporting requirement.

*Total Annual Burden:* 242,633 hours.

*Total Annual Cost:* $33,828.

*Obligation to Respond:* Required to obtain or retain benefits. The statutory authority for this collection is contained in Sections 4(i), 317 and 507 of the Communications Act of 1934, as amended.

*Nature and Extent of Confidentiality:* No need for confidentiality required.

*Privacy Impact Assessment(s):* No impact(s).

*Needs and Uses:* 47 CFR 73.1212 requires a broadcast station to identify the sponsor of any matter transmitted for consideration. 47 CFR 76.1615 states that, when a cable operator engaged in origination cablecasting presents any matter for which consideration is provided to such cable television system operator, the cable television system operator, at the time of the telecast, shall identify the sponsor. For both sections, for advertising commercial products or services, the mention of the sponsor's name or product, when it is clear that the mention of the product constitutes sponsorship identification, is all that is required. In the case of television political advertisements concerning candidates for public office, the sponsor shall be identified with letters equal to or greater than four (4) percent of the vertical height of the television screen that airs for no less than four (4) seconds.

47 CFR 73.1212 and 76.1715 state that, with respect to sponsorship announcements that are waived when the broadcast/origination cablecast of ''want ads'' sponsored by an individual, the licensee/operator shall maintain a list showing the name, address and telephone number of each such advertiser. These lists shall be made available for public inspection.

47 CFR 73.1212 states that, when an entity rather than an individual sponsors the broadcast of matter that is of a political or controversial nature, the licensee is required to retain a list of the executive officers, or board of directors, or executive committee, *etc.,* of the organization paying for such matter in its public file.

Federal Communications Commission.

**Bulah P. Wheeler,**

*Deputy Manager, Office of the Secretary, Office of Managing Director.*

[FR Doc. 2011–17432 Filed 7–11–11; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL COMMUNICATIONS COMMISSION

### Information Collection Being Submitted for Review and Approval to the Office of Management and Budget

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden for small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a currently valid OMB control number.

**DATES:** Written Paperwork Reduction Act (PRA) comments should be submitted on or before August 11, 2011. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

**ADDRESSES:** Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or via e-mail to *Nicholas_A._Fraser@omb.eop.gov* and to the Federal Communications Commission via e-mail to *PRA@fcc.gov* and *Cathy.Williams@fcc.gov.* To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page *http://reginfo.gov/public/do/PRAMain,* (2) look for the section of the Web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, and (6) when the list of FCC ICRs currently under review appears, look for the title of this ICR (or its OMB Control Number, if there is one) and then click on the ICR Reference Number to view detailed information about this ICR.

**FOR FURTHER INFORMATION CONTACT:** For additional information or copies of the information collection(s), contact Cathy Williams on (202) 418–2918.

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 3060–1146.

*Title:* Implementation of the Twenty-first Century Communications and Video Accessibility Act of 2010, Section 105, Relay Services for Deaf-Blind Individuals, CG Docket No. 10–210.

*Form Number:* N/A.

*Type of Review:* Revision of a currently approved collection.

*Respondents:* Individuals or households; businesses or other for-profit entities; not-for-profit institutions; Federal government; State, local or tribal governments.

*Number of Respondents and Responses:* 106 respondents; 406 responses.

*Estimated Time per Response:* 24 to 120 hours.

*Frequency of Response:* Annual, on occasion, one-time, monthly, and semi-annually reporting requirements; Recordkeeping requirement; Third party disclosure requirement.

*Obligation To Respond:* Required to obtain or retain benefit. The statutory authority for the information collections is contained in 47 U.S.C. 154, 254(k); sections 403(b)(2)(B), (c), Public Law 104–104, 110 Stat. 56. Interpret or apply

47 U.S.C. 201, 218, 222, 225, 226, 228, 254(k), and 620.

*Total Annual Burden:* 21,412 hours.

*Total Annual Cost:* None.

*Nature and Extent of Confidentiality:* Confidentiality is an issue to the extent that individuals and households provide personally identifiable information, which is covered under the FCC's system of records notice (SORN), FCC/CGB–1, ''Informal Complaints and Inquiries.'' As required by the Privacy Act, 5 U.S.C. 552a, the Commission also published a SORN, FCC/CGB–1 ''Informal Complaints and Inquiries,'' in the Federal Register on December 15, 2009 (74 FR 66356) which became effective on January 25, 2010. Also, the Commission is in the process of preparing the new SORN and PIA titled CGB–3, ''National Deaf-Blind Equipment Distribution Program,'' to cover the PII collected related thereto, as required by OMB's Memorandum M–03–22 (September 26, 2003) and by the Privacy Act, 5 U.S.C. 552a.

*Privacy Impact Assessment:* Yes. The Privacy Impact Assessment (PIA) was completed on June 28, 2007. It may be reviewed at: *http://www.fcc.gov/omd/privacyact/Privacy-Impact-Assessment.html.* The Commission is in the process of updating the PIA to incorporate various revisions made to the SORN and is in the process of preparing a new SORN to cover the PII collected related thereto, as stated above.

*Needs and Uses:* On April 6, 2011, in document FCC 11–56, the Commission released a Report and Order adopting final rules requiring the following:

(a) State EDPs, other public programs, and private entities may submit applications for NDBEDP certification to the Commission. For each state, the Commission will certify a single program as the sole authorized entity to participate in the NDBEDP and receive reimbursement from the TRS Fund. The Commission will determine whether to grant certification based on the ability of a program to meet the following qualifications, either directly or in coordination with other programs or entities, as evidenced in the application and any supplemental materials, including letters of recommendation:

- Expertise in the field of deaf-blindness, including familiarity with the culture and etiquette of people who are deaf-blind, to ensure that equipment distribution and the provision of related services occurs in a manner that is relevant and useful to consumers who are deaf-blind;
- The ability to communicate effectively with people who are deaf-blind (for training and other purposes), by among other things, using sign language, providing materials in Braille, ensuring that information made available online is accessible, and using other assistive technologies and methods to achieve effective communication;
- Staffing and facilities sufficient to administer the program, including the ability to distribute equipment and provide related services to eligible individuals throughout the state, including those in remote areas;
- Experience with the distribution of specialized CPE, especially to people who are deaf-blind;
- Experience in how to train users on how to use the equipment and how to set up the equipment for its effective use; and
- Familiarity with the telecommunications, Internet access, and advanced communications services that will be used with the distributed equipment.

(b) Each program certified under the NDBEDP must submit the following data electronically to the Commission, as instructed by the NDBEDP Administrator, every six months, commencing with the start of the pilot program:

- For each piece of equipment distributed, the identity of and contact information, including street and e-mail addresses, and phone number, for the individual receiving that equipment;
- For each piece of equipment distributed, the identity of and contact information, including street and e-mail addresses, and phone number, for the individual attesting to the disability of the individual who is deaf-blind;
- For each piece of equipment distributed, its name, serial number, brand, function, and cost, the type of communications service with which it is used, and the type of relay service it can access;
- For each piece of equipment distributed, the amount of time, following any assessment conducted, that the requesting individual waited to receive that equipment;
- The cost, time and any other resources allocated to assessing an individual's equipment needs;
- The cost, time and any other resources allocated to installing equipment and training deaf-blind individuals on using equipment;
- The cost, time and any other resources allocated to maintain, repair, cover under warranty, and refurbish equipment;
- The cost, time and any other resources allocated to outreach activities related to the NDBEDP, and the type of outreach efforts undertaken;
- The cost, time and any other resources allocated to upgrading the distributed equipment, along with the nature of such upgrades;
- To the extent that the program has denied equipment requests made by their deaf-blind residents, a summary of the number and types of equipment requests denied and reasons for such denials;
- To the extent that the program has received complaints related to the program, a summary of the number and types of such complaints and their resolution; and
- The number of qualified applicants on waiting lists to receive equipment.

(c) Each program certified under the NDBEDP must retain all records associated with the distribution of equipment and provision of related services under the NDBEDP for two years following the termination of the pilot program.

(d) Each program certified under the NDBEDP must obtain verification that NDBEDP applicants meet the definition of an individual who is deaf-blind.

(e) Each program certified under the NDBEDP must obtain verification that NDBEDP applicants meet the income eligibility requirements.

(f) Programs certified under the NDBEDP shall be reimbursed for the cost of equipment that has been distributed to eligible individuals and authorized related services, up to the state's funding allotment under this program. Within 30 days after the end of each six-month period of the Fund Year, each program certified under the NDBEDP pilot must submit documentation that supports its claim for reimbursement of the reasonable costs of the following:

- Equipment and related expenses, including maintenance, repairs, warranties, returns, refurbishing, upgrading, and replacing equipment distributed to consumers;
- Individual needs assessments;
- Installation of equipment and individualized consumer training;
- Maintenance of an inventory of equipment that can be loaned to the consumer during periods of equipment repair;
- Outreach efforts to inform state residents about the NDBEDP; and administration of the program, but not to exceed 15 percent of the total reimbursable costs for the distribution of equipment and related services permitted under the NDBEDP.

Federal Communications Commission.

**Bulah P. Wheeler,**

*Deputy Manager, Office of the Secretary, Office of Managing Director.*

[FR Doc. 2011–17434 Filed 7–11–11; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL COMMUNICATIONS COMMISSION

### Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Federal Communications Commission (FCC), as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act (PRA) of 1995. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

**DATES:** Written PRA comments should be submitted on or before September 12, 2011. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

**ADDRESSES:** Direct all PRA comments to Cathy Williams, FCC, via e-mail *PRA@fcc.gov mailto: PRA@fcc.gov* and to *Cathy.Williams@fcc.gov mailto:Cathy.Williams@fcc.gov*.

**FOR FURTHER INFORMATION CONTACT:** For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 3060–0474.

*Title:* Section 74.1263, Time of Operation.

*Form Number:* N/A.

*Type of Review:* Extension of a currently approved collection.

*Respondents:* Business and other for profit entities; Not-for-profit institutions.

*Number of Respondents and Responses:* 75 respondents and 75 responses.

*Estimated Time per Response:* 0.5 hours.

*Frequency of Response:* On occasion reporting requirement.

*Total Annual Burden:* 38 hours.

*Total Annual Costs:* None.

*Obligation to Respond:* Required to obtain or retain benefits. The statutory authority for this collection is contained in Sections 154(i), 303 and 308 of the Communications Act of 1934, as amended.

*Nature and Extent of Confidentiality:* No need for confidentiality required.

*Privacy Impact Assessment(s):* No impact(s).

*Needs and Uses:* 47 CFR 74.1263(c) requires licensees of FM translator or booster station's to notify the Commission of its intent to discontinue operations for 30 or more consecutive days. In addition, licensees must notify the Commission within 48 hours of the station's return to operation. 47 CFR 74.1263(d) requires FM translator or booster station licensees to notify the Commission of its intent to permanently discontinue operations and to forward the station license to the FCC for cancellation. FCC staff uses this data to keep records up-to-date. These notifications inform FCC staff that frequencies are not being used for a specified amount of time and that frequencies have become available for other users.

Federal Communications Commission.

**Bulah P. Wheeler,**

*Deputy Manager, Office of the Secretary, Office of Managing Director.*

[FR Doc. 2011–17435 Filed 7–11–11; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL MARITIME COMMISSION

### Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of the agreements are available through the Commission's Web site (*http://www.fmc.gov*) or by contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov.*

*Agreement No.:* 012093–001.

*Title:* CSAV/K-Line Space Charter and Sailing Agreement.

*Parties:* Compania Sud Americana de Vapores and Kawasaki Kisen Kaisha, Ltd.

*Filing Parties:* Walter H. Lion, Esq., McLaughlin & Stern, LLP, 260 Madison Avenue, New York, NY 10016.

*Synopsis:* The amendment adds Greece to the geographic scope of the Agreement and changes the Agreement's name.

*Agreement No.:* 201211.

*Title:* Marine Terminal Lease and Operating Agreement between Broward County and H.T. Shipping, Inc., and Hybur Ltd.

*Parties:* Broward County, H.T. Shipping, Inc., and Hybur Ltd.

*Filing Party:* Candace J. Running, Broward County Board of County Commissioners, Office of the County Attorney, 1850 Eller Drive, Suite 502, Fort Lauderdale, FL 33316.

*Synopsis:* The agreement provides for the lease and operation of terminal facilities at Port Everglades, Florida.

By Order of the Federal Maritime Commission.

Dated: June 10, 2011.

**Rachel E. Dickon,**

*Assistant Secretary.*

[FR Doc. 2011–17082 Filed 7–11–11; 8:45 am]

**BILLING CODE 6730–01–P**

## FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

### Sunshine Act Notice

July 6, 2011.

**TIME AND DATE:** 10 a.m., Thursday, July 14, 2011.

**PLACE:** The Richard V. Backley Hearing Room, 9th Floor, 601 New Jersey Avenue, NW., Washington, DC.

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:** The Commission will hear oral argument in the matter *Secretary of Labor* v. *Oak Grove Resources, LLC,* Docket No. SE 2010–350–R. (Issues include whether an order issued by the Secretary of Labor

was impermissibly duplicative of a previously issued citation.)

Any person attending this oral argument who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and 2706.160(d).

**CONTACT PERSON FOR MORE INFO:** Jean Ellen (202) 434–9950/(202) 708–9300 for TDD Relay/1–800–877–8339 for toll free.

**Emogene Johnson,**

*Administrative Assistant.*

[FR Doc. 2011–17583 Filed 7–8–11; 4:15 pm]

**BILLING CODE 6735–01–P**

## GENERAL SERVICES ADMINISTRATION

**[Notice-PBS–02; Docket No. 2011–0006; Sequence 13]**

### Notice of Availability of the Draft Environmental Assessment for the Renovation of the Charles F. Prevedel Federal Building and Demolition of Federal Buildings 100, 101, and 102 at the Federal Records Center at Overland, MO

**AGENCY:** General Services Administration (GSA).

**ACTION:** Notice of Availability.

**SUMMARY:** This notice announces the availability, and opportunity for public review and comment, of a draft environmental assessment (EA), that examines the impacts of a proposal by the GSA. The EA considers proposed renovation and demolition actions at the Page Federal Complex in Overland, Missouri. The EA identifies, evaluates, and documents the effects of the GSA renovating the Charles F. Prevedel Building, including the replacement of mechanical systems to meet high performance green building standards, and making needed improvements in parking, security setbacks, and the like; and demolishing Buildings 100,101, and 102 at the Page Federal Complex, which are no longer needed.

**DATES:** The review period for the Draft EA and other NEPA documents ends Friday, August 19th, 2011. Comments postmarked after this date will be considered to the extent practicable.

**ADDRESSES:** Comments, or requests for copies of the draft EA, should be sent to Jeremiah Nelson, General Services Administration, 1500 East Bannister Road, Room 2191 (6PTA), Kansas City, MO 64131 or via e-mail to *jeremiah.nelson@gsa.gov.* Verbal requests for copies of the draft EA or comments on the EA may also be made by calling Jeremiah Nelson at 816–823–5803.

**SUPPLEMENTARY INFORMATION:** Certain actions by other Federal agencies have left the Page Federal Complex underused, leaving the GSA, which has custody and control of the Page Federal Complex, to determine how best to deal with its excess property. U.S. Army Human Resources Command (HRC) personnel vacated the Page Federal Complex and moved to Fort Knox, Kentucky, under a Defense Base Closure and Realignment (BRAC) directive. Personnel associated with the Military Personnel Records Center are moving from the Page Federal Complex to a new facility in Fort Knox, Kentucky.

On September 8, 2005, the BRAC Commission recommended numerous realignment and closure actions for domestic military installations. The recommendations became law on November 9, 2005, and they must be implemented as provided for in the Defense Base Closure and Realignment Act of 1990 (Pub. L. 101–510, as amended). BRAC Commission Recommendation Number 143 (BRAC 143) requires the realignment of Army HRC leased facilities in Alexandria, Virginia; Indianapolis, Indiana; and St. Louis, Missouri; to Fort Knox, Kentucky. Approximately 1,583 HRC personnel that occupied space in the Page Federal Complex in Overland, Missouri, were relocated to Fort Knox (DoD 2005).

The National Archives and Records Administration (NARA), which is the nation's record keeper for documents and materials created in the course of business conducted by the U.S. government, vacated the Military Personnel Records Center and the Civilian Personnel Records Center, also in St. Louis, to establish a new facility in St. Louis which complies with NARA's 2009 record storage standards—a move that involves approximately 800 personnel associated with the two record centers.

The Prevedel Building was constructed in 1990, and structurally is in very good condition. Minimal seismic improvements are necessary to meet current standards. Replacing the building's mechanical systems would result in a reduction of energy usage and promote the government's commitment to achieve the mandates set forth in Executive Order (EO) 13514 (*Federal Leadership in Environmental, Energy, and Economic Performance*).

Furthermore, a 2008 U.S. Government Accountability Office (GAO) report cites the Federal government's overreliance on costly, long-term leasing (GAO 2008). In that report, GAO recommends that agencies' reliance on leased space for long-term needs could be reduced when ownership would be less costly than leasing. Reinvesting in the Prevedel Building (through mechanical systems renovation and replacement) would promote the backfill of the remaining approximately 436,153 square feet (SF) of vacant space in the building by Federal agencies currently housed in leased space in the St. Louis area. An analysis performed on alternatives revealed that continuing to lease space would result in a higher long-term cost to the government than using Federally owned space in the Prevedel Building. Alteration of the Prevedel Building is the most cost efficient solution, and it would comply with EO 13514 and GAO's recommendations.

This EA is being prepared pursuant to the National Environmental Policy Act of 1969 (NEPA), and regulations implementing NEPA issued by the Council on Environmental Quality (40 CFR Parts 1500–1508), GSA (ADM 1095.1F). GSA will consider comments received (see dates and addresses, above) in finalizing the EA. Based on the final EA, GSA will determine whether to prepare an environmental impact statement or issue a finding of no significant impact if appropriate for the proposed action.

Dated: June 30, 2011.

**Kevin D. Rothmier,**

*Director of Portfolio Management, U.S. General Services Administration, PBS, Heartland Region.*

[FR Doc. 2011–17366 Filed 7–11–11; 8:45 am]

**BILLING CODE 6820–CG–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

**[Document Identifier: OS–0990–0371; 30-day notice]**

### Agency Information Collection Request. 30-Day Public Comment Request

**AGENCY:** Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The

necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *Sherette.funncoleman@hhs.gov,* or call the Reports Clearance Office on (202) 690–5683. Send written comments and recommendations for the proposed information collections within 30 days of this notice directly to the OS OMB Desk Officer; faxed to OMB at 202–395–5806.

*Proposed Project:* Evaluation of SAMHSA Primary and Behavioral Health Care Integration Grant Program.—Revision—OMB No. 0990–0371—Assistant Secretary for Planning and Evaluation.

*Abstract:* The Assistant Secretary for Planning and Evaluation (ASPE) and the Substance Abuse and Mental Health Services Administration are funding an independent evaluation of the Substance Abuse and Mental Health Services Administration/Center for Mental Health Services' (SAMHSA/CMHS) Primary and Behavioral Health Care Integration (PBHCI) grant program. Four-year PBHCI grants for up to $500,000 per year were awarded to thirteen grantees on September 30, 2009. A second group of nine grants and a third group of 34 grants were awarded September 30, 2010, for a total of 56 grants. The purpose of the PBHCI program is to improve the overall wellness and physical health status of people with serious mental illnesses (SMI), including individuals with co-occurring substance use disorders, by supporting communities to coordinate and integrate primary care services into publicly-funded community mental health and other community-based behavioral health settings. The information collected through the 3 year evaluation will assist SAMHSA in assessing whether integrated primary care services produce improvements in the physical and mental health of the SMI population receiving services from community-based behavioral health agencies. Data will be collected from grantee staff at all sites and from clients at up to 10 sites (client exam/survey). An Emergency Clearance Request covering the first six months of data collection starting February 15, 2011 and ending August 14, 2011 was approved February 15, 2011. This submission will cover data collection for the period starting August 15, 2011 and ending October 1, 2013.

ESTIMATED ANNUALIZED BURDEN TABLE

| Type of respondent | Instrument name | No. of respondents | No. responses per respondent | Average burden per response (in hours) | Total burden hours |
|---|---|---|---|---|---|
| Grantee Data Staff | Individual Service Utilization Data | 56 | 4 | 8 | 1,792 |
| Grantee Data Staff | TRAC Indicators | 56 | 1,000 | 5/60 | 4,667 |
| Grantee Project Directors | Quarterly Reports | 56 | 4 | 2 | 448 |
| SMI Clients | Client Exam and Survey-Baseline | 1,000 | 1 | 45/60 | 750 |
| SMI Clients | Client Exam and Survey-Follow-up | 1,667 | 1 | 45/60 | 1,250 |
| Grantee Leadership | Site Visit Interview | 40 | 1 | 2 | 80 |
| Grantee MH Providers | Site Visit Interview | 40 | 1 | 1 | 40 |
| Grantee PH Providers | Site Visit Interview | 40 | 1 | 1.5 | 60 |
| Grantee Care Coordinators | Site Visit Interview | 20 | 1 | 1.5 | 30 |
| Control Site Leadership | Site Visit Interview | 50 | 1 | 2 | 100 |
| Grantee Key Staff | Web Survey | 560 | 1 | 1.5 | 840 |
| Total | | | | | 10,057 |

**Mary Forbes,**

*Office of the Secretary, Paperwork Reduction Act Clearance Officer.*

[FR Doc. 2011–17398 Filed 7–11–11; 8:45 am]

**BILLING CODE 4150–05–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

**[Document Identifier: OS–0990–New; 30-day Notice]**

## Agency Information Collection Request; 30-Day Public Comment Request

**AGENCY:** Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *Sherette.funncoleman@hhs.gov,* or call the Reports Clearance Office on (202) 690–5683. Send written comments and recommendations for the proposed information collections within 30 days of this notice directly to the OS OMB Desk Officer; faxed to OMB at 202–395–5806.

*Proposed Project:* Wellness Program Study: Assessing the Impact of Workplace Health and Wellness Programs—OMB No. 0990–New—Assistant Secretary for Planning Evaluation (ASPE).

*Abstract:* The Office of the Assistant Secretary for Planning and Evaluation (ASPE) and the Employee Benefits

Security Administration (EBSA) is requesting Office of Management and Budget (OMB) approval on a new collection to conduct a survey on employers to learn about their experiences and attitudes regarding workplace wellness programs. ASPE will use the employers' experience to assess the effectiveness and impact of workplace wellness programs, as well as identify best practices and lessons learned in program implementation with a particular focus on the use of incentives. As part of the study, a one-time, self-administered survey will be administered to 3,000 employers selected from the Dun & Bradstreet database, a comprehensive listing of private companies and government agencies in the U.S. The survey will assess prevalence and type of wellness programs as well as the use of employee incentives. The survey design and content is informed by a review of the literature on the characteristics, prevalence and impact of workplace wellness programs. Data collection will also include employee focus groups and key informant semi-structured interviews at each of 4 employer sites that will inform in-depth case studies of those employers. The focus groups will consist of 12 employees and will be conducted to get the end-user perspective on the impact and effectiveness of the wellness program. The key informant interviews will be carried out with 5 wellness leaders at each employer, and will gather information on employer background, health insurance and wellness programs offered, and anticipated changes due to the Affordable Care Act. Data collection activities will be completed within 18 months of OMB Clearance.

ESTIMATE OF ANNUALIZED TIME BURDEN TO RESPONDENTS

| Forms | Type of respondent | Number of respondents | Number of responses per respondent | Average burden per response (in hours) | Total burden hours |
|---|---|---|---|---|---|
| Survey | Human Resource Manager | 3,000 | 1 | 30/60 | 1,500 |
| Focus Group Protocol | Employees in All Occupations | 48 | 1 | 1.5 | 72 |
| Key Informant Interview Script | Human Resource Manager | 20 | 1 | 45/60 | 15 |
| Total | | | | | 1,587 |

**Mary Forbes,**

*Paperwork Reduction Act Clearance Officer, Office of the Secretary.*

[FR Doc. 2011–17461 Filed 7–11–11; 8:45 am]

**BILLING CODE 4150–05–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[60Day-11–11IN]**

### Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 or send comments to Daniel Holcomb, CDC Reports Clearance Officer, 1600 Clifton Road, MS D–74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

**Proposed Project**

Testing and Evaluation of Tobacco Communication Activities—New National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

**Background and Brief Description**

Tobacco use remains the leading preventable cause of death in the United States, causing over 443,000 deaths each year and resulting in an annual cost of more than $96 billion in direct medical expenses. The only proven strategy for reducing the risk of tobacco-related morbidity and mortality is to never smoke, or to quit if tobacco use has been initiated.

Within the Centers for Disease Control and Prevention (CDC), the Office on Smoking and Health (OSH) serves as a primary resource of tobacco and health information for the public, health professionals, various branches of government, and other interested groups. OSH distributes tobacco-related health communications using a wide array of formats and media channels, conducts formative research to develop and test tobacco-related communications, and evaluates the effectiveness of messages and campaigns. OSH employs a strategic and systematic approach to the design and evaluation of high-quality health messages and campaigns, by applying scientific methods to the development of health messages, obtaining input from public health partners, and pre-testing with target audiences.

Recent legislative developments highlight the importance of tobacco control—and appropriate tobacco control messages—in efforts to improve the nation's health. These developments include the Prevention and Public Health Fund, established by the Affordable Care Act (ACA), which supports initiatives designed to reduce the health and financial burden of tobacco use through prevention and cessation approaches. An essential component of this initiative is a national campaign to increase awareness of the health consequences of tobacco use and exposure to secondhand smoke. OSH is primarily responsible for planning, implementing, and evaluating the campaign.

CDC requests OMB approval of a new, generic clearance mechanism to support information collection for the development, implementation and evaluation of tobacco-related health messages and campaigns. The proposed generic mechanism will establish a

unified clearance framework for a broad array of tobacco-related communication activities, which may occur on an as-needed basis, or in the context of a coordinated series of activities. A generic clearance is needed to support the breadth, flexibility and time-sensitivity of information collections required to execute and evaluate the upcoming ACA-funded tobacco communication campaign, and to support OSH's ongoing programmatic needs, including materials development and testing for the Media Campaign Research Center.

Information will be collected through a variety of strategies including in-person focus groups, online focus groups, computer-assisted, in-person, or telephone interviews, and online surveys of variable length (short, medium, in-depth). The average burden per response is expected to range from 6–25 minutes for online surveys, and from 1–1.5 hours for interviews and focus groups. CDC will request OMB approval for each data collection activity through submission of a specific Information Collection Request that describes its purpose, use, methodology, and impact on affected respondents. The information will be used to improve the clarity, salience, appeal, and persuasiveness of messages and campaigns supporting OSH's mission. CDC's authority to collect information for public health purposes is provided by the Public Health Service Act (41 U.S.C. 241) Section 301.

Approval of the generic mechanism is requested for three years. Participation is voluntary. There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

| Type of respondent | Form name | Number of respondents | Number of responses per respondent | Average burden per response (in hr) | Total burden (in hr) |
|---|---|---|---|---|---|
| General Public or Target Population | Focus Group | 160 | 1 | 1.5 | 240 |
| | Online Focus Group | 120 | 1 | 1 | 120 |
| | Interviews | 67 | 1 | 1 | 67 |
| | Short Online Surveys | 8,001 | 1 | 6/60 | 800 |
| | Medium Online Surveys | 13,334 | 1 | 25/60 | 5,556 |
| | In-depth Online Surveys | 1,292 | 1 | 1 | 1,292 |
| | | | | | 8,075 |

**Catina Conner,**

*Acting Reports Clearance Officer, Centers for Disease Control and Prevention.*

[FR Doc. 2011–17420 Filed 7–11–11; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[30Day–11–0006]**

### Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–5960 or send an e-mail to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

**Proposed Project**

Statements in Support of Application of Waiver of Inadmissibility (0920–0006) exp. 12/31/2011—Revision—National Center for Emerging and Zoonotic Infectious Diseases (NCEZID), Centers for Disease Control and Prevention (CDC).

**Background and Brief Description**

Section 212(a)1) of the Immigration and Nationality Act states that aliens with specific health related conditions are ineligible for admission into the United States. The Attorney General may waive application of this inadmissibility on health-related grounds if an application for waiver is filed and approved by the U.S. Citizenship and Immigration Services office of the Department of Homeland Security having jurisdiction. CDC uses this application primarily to collect information to establish and maintain records of waiver applicants in order to notify the U.S. Citizenship and Immigration Services when terms, conditions and controls imposed by waiver are not met. CDC is requesting approval from OMB to collect this data for another 3 years. There are no costs to respondents except their time to complete the application. The annualized burden for this data collection is 100 hours.

ESTIMATE OF ANNUALIZED BURDEN HOURS

| Form | No. of responses | No. of responses per respondent | Average burden per response (in hours) |
|---|---|---|---|
| Form CDC 4.422–1 | 200 | 1 | 10/60 |
| Form CDC 4.422–1a | 200 | 1 | 20/60 |

Dated: July 6, 2011.

**Carol Walker,**

*Acting Reports Clearance Officer, Centers for Disease Control and Prevention.*

[FR Doc. 2011–17408 Filed 7–11–11; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[60Day–11–11IP]**

### Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 and send comments to Daniel Holcomb, CDC Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov*.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

**Proposed Project**

Workplace Violence Prevention Programs in NJ Healthcare Facilities—New—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

*Background and Brief Description*

The long-term goal of the proposed project is to reduce violence against healthcare workers. The objective of the proposed study is two-fold: (1) To examine healthcare facility compliance with the New Jersey Violence Prevention in Health Care Facilities Act, and (2) to evaluate the effectiveness of the regulations in this Act in reducing assault injuries to workers. Our central hypothesis is that facilities with high compliance with the regulations will have lower rates of employee violence-related injury. First, we will conduct face-to-face interviews with the chairs of the Violence Prevention Committees who are in charge of overseeing compliance efforts. The purpose of the interviews is to measure compliance to the state regulations (violence prevention policies, reporting systems for violent events, violence prevention committee, written violence prevention plan, violence risk assessments, post incident response and violence prevention training). Second, we will also collect assault injury data from facility violent event reports 3 years pre-regulation (2009–2011) and 3 years post-regulation (2012–2014). The purpose of collecting these data is to evaluate changes in assault injury rates before and after enactment of the regulations. Third, we will conduct a nurse survey. The survey will describe the workplace violence prevention training nurses receive following enactment of the New Jersey regulations.

Healthcare workers are nearly five times more likely to be victims of violence than workers in all industries combined. While healthcare workers are not at particularly high risk for job-related homicide, nearly 60% of all nonfatal assaults occurring in private industry are experienced in healthcare. Six states have enacted laws to reduce violence against healthcare workers by requiring workplace violence prevention programs. However, little is understood about how effective these laws are in reducing violence against healthcare workers.

We will test our central hypothesis by accomplishing the following specific aims:

1. Compare the comprehensiveness of healthcare facility workplace violence prevention programs before and after enactment of the New Jersey regulations; *Working hypothesis:* Based on our preliminary research, we hypothesize that enactment of the regulations will improve the comprehensiveness of hospital workplace violence prevention program policies, procedures and training.

2. Describe the workplace violence prevention training nurses receive following enactment of the New Jersey regulations; *Working hypothesis:* Based on our preliminary research, we hypothesize that nurses receive at least 80% of the workplace violence prevention training components mandated in the New Jersey regulations.

3. Examine patterns of assault injuries to workers before and after enactment of the regulations; *Working hypothesis:* Based on our preliminary research, we hypothesize that rates of assault injuries to workers will decrease following enactment of the regulations.

Healthcare facilities falling under the regulations are eligible for study inclusion (*i.e.,* general acute care hospitals and psychiatric facilities). We will conduct face-to-face interviews with the chairs of the Violence Prevention Committees, who as stated in regulations, are in charge of overseeing compliance efforts. These individuals will include hospital administrators, security directors and/or risk managers, many of whom participated in the California study. The purpose of the interviews is to measure compliance to the state regulations (Aim 1). The interview form was pilot-tested by the study team in the fall 2010 and includes the following components as mandated in the regulations: Violence prevention policies, reporting systems for violent events, violence prevention committee, written violence prevention plan, violence risk assessments, post-incident response and violence prevention training. Questions will also be asked about barriers and facilitators to developing the violence prevention program.

These data will be collected in the post-regulation time period; data collected from New Jersey hospitals in the California study will be used as the baseline measure for evaluating compliance. We will also collect assault injury data from facility violent event reports 3 years pre-regulation (2009–2011) and 3 years post-regulation (2012–2014). The purpose of collecting these data is to evaluate changes in assault injury rates before and after enactment of the regulations (Aim 3). The abstraction form was developed to collect the specific reporting components stated in the regulations: Date, time and location of the incident; identity, job title and job task of the victim; identity of the perpetrator; description of the violent act, including whether a weapon was used; description of physical injuries; number of employees in the vicinity when the incident occurred, and their actions in response to the incident; recommendations of police advisors, employees or consultants, and; actions taken by the facility in response to the incident. No employee or perpetrator identifiable information will be collected.

In addition to health care facilities, nurses will also be recruited. These nurses will be recruited from a mailing list of nurses licensed from the State of New Jersey Division of Consumer Affairs Board of Nursing. The mailing list was selected as the population source of workers due to the ability to capture all licensed nurses in New Jersey. A similar listing does not exist for non-licensed frontline workers, such as aides and orderlies. Therefore, a sampling frame based on nurses (registered nurses and licensed practical nurses) will be used to select workers to participate in the study. A random sample of 2000 registered and licensed practical nurses will be recruited for study participation. A third-party contractor will be responsible for sending the survey to the random sample of 2000. The Health Professionals and Allied Employees union will promote the survey to their members. To maintain the worker's anonymity, the facility in which he/she works will not be identified. The survey will describe the workplace violence prevention training nurses receive following enactment of the New Jersey regulations (Aim 2).

There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

| Respondents | Number of respondents | Number of responses per respondent | Average burden per response (in hrs) | Total burden (in hrs) |
|---|---|---|---|---|
| Hospital Administrators | 50 | 1 | 1 | 50 |
| Nurses (RN and LPN) | 2000 | 1 | 20/60 | 667 |
| Total | | | | 717 |

**Catina Conner,**

*Acting Reports Clearance Officer, Centers for Disease Control and Prevention.*

[FR Doc. 2011–17407 Filed 7–11–11; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[60Day–11–0260]**

### Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 or send comments to Daniel Holcomb, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

**Proposed Project**

Health Hazard Evaluation and Technical Assistance—Requests and Emerging Problems—Revision (OMB No. 0920–0260)—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

*Background and Brief Description*

In accordance with its mandates under the Occupational Safety and Health Act of 1970 and the Federal Mine Safety and Health Act of 1977, the National Institute for Occupational Safety and Health (NIOSH) responds to requests for health hazard evaluations (HHE) to identify chemical, biological or physical hazards in workplaces throughout the United States. Each year, NIOSH receives approximately 320 such requests. Most HHE requests come from the following types of companies: Service, manufacturing companies, health and social services, transportation, construction, agriculture, mining, skilled trade and construction.

A printed Health Hazard Evaluation request form is available in English and in Spanish. The form is also available on the Internet and differs from the printed version only in format and in the fact that it uses an Internet address to submit the form to NIOSH. Both the printed and Internet versions of the form provide the mechanism for employees, employers, and other authorized representatives to supply the information required by the regulations governing the NIOSH Health Hazard Evaluation program (42 CFR 85.3–1). In general, if employees are submitting the form it must contain the signatures of three or more current employees. However, regulations allow a single signature if the requestor: Is one of three (3) or fewer employees in the process, operation, or job of concern; or is any officer of a labor union representing the employees for collective bargaining purposes. An individual management official may request an evaluation on behalf of the employer. For the purpose of the burden estimates, employers includes government, other, and joint requests. About 20% of the total number of HHE requests received per year is identified specifically as management requests. The information provided is used by NIOSH to determine whether there is reasonable cause to justify conducting an investigation and provides a mechanism to respond to the requestor.

In the case of 25% to 50% of the health hazard evaluation requests received, NIOSH determines an on-site evaluation is needed. The primary purpose of an on-site evaluation is to help employers and employees identify and eliminate occupational health hazards. In most on-site evaluations employees are interviewed to help further define concerns, and in approximately 50% these evaluations (presently estimated to be about 80 facilities), questionnaires are distributed to the employees (averaging about 40 employees per site for this last subgroup). No specific interview form is

used. The interview and survey questions are specific to each workplace and its suspected diseases and hazards, however, items are derived from standard medical and epidemiologic techniques. The request forms take an estimated 12 minutes to complete. The interview forms take 15–30 minutes to complete. An example of an interview and an HHE specific questionnaire used for two separate completed HHEs are included in the proposed data collection package.

NIOSH distributes interim and final reports of health hazard evaluations, excluding personal identifiers, to: Requesters, employers, employee representatives; the Department of Labor (Occupational Safety and Health Administration or Mine Safety and Health Administration, as appropriate); and, as needed, other state and Federal agencies.

NIOSH administers a follow-back program to assess the effectiveness of its health hazard evaluation program in reducing workplace hazards. This program entails the mailing of follow-back questionnaires to employer and employee representatives at all the workplaces where NIOSH conducted site visits. In a small number of instances, a follow-back on-site evaluation may be conducted. The initial follow-back questionnaire is administrated immediately following the site visits and takes about 15 minutes. Another follow-back questionnaire is sent a year later and requires about 15 minutes to complete. At 24 months, a final follow-back questionnaire regarding the completed evaluation is sent which takes about 15 minutes to complete.

For requests where NIOSH does not conduct an onsite evaluation, the requester receives a follow-back questionnaire 12 months after our response and a second one 24 months after our response. The first questionnaire takes about 10 minutes to complete and the second questionnaire takes about 15 minutes to complete.

Because of the large number of investigations conducted each year, the need to respond quickly to requests for assistance, the diverse and unpredictable nature of these investigations, and its follow-back program to assess evaluation effectiveness; NIOSH requests an umbrella clearance for data collections performed within the domain of its health hazard evaluation program. There is no cost to respondents other than their time.

ESTIMATE OF ANNUALIZED BURDEN HOURS

| Type of respondent | Form | Number of respondents | Number of responses per respondent | Average burden per response in hours | Total burden hours |
|---|---|---|---|---|---|
| Employees and Representatives | Health Hazard Evaluation Request Form. | 211 | 1 | 12/60 | 42 |
| Employers | Health Hazard Evaluation Request Form. | 109 | 1 | 12/60 | 22 |
| Employees | Health Hazard Evaluation specific interview example. | 3200 | 1 | 15/60 | 800 |
| Employees | Health Hazard Evaluation specific questionnaire example. | 3440 | 1 | 30/60 | 1720 |
| Followback for onsite evaluations for Management, Labor and Requester Year 1. | Initial Site Visit survey form | 320 | 1 | 15/60 | 80 |
| | Year 1—Closeout for HHE with an On Site Evaluation. | 320 | 1 | 15/60 | 80 |
| | Year 2—1 year Later HHE with an On Site Evaluation. | 320 | 1 | 15/60 | 80 |
| Followback for evaluations for Management, Labor and Requester without onsite evaluation. | Year 1—Closeout Survey cover letter and Forms. | 120 | 1 | 10/60 | 20 |
| | Year 2—Closeout Survey Cover Letter and Forms. | 120 | 1 | 15/60 | 30 |
| Total | | | | | 2874 |

**Catina Conner,**

*Acting Reports Clearance Officer, Center for Disease Control and Prevention.*

[FR Doc. 2011–17411 Filed 7–11–11; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[60Day–11–11EP]**

### Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 and send comments to Daniel Holcomb, CDC Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have

practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

**Proposed Project**

Validation of an Occupational Safety and Health Questionnaire—New—*National Institute for Occupational Safety and Health (NIOSH),* Centers for Disease Control and Prevention (CDC).

*Background and Brief Description*

The mission of the National Institute for Occupational Safety and Health (NIOSH) is to promote safety and health at work for all people through research and prevention. Under Public Law 91–596, Section 20 and 22 (section 20–22, Occupational Safety and Health Act of 1970), NIOSH has the responsibility to conduct research to advance the health and safety of workers. In this capacity, NIOSH will administer a questionnaire designed to assess differences in approaches to and perspectives of workplace safety between American-born and Latino immigrant workers.

The rapid growth of the Latino immigrant population in the United States has increased the demand for Spanish-language occupational safety and health training materials. Typically, this need has been met by translating existing, English-language training materials into Spanish rather than developing new materials specifically designed for Latino immigrants. Critics suggest that such efforts frequently fall short of the mark because of poor translations and a failure to address the cultural, legal, educational and socio-economic realities that differentiate Latino immigrant workers from the American-born workers for whom the training materials were originally developed. The failure of current occupational safety and health training approaches with Latino immigrants is highlighted by data from Bureau of Labor Statistics indicating that significant occupational health disparities exist between Latino immigrant workers and American-born workers.

A major obstacle to designing and assessing the impact of occupational safety and health training interventions with Latino immigrants is the lack of a rigorously validated questionnaire addressing the issues believed to be contributing to the occupational health disparities experienced by this group. In order to better understand some of the factors that may be contributing to the persistent occupational health disparities between Latino immigrant and American-born workers, NIOSH is developing a questionnaire that focuses on important occupational safety and health issues such as risk perception, risk acceptance, and workplace coping strategies. The content of this questionnaire was guided, in part, by data collected from focus groups conducted with both Latino immigrants and American-born workers. Additionally, a review of the existing literature and feedback from experts in the field of occupational health disparities contributed to questionnaire content.

For validation purposes, this questionnaire will be administered to a sample of approximately 600 workers employed in a broad range of industries. In order to account for differences in level of acculturation, 200 of the workers will be Latino immigrants who have been in the United States less than 2 years and 200 of the workers will be Latino immigrants who have been in the United States more than 5 years. An additional 200 American-born workers will be given the questionnaire so that their responses may be contrasted with those of the Latino immigrants. Half of the workers will be male and the other half female. In order to account for potential regional differences, 300 of the workers will be from New Mexico, a state that has historically always had a large Latino population and 300 workers will be from Ohio, a state that has only recently experienced a large increase in its Latino population. The sample sizes are not based upon power analyses comparing expected group differences. Rather, the sample sizes are based upon recommendations related to validation of questionnaires, both on the basis of individual items and the analysis of the underlying structure elements.

Participants for this data collection will be recruited with the assistance of contractors who have successfully performed similar tasks for NIOSH in the past. The Latino immigrants will be assessed first so that an American-born workers sample can be recruited that can be matched in terms of occupation and industry. Depending upon literacy level and/or individual preferences, the questionnaire will be administered verbally or in ''paper and pencil'' format to participants in either English or Spanish. Based upon previous experiences working with these populations, it is estimated that each questionnaire will take approximately 75 minutes complete

The purpose of this information collection is to validate a questionnaire assessing factors that are thought to contribute to the persistent occupational health disparities experienced by Latino immigrant workers. Once validated, this questionnaire can be used in other efforts to assess the impact of occupational safety and health interventions aimed at the Latino immigrant community. Without the benefit of this data, NIOSH will be unable to assess variables related to the occupational health disparities experienced by Latino immigrants or to assess the impact of occupational safety and health training interventions targeted at this group.

Once this study is complete, results will be made available via various means including print publications and the agency internet site. NIOSH expects to complete data collection no later than March 2012. There is no cost to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

| | Number of respondents | Number of responses per respondent | Average burden per response (in hours) | Total burden (in hours) |
|---|---|---|---|---|
| Respondents | 600 | 1 | 1.25 | 750 |
| Total | | | | 750 |

**Catina Conner,**

*Acting Reports Clearance Officer, Centers for Disease Control and Prevention.*

[FR Doc. 2011–17410 Filed 7–11–11; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2011–N–0019]**

### Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Customer/Partner Service Surveys

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

**DATES:** Fax written comments on the collection of information by August 11, 2011.

**ADDRESSES:** To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, *Attn:* FDA Desk Officer, FAX: 202–395–7285, or e-mailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number 0910–0360. Also include the FDA docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** Jonna Capezzuto, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–3794, *Jonnalynn.Capezzuto@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:** In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

**Customer/Partner Service Surveys (OMB Control Number 0910–0360)–Extension**

Under section 903 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 393), FDA is authorized to conduct research and public information programs about regulated products and responsibilities of the agency. Executive Order 12862, entitled, ''Setting Customer Service Standard,'' directs Federal agencies that ''provide significant services directly to the public'' to ''survey customers to determine the kind and quality of services they want and their level of satisfaction with existing services.'' FDA is seeking OMB clearance to conduct a series of surveys to implement Executive Order 12862. Participation in the surveys is voluntary. This request covers customer/partner service surveys of regulated entities, such as food processors; cosmetic drug, biologic and medical device manufacturers; consumers; and health professionals. The request also covers ''partner'' (State and local governments) customer service surveys.

FDA will use the information from these surveys to identify strengths and weaknesses in service to customers/partners and to make improvements. The surveys will measure timeliness, appropriateness and accuracy of information, courtesy and problem resolution in the context of individual programs.

FDA estimates conducting 15 customer/partner service surveys per year, each requiring an average of 15 minutes for review and completion. We estimate respondents to these surveys to be between 100 and 10,000 customers. Some of these surveys will be repeats of earlier surveys for purposes of monitoring customer/partner service and developing long-term data.

In the **Federal Register** of January 13, 2011 (76 FR 2395), FDA published a 60-day notice requesting public comment on the proposed collection of information. No comments were received on the information collection.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

| Type of survey | Number of respondents | Number of responses per respondent | Total annual responses | Average burden per response | Total hours |
|---|---|---|---|---|---|
| Mail, telephone, web-based | 20,000 | 1 | 20,000 | 0.25 (15 min.) | 5,000 |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: July 6, 2011.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2011–17416 Filed 7–11–11; 8:45 am]

**BILLING CODE 4160–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2011–N–0494]**

### Agency Information Collection Activities; Proposed Collection; Comment Request; Data To Support Communications To Educate Consumers on How To Safely Purchase Drugs Online

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information and to allow 60 days for public comment in response to the notice. This notice solicits comments on a generic clearance on ''Data to Support Communications to Educate Consumers on How to Safely Purchase Drugs Online.'' This data collection will obtain baseline knowledge of the Internet users' knowledge, attitudes, and practices with regard to online pharmacies, and then will collect ongoing data for tracking changes in knowledge, attitudes, and practices as a

function of an integrated public outreach campaign FDA will roll out to educate consumers on how to safely purchase drugs online.

**DATES:** Submit either electronic or written comments on the collection of information by September 12, 2011.

**ADDRESSES:** Submit electronic comments on the collection of information to *http://www.regulations.gov.* Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Berbakos, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., P150–400B, 301–796–3792, *Elizabeth.Berbakos@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:** Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

**Data To Support Communications To Educate Consumers on How To Safely Purchase Drugs Online—(OMB Control Number 0910—New)**

FDA has planned an integrated public outreach campaign to improve the safe use of online pharmacies for drug purchases. In order to effectively evaluate this campaign, FDA must understand individuals' knowledge, attitudes, and practices with regard to online pharmacies both at the start of the campaign and on an ongoing basis. This will enable FDA to gauge progress toward educating the public on safely purchasing from online pharmacies. An online survey panel will be employed to collect this information, which serves the need for direct and quantitative measurement of our target population, and which, as a quantitative research tool has some major benefits:

- To focus on our target population of adults who use the Internet.
- To collect data quickly and efficiently with minimal cost to the government.
- To reduce burden to the public by providing a means to complete the survey at a time and place of their choosing.

FDA will use online data collection to establish a baseline and evaluate the success of its messages and distribution methods for its outreach campaign, which educates consumers about how to safely purchase drugs online. Additionally, FDA will use this method to help tailor messages and communications vehicles to have both a more powerful and desired impact on target audiences. The data will not be used for the purposes of making policy or regulatory decisions.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

| Activity | Number of respondents | Number of responses per respondent | Total annual responses | Average burden per response | Total hours |
|---|---|---|---|---|---|
| Survey Study | 5,000 | 1 | 5,000 | .33 (20 min.) | 1,650 |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Annually, FDA projects one survey study. FDA is requesting this data collection burden so as not to restrict the Agency's ability to gather information on public sentiment for its proposals in its regulatory and communications programs.

Dated: July 6, 2011.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2011–17415 Filed 7–11–11; 8:45 am]

**BILLING CODE 4160–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2011–D–0476]**

### Draft Guidance for Industry and Food and Drug Administration Staff; Enforcement Policy for Premarket Notification Requirements for Certain In Vitro Diagnostic and Radiology Devices; Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of the draft guidance entitled ''Enforcement Policy for Premarket Notification Requirements for Certain In Vitro Diagnostic and Radiology Devices.'' This document describes FDA's intent with regard to enforcement of premarket notification (510(k)) requirements for certain in vitro diagnostic and radiology devices under the regulations. This draft guidance is not final nor is it in effect at this time.

**DATES:** Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by October 11, 2011.

**ADDRESSES:** Submit written requests for single copies of the draft guidance document entitled ''Enforcement Policy for Premarket Notification Requirements for Certain In Vitro Diagnostic and Radiology Devices'' to the Division of Small Manufacturers, International, and Consumer Assistance, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 4613, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 301–847–8149. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit electronic comments on the draft guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Identify comments with the docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** Scott McFarland, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 5543, Silver Spring, MD 20993–0002, 301–796–6217.

**SUPPLEMENTARY INFORMATION:**

## I. Background

FDA has identified certain Class I and Class II in vitro diagnostic and radiology devices that have established safety and effectiveness profiles and for which it believes 510(k) review is not necessary to assure safety and effectiveness. While FDA intends to exempt these devices from the 510(k) requirement through rulemaking that would reclassify the Class II devices and amend the classification regulations of the Class I devices, FDA no longer believes it is necessary to review premarket notification (510(k)) submissions for these devices before they enter the market. FDA is issuing a draft guidance concerning a policy of exercising enforcement discretion with regard to the 510(k) requirement for such devices. The draft guidance lists the devices for which, when the guidance is finalized, FDA intends to exercise enforcement discretion with regard to premarket notification requirements, subject to the limitations to the exemption criteria found in 21 CFR 862.9, 21 CFR 864.9, 21 CFR 866.9, and 21 CFR 892.9. FDA intends to continue to enforce all other applicable requirements under the FD&C Act, including, but not limited to: Registration and listing (21 CFR part 807); labeling (21 CFR part 801 and 21 CFR 809.10); good manufacturing practice requirements as set forth in the Quality System regulation (21 CFR part 820); and Medical Device Reporting requirements (21 CFR part 803).

## II. Significance of Guidance

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the Agency's current thinking on ''Enforcement Policy for Premarket Notification Requirements for Certain In Vitro Diagnostic and Radiology Devices.'' It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

## III. Electronic Access

Persons interested in obtaining a copy of the draft guidance may do so by using the Internet. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm.* Guidance documents are also available at *http://www.regulations.gov.* To receive ''Premarket Notification Enforcement Discretion for Certain In Vitro Diagnostic and Radiology Devices,'' you may either send an e-mail request to *dsmica@fda.hhs.gov* to receive an electronic copy of the document or send a fax request to 301–847–8149 to receive a hard copy. Please use the document number 1752 to identify the guidance you are requesting.

## IV. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations and guidance documents. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 807, subpart E have been approved under OMB control number 0910–0120; the collections of information in 21 CFR part 807, subparts B and C have been approved under OMB control number 0910–0387; the collections of information in 21 CFR part 820 have been approved under OMB control number 0910–0073; the collections of information in 21 CFR part 801 and 21 CFR 809.10 have been approved under OMB control number 0910–0485; and the collections of information in 21 CFR part 803 have been approved under OMB control number 0910–0437.

## V. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**), either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: July 6, 2011.

**Nancy K. Stade,**

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

[FR Doc. 2011–17352 Filed 7–11–11; 8:45 am]

**BILLING CODE 4160–01–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Biomedical Imaging and Bioengineering; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel; Training (2012/01).

*Date:* October 27, 2011.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Hotel Palomar Arlington, 1121 North 19th Street, Arlington, VA 22209.

*Contact Person:* Ruth Grossman, DDS, Scientific Review Officer, National Institute of Biomedical Imaging and Bioengineering, National Institutes of Health, 6707 Democracy Boulevard, Room 960, Bethesda, MD 20892, 301–496–8775, *grossmanrs@mail.nih.gov.*

Dated: July 6, 2011.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–17448 Filed 7–11–11; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, Spectroscopy and Imaging: Enabling Bioanalytical Techniques.

*Date:* July 26–27, 2011.

*Time: 8 a.m.* to 6 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Vonda K Smith, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6188, MSC 7892, Bethesda, MD 20892, 301–435–1789, *smithvo@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: July 6, 2011.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–17450 Filed 7–11–11; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Biomedical Imaging and Bioengineering; 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 for Biomedical Imaging and Bioengineering.

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/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Advisory Council for Biomedical Imaging and Bioengineering; NACBIB, September, 2011.

*Date:* September 12, 2011.

*Open:* 9 a.m. to 1 p.m.

*Agenda:* Report from the Institute Director, other Institute Staff and presentation of the Stategic Plan Implementation Workgroup.

*Place:* Bethesda Marriott Suites, 6711 Democracy Boulevard, Independence Room (2nd Level), Bethesda, MD 20817.

*Closed:* 1 p.m. to 4 p.m.

*Agenda:* To review and evaluate grant applications and/or proposals.

*Place:* Bethesda Marriott Suites, 6711 Democracy Boulevard, Independence Room (2nd Level), Bethesda, MD 20817

*Contact Person:* Anthony Demsey, PhD, Director, National Institute of Biomedical Imaging and Bioengineering, 6707 Democracy Boulevard, Room 241, Bethesda, MD 20892.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://www.nibib1.nih.gov/about/NACBIB/NACBIB.htm,* where an agenda and any additional information for the meeting will be posted when available.

Dated: July 6, 2011.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–17445 Filed 7–11–11; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Heart, Lung, and Blood Institute Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Heart, Lung, and Blood Institute Special Emphasis Panel; Reducing Emergency Department Use for Recurrent Exacerbations of Asthma.

*Date:* July 28, 2011.

*Time:* 1 p.m. to 4 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

*Contact Person:* Stephanie L Constant, PhD, Scientific Review Officer, Office of Scientific Review, Division of Extramural Research Activities, NHLBI/NIH, 6701 Rockledge Drive, Rm. 7189, Bethesda, MD 20892, 301–443–8784, *constantsl@nhlbi.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: July 5, 2011.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–17363 Filed 7–11–11; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Substance Abuse and Mental Health Services Administration

### Current List of Laboratories and Instrumented Initial Testing Facilities Which Meet Minimum Standards To Engage in Urine Drug Testing for Federal Agencies

**AGENCY:** Substance Abuse and Mental Health Services Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Department of Health and Human Services (HHS) notifies Federal agencies of the Laboratories and Instrumented Initial Testing Facilities (IITF) currently certified to meet the standards of the Mandatory Guidelines for Federal Workplace Drug Testing Programs (Mandatory Guidelines). The Mandatory Guidelines were first published in the **Federal Register** on April 11, 1988 (53 FR 11970), and subsequently revised in the **Federal Register** on June 9, 1994 (59 FR 29908); September 30, 1997 (62 FR 51118); April 13, 2004 (69 FR 19644); November 25, 2008 (73 FR 71858); December 10, 2008 (73 FR 75122); and on April 30, 2010 (75 FR 22809).

A notice listing all currently certified Laboratories and Instrumented Initial Testing Facilities (IITF) is published in the **Federal Register** during the first week of each month. If any Laboratory/IITF's certification is suspended or revoked, the Laboratory/IITF will be omitted from subsequent lists until such time as it is restored to full certification under the Mandatory Guidelines.

If any Laboratory/IITF has withdrawn from the HHS National Laboratory Certification Program (NLCP) during the past month, it will be listed at the end and will be omitted from the monthly listing thereafter.

This notice is also available on the Internet at *http://www.workplace.samhsa.gov* and *http://www.drugfreeworkplace.gov.*

**FOR FURTHER INFORMATION CONTACT:** Mrs. Giselle Hersh, Division of Workplace Programs, SAMHSA/CSAP, Room 2–1042, One Choke Cherry Road, Rockville, Maryland 20857; 240–276–2600 (voice), 240–276–2610 (fax).

**SUPPLEMENTARY INFORMATION:** The Mandatory Guidelines were initially developed in accordance with Executive Order 12564 and section 503 of Public Law 100–71. The ''Mandatory Guidelines for Federal Workplace Drug Testing Programs'', as amended in the revisions listed above, requires {or set} strict standards that Laboratories and Instrumented Initial Testing Facilities (IITF) must meet in order to conduct drug and specimen validity tests on urine specimens for Federal agencies.

To become certified, an applicant Laboratory/IITF must undergo three rounds of performance testing plus an on-site inspection. To maintain that certification, a Laboratory/IITF must participate in a quarterly performance testing program plus undergo periodic, on-site inspections.

Laboratories and Instrumented Initial Testing Facilities (IITF) in the applicant stage of certification are not to be considered as meeting the minimum requirements described in the HHS Mandatory Guidelines. A Laboratory/IITF must have its letter of certification from HHS/SAMHSA (formerly: HHS/NIDA) which attests that it has met minimum standards.

In accordance with the Mandatory Guidelines dated November 25, 2008 (73 FR 71858), the following Laboratories and Instrumented Initial Testing Facilities (IITF) meet the minimum standards to conduct drug and specimen validity tests on urine specimens:

**Instrumented Initial Testing Facilities (IITF)**

None.

**Laboratories**

ACL Laboratories, 8901 W. Lincoln Ave., West Allis, WI 53227, 414–328–7840/800–877–7016 (Formerly: Bayshore Clinical Laboratory).

ACM Medical Laboratory, Inc., 160 Elmgrove Park, Rochester, NY 14624, 585–429–2264.

Advanced Toxicology Network, 3560 Air Center Cove, Suite 101, Memphis, TN 38118, 901–794–5770/888–290–1150.

Aegis Analytical Laboratories, 345 Hill Ave., Nashville, TN 37210, 615–255–2400 (Formerly: Aegis Sciences Corporation, Aegis Analytical Laboratories, Inc.).

Alere Toxicology Services, 1111 Newton St., Gretna, LA 70053, 504–361–8989/800–433–3823 (Formerly: Kroll Laboratory Specialists, Inc., Laboratory Specialists, Inc.).

Alere Toxicology Services, 450 Southlake Blvd., Richmond, VA 23236, 804–378–9130 (Formerly: Kroll Laboratory Specialists, Inc., Scientific Testing Laboratories, Inc.; Kroll Scientific Testing Laboratories, Inc.).

Baptist Medical Center–Toxicology Laboratory, 11401 I–30, Little Rock, AR 72209–7056, 501–202–2783 (Formerly: Forensic Toxicology Laboratory Baptist Medical Center).

Clinical Reference Lab, 8433 Quivira Road, Lenexa, KS 66215–2802, 800–445–6917.

Doctors Laboratory, Inc., 2906 Julia Drive, Valdosta, GA 31602, 229–671–2281.

DrugScan, Inc., P.O. Box 2969, 1119 Mearns Road, Warminster, PA 18974, 215–674–9310.

ElSohly Laboratories, Inc., 5 Industrial Park Drive, Oxford, MS 38655, 662–236–2609.

Gamma-Dynacare Medical Laboratories*, A Division of the Gamma-Dynacare Laboratory Partnership, 245 Pall Mall Street, London, ONT, Canada N6A 1P4, 519–679–1630.

Laboratory Corporation of America Holdings, 7207 N. Gessner Road, Houston, TX 77040, 713–856–8288/800–800–2387.

Laboratory Corporation of America Holdings, 69 First Ave., Raritan, NJ 08869, 908–526–2400/800–437–4986 (Formerly: Roche Biomedical Laboratories, Inc.).

Laboratory Corporation of America Holdings, 1904 Alexander Drive, Research Triangle Park, NC 27709, 919–572–6900/800–833–3984 (Formerly: LabCorp Occupational Testing Services, Inc., CompuChem Laboratories, Inc.; CompuChem Laboratories, Inc., A Subsidiary of Roche Biomedical Laboratory; Roche CompuChem Laboratories, Inc., A Member of the Roche Group).

Laboratory Corporation of America Holdings, 1120 Main Street, Southaven, MS 38671, 866–827–8042/800–233–6339 (Formerly: LabCorp Occupational Testing Services, Inc.; MedExpress/National Laboratory Center).

LabOne, Inc. d/b/a Quest Diagnostics, 10101 Renner Blvd., Lenexa, KS 66219, 913–888–3927/800–873–8845 (Formerly: Quest Diagnostics Incorporated; LabOne, Inc.; Center for Laboratory Services, a Division of LabOne, Inc.).

Maxxam Analytics*, 6740 Campobello Road, Mississauga, ON, Canada L5N 2L8, 905–817–5700 (Formerly: Maxxam Analytics Inc., NOVAMANN (Ontario), Inc.).

MedTox Laboratories, Inc., 402 W. County Road D, St. Paul, MN 55112, 651–636–7466/800–832–3244.

MetroLab-Legacy Laboratory Services, 1225 NE 2nd Ave., Portland, OR 97232, 503–413–5295/800–950–5295.

Minneapolis Veterans Affairs Medical Center, Forensic Toxicology

Laboratory, 1 Veterans Drive, Minneapolis, MN 55417, 612–725–2088.

National Toxicology Laboratories, Inc., 1100 California Ave., Bakersfield, CA 93304, 661–322–4250/800–350–3515.

One Source Toxicology Laboratory, Inc., 1213 Genoa-Red Bluff, Pasadena, TX 77504, 888–747–3774 (Formerly: University of Texas Medical Branch, Clinical Chemistry Division; UTMB Pathology-Toxicology Laboratory).

Pacific Toxicology Laboratories, 9348 DeSoto Ave., Chatsworth, CA 91311, 800–328–6942 (Formerly: Centinela Hospital Airport Toxicology Laboratory).

Pathology Associates Medical Laboratories, 110 West Cliff Dr., Spokane, WA 99204, 509–755–8991/800–541–7891x7.

Phamatech, Inc., 10151 Barnes Canyon Road, San Diego, CA 92121, 858–643–5555.

Quest Diagnostics Incorporated, 1777 Montreal Circle, Tucker, GA 30084, 800–729–6432 (Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories).

Quest Diagnostics Incorporated, 400 Egypt Road, Norristown, PA 19403, 610–631–4600/877–642–2216 (Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories).

Quest Diagnostics Incorporated, 8401 Fallbrook Ave., West Hills, CA 91304, 800–877–2520 (Formerly: SmithKline Beecham Clinical Laboratories).

S.E.D. Medical Laboratories, 5601 Office Blvd., Albuquerque, NM 87109, 505–727–6300/800–999–5227.

South Bend Medical Foundation, Inc., 530 N. Lafayette Blvd., South Bend, IN 46601, 574–234–4176 x1276.

Southwest Laboratories, 4625 E. Cotton Center Boulevard, Suite 177, Phoenix, AZ 85040, 602–438–8507/800–279–0027.

St. Anthony Hospital Toxicology Laboratory, 1000 N. Lee St., Oklahoma City, OK 73101, 405–272–7052.

STERLING Reference Laboratories, 2617 East L Street, Tacoma, Washington 98421, 800–442–0438.

Toxicology & Drug Monitoring Laboratory, University of Missouri Hospital & Clinics, 301 Business Loop 70 West, Suite 208, Columbia, MO 65203, 573–882–1273.

Toxicology Testing Service, Inc., 5426 N.W. 79th Ave., Miami, FL 33166, 305–593–2260.

US Army Forensic Toxicology Drug Testing Laboratory, 2490 Wilson St., Fort George G. Meade, MD 20755–5235, 301–677–7085.

The following laboratory is voluntarily withdrawing from the National Laboratory Certification Program, effective 30 June 2011:

DynaLIFE Dx *, 10150–102 St., Suite 200, Edmonton, Alberta, Canada T5J 5E2, 780–451–3702/800–661–9876 (Formerly: Dynacare Kasper Medical Laboratories).

* The Standards Council of Canada (SCC) voted to end its Laboratory Accreditation Program for Substance Abuse (LAPSA) effective May 12, 1998. Laboratories certified through that program were accredited to conduct forensic urine drug testing as required by U.S. Department of Transportation (DOT) regulations. As of that date, the certification of those accredited Canadian laboratories will continue under DOT authority. The responsibility for conducting quarterly performance testing plus periodic on-site inspections of those LAPSA-accredited laboratories was transferred to the U.S. HHS, with the HHS' NLCP contractor continuing to have an active role in the performance testing and laboratory inspection processes. Other Canadian laboratories wishing to be considered for the NLCP may apply directly to the NLCP contractor just as U.S. laboratories do.

Upon finding a Canadian laboratory to be qualified, HHS will recommend that DOT certify the laboratory (**Federal Register**, July 16, 1996) as meeting the minimum standards of the Mandatory Guidelines published in the **Federal Register** on April 30, 2010 (75 FR 22809). After receiving DOT certification, the laboratory will be included in the monthly list of HHS-certified laboratories and participate in the NLCP certification maintenance program.

Dated: July 6, 2011.

**Kathleen G. Milenkowic,**

*Acting Director, Office of Management, Technology, and Operations, SAMHSA.*

[FR Doc. 2011–17409 Filed 7–11–11; 8:45 am]

**BILLING CODE 4160–20–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Ocean Energy Management, Regulation and Enforcement

**[Docket No. BOEM–2011–0053]**

### Commercial Wind Lease Issuance and Site Characterization Activities on the Atlantic Outer Continental Shelf (OCS) Offshore New Jersey, Delaware, Maryland, and Virginia

**AGENCY:** Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE), Interior.

**ACTION:** Notice of the availability of an environmental assessment.

**SUMMARY:** BOEMRE has prepared a draft environmental assessment (EA) considering the environmental impacts and socioeconomic effects of issuing renewable energy leases (which includes reasonably foreseeable site characterization activities—geophysical, geotechnical, archeological, and biological surveys—on those leases) in identified Wind Energy Areas (WEAs) offshore New Jersey, Delaware, Maryland, and Virginia. The draft EA also considers the reasonably foreseeable environmental impacts and socioeconomic effects associated with the approval of site assessment activities (including the installation and operation of meteorological towers and buoys) on the leases that may be issued.

The purpose of this notice is to inform the public of the availability of the draft EA for review and comment. Public comments on the draft EA will be considered in the preparation of the final EA and determination of whether a Finding of No Significant Impact would be appropriate, or whether an Environmental Impact Statement (EIS) would need to be prepared. The draft EA can be accessed online at: *http://www.boemre.gov/offshore/RenewableEnergy/SmartFromTheStart.htm.*

**Authority:** This Notice of Availability (NOA) of an EA is published pursuant to 43 CFR 46.305.

**FOR FURTHER INFORMATION CONTACT:** Michelle Morin, BOEMRE Office of Offshore Alternative Energy Programs, 381 Elden Street, MS 4090, Herndon, Virginia 20170–4817, (703) 787–1340 or *michelle.morin@boemre.gov.*

**SUPPLEMENTARY INFORMATION:** On November 23, 2010, Secretary of the Interior Ken Salazar announced the ''Smart from the Start'' renewable energy initiative to accelerate the responsible development of renewable energy resources on the Atlantic OCS. One of the focuses of the initiative is the

identification and refinement of WEAs (areas on the OCS that appear to be suitable for renewable energy development), within which BOEMRE will focus its leasing efforts. In consultation with other Federal agencies and BOEMRE's Intergovernmental Renewable Energy Task Forces, BOEMRE identified WEAs offshore New Jersey, Delaware, Maryland, and Virginia. On February 9, 2011, BOEMRE identified these WEAs in a Notice of Intent (NOI) to prepare an EA for Mid-Atlantic WEAs (76 FR 7226), which requested public input with regard to the identification of the important environmental issues associated with leasing and site assessment within the identified WEAs, and alternatives to be considered in the EA. BOEMRE considered these public comments in drafting the alternatives and assessing the reasonably foreseeable environmental impacts associated with each. Comments received in response to the NOI can be viewed at *http://www.regulations.gov* by searching for Docket ID BOEM–2010–0077.

**Comments**

Federal, state, and local government agencies, tribal governments, and other interested parties are requested to submit their written comments on the draft EA in one of the following ways:

1. Electronically: *http://www.regulations.gov.* In the entry titled ''Enter Keyword or ID,'' enter BOEM–2011–0053, then click ''search.'' Follow the instructions to submit public comments and view supporting and related materials available for this document.

2. In written form, delivered by hand or by mail, enclosed in an envelope labeled ''Comments on Mid Atlantic WEA Draft EA'' to Program Manager, Office of Offshore Alternative Energy Programs (MS 4090), Bureau of Ocean Energy Management, Regulation and Enforcement, 381 Elden Street, Herndon, Virginia 20170–4817.

Comments should be submitted no later than August 11, 2011. All written comments received during the comment period will be made available to the public and considered during preparation of the final EA.

Dated: June 8, 2011.

**Robert P. LaBelle,**

*Acting Associate Director for Offshore Energy and Minerals Management.*

[FR Doc. 2011–17455 Filed 7–11–11; 8:45 am]

**BILLING CODE 4310–MR–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R4–ES–2011–N129; 40120–1112–0000–F5]**

### Receipt of Applications for Endangered Species Permits

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice.

**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 requires that we invite public comment before issuing these permits.

**DATES:** We must receive written data or comments on the applications at the address given below, by *August 11, 2011.*

**ADDRESSES:** Documents and other information submitted with the applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to the following office within 30 days of the date of publication of this notice: U.S. Fish and Wildlife Service, 1875 Century Boulevard, Suite 200, Atlanta, GA 30345 (Attn: Cameron Shaw, Permit Coordinator).

**FOR FURTHER INFORMATION CONTACT:** Cameron Shaw, telephone 904/731–3191; facsimile 904/731–3045.

**SUPPLEMENTARY INFORMATION:** The public is invited to comment on the following applications for permits to conduct certain activities with endangered and threatened species pursuant to section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) and our regulations in the Code of Federal Regulations (CFR) at 50 CFR part 17. This notice is provided under section 10(c) of the Act.

If you wish to comment, you may submit comments by any one of the following methods. You may mail comments to the Fish and Wildlife Service's Regional Office (see **ADDRESSES** section) or via electronic mail (e-mail) to: *permitsR4ES@fws.gov.* Please include your name and return address in your e-mail message. If you do not receive a confirmation from the Fish and Wildlife Service that we have received your e-mail message, contact us directly at the telephone number listed above (see **FOR FURTHER INFORMATION CONTACT** section). Finally, you may hand deliver comments to the Fish and Wildlife Service office listed above (see **ADDRESSES** section).

Before including your address, telephone number, e-mail address, or other personal identifying information in your comments, 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 comments to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

*Applicant:* William Holimon, Arkansas Natural Heritage Commission, Little Rock, Arkansas, TE–142294.

The applicant requests renewal of authorization for trapping, banding, translocating, and installing artificial nesting cavities for red-cockaded woodpeckers *(Picoides borealis)* in Arkansas.

*Applicant:* Georgia Department of Natural Resources, Social Circle, Georgia, TE–36886A.

Applicant requests renewal of authorization to take (capture and release) Indiana bats (*Myotis sodalist*) and gray bats (*Myotis grisescens*) for the purpose of conducting presence/absence surveys, population monitoring, and ecological studies. This work will be conducted throughout Georgia.

*Applicant:* CCR Environmental Inc., Atlanta, Georgia, TE–59008.

Applicant requests amendment of permit to add the following species for the purpose of conducting presence/absence surveys in the States of Georgia, Tennessee, Alabama, Mississippi, Kentucky, and Louisiana: Armored snail (*Pyrgulopsis pachyta*), speckled pocketbook (*Lampsilis streckeri*), and Rabbitsfoot (*Quadrula cylindrical cylindrical*).

*Applicant:* Avian Research and Conservation Institute, Gainesville, Florida, TE–38642A.

Applicant requests authorization to take snail kites (*Rostrhamus sociabilis*) for the purpose of attaching scientific devices to conduct research. This activity will be conducted in Polk, Osceola, Glades, Okeechobee, Martin, Palm Beach, Hendry, Broward, Collier, Monroe and Dade Counties, Florida.

*Applicant:* University of Kentucky, Lexington, Kentucky, TE–38522A.

Applicant requests authorization to take Indiana bats and gray bats for the purpose of conducting research on these

species within Barren, Edmonson and Hart Counties, Kentucky.

*Applicant:* Christopher Hintz, PhD., Savannah State University, Savannah, Georgia, TE–40005A.

Applicant requests authorization to take by the use of ground penetrating radar, nests of loggerhead sea turtle (*Caretta caretta*), green sea turtle (*Chelonia mydas*) and leatherback sea turtle (*Dermochelys coriacea*) for the purpose of studying nesting success. This work will be conducted throughout the Atlantic coastline of Georgia.

*Applicant:* Dr. David Nelson, University of South Alabama, Mobile, Alabama, TE–40523A.

Applicant requests authorization to take (trap, take tissue samples) the Alabama red-bellied turtle (*Pseudemys alabamensis*). This study will be conducted in the Blakeley River drainage in Alabama.

*Applicant:* Dr. Thomas Risch, Arkansas State University, Jonesboro Arkansas, TE–75913.

Applicant requests renewal of authorization to take (capture and release) Indiana bats, Ozark big-eared bats (*Corynorhinus townsendii ingens*), and gray bats for the purpose of conducting presence/absence surveys, population monitoring, and ecological studies. This work will be conducted throughout Arkansas.

*Applicant:* Stuart McGregor, Geologic Survey of Alabama, Tuscaloosa Alabama, TE–41252A.

Applicant requests authorization to conduct presence/absence surveys throughout Alabama for 39 listed mussel species.

*Applicant:* Eglin Air Force Base, Niceville Florida, TE–42183A.

The applicant requests authorization for trapping, banding, translocating and installing artificial nesting cavities for red-cockaded woodpeckers on Eglin Air Force Base, Niceville Florida.

*Applicant:* David Saugey, Jessieville, Arkansas, TE–43704A.

Applicant requests authorization for non-lethal take of Indiana bats, gray bats, Virginia big-eared bats (*Corynorihinus townsendii virginianus*) and Ozark big-eared bats for the purpose of conducting presence/absence surveys and collecting scientific data on roost sites. This work will be conducted throughout the range of these species.

*Applicant:* Department of Natural and Environmental Resources, Cupey, Puerto Rico, TE–125521.

Applicant requests a permit amendment to house Puerto Rican parrots (*Amazona vittata*) at the Puerto Rico Zoo in Mayaguez, Puerto Rico.

Dated: June 16, 2011.

**Mark J. Musaus,**

*Acting Regional Director.*

[FR Doc. 2011–17422 Filed 7–11–11; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R1–ES–2011–N027; 10120–1112–0000–F2]**

### Endangered and Threatened Wildlife and Plants; Draft Habitat Conservation Plan and Environmental Assessment for Construction and Operations at Kauai Lagoons Resort and Golf Course on Kauai, HI

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of availability; receipt of permit application.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), have received an application from Kauai Lagoons LLC (KL) (applicant) for an incidental take permit (ITP) under the Endangered Species Act of 1973, as amended (ESA). The applicant is requesting a 30-year ITP to authorize take of eight bird species—six endangered, one threatened, and one candidate for listing. The ITP application includes a draft habitat conservation plan (HCP) that describes the actions and measures the applicant will implement to minimize, mitigate, and monitor incidental take of the covered species. The ITP application also includes a draft implementing agreement (IA). The Service also announces the availability of a draft Environmental Assessment (EA) that has been prepared in response to the permit application in accordance with the requirements of the National Environmental Policy Act (NEPA). The Service is making the permit application materials and draft EA available for public review and comment.

**DATES:** All comments from interested parties must be received on or before August 26, 2011.

**ADDRESSES:** Please address written comments to Loyal Mehrhoff, Project Leader, Pacific Islands Fish and Wildlife Office, U.S. Fish and Wildlife Service, 300 Ala Moana Boulevard, Room 3–122, Honolulu, HI 96850. You may also send comments by facsimile to (808) 792–9581.

**FOR FURTHER INFORMATION CONTACT:** Michelle Bogardus, Fish and Wildlife Biologist, U.S. Fish and Wildlife Service (see **ADDRESSES** above); telephone (808) 792–9400.

**SUPPLEMENTARY INFORMATION:** The applicant is requesting a 30-year ITP to authorize take of six bird species that are federally listed as endangered: the Hawaiian goose (*Branta sandvicensis*), Hawaiian moorhen (*Gallinula chloropus sandvicensis*), Hawaiian coot (*Fulica alai*), Hawaiian duck (*Anas wyvilliana*), Hawaiian stilt (*Himantopus mexicanus knudseni*), and the Hawaiian petrel (*Pterodroma sandwichensis*). The requested ITP would also cover Newell's shearwater (*Puffinus auricularis newelli*), which is federally listed as threatened, and the band-rumped storm petrel (*Oceanodroma castro*), a candidate for listing under the ESA.

KL is also applying for an incidental take license (ITL) from the Hawaii Department of Land and Natural Resources (DLNR) to comply with State endangered species laws.

#### Availability of Documents

You may request copies of the draft HCP, IA, and EA by contacting the Service's Pacific Islands Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** above). These documents are also available electronically for review on the Service's Pacific Islands Fish and Wildlife Office *Web site* at *http://www.fws.gov/pacificislands.* Comments the Service receives, as well as supporting documentation used in preparing the final NEPA document, will become part of the public record and will be available for public inspection by appointment during regular business hours. 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 information—may be made publicly available at any time. While you can ask in your comment to withhold your personal identifying information from public review, this cannot be guaranteed.

The Service specifically requests information from the public on whether the application meets the statutory and regulatory requirements for issuing a permit, and identification of any aspects of the human environment that should be analyzed in the EA. The Service is soliciting information regarding the adequacy of the HCP to minimize, mitigate, and monitor the proposed incidental take of the covered species and to provide for adaptive management, as evaluated against our permit issuance criteria found in section 10(a) of the ESA, 16 U.S.C. 1539(a), and 50 CFR 13.21, 17.22, and 17.32. In

compliance with section 10(c) of the ESA (16 U.S.C. 1539(c)), the Service is making the permit application materials available for public review and comment for 45 days (see **DATES** section above).

**Background**

Section 9 of the ESA (16 U.S.C. 1538) and Federal regulations prohibit the take of fish and wildlife species listed as endangered or threatened. The term ''take'' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct (16 U.S.C. 1532 (19)). However, under section 10(a) of the ESA (16 U.S.C. 1539(a)), the Service may issue permits to authorize incidental take of federally listed fish and wildlife species. Incidental take is defined as take that is incidental to, and not the purpose of, carrying out an otherwise lawful activity. Regulations governing incidental take permits for threatened and endangered species are found at 50 CFR 17.32 and 17.22. If issued, the permittee would receive assurances under the Service's ''No Surprises'' regulations at 50 CFR 17.32(b)(5) and 50 CFR 17.22(b)(5).

KL owns and operates Kauai Lagoons Resort on the island of Kauai. The resort was built in the 1980s, encompasses approximately 600 acres, and was originally developed with two 18-hole championship golf courses, a golf and racquet club facility, a network of man-made navigable lagoons, a restaurant, commercial development, and associated parking areas. KL is developing additional facilities at the resort to include construction of 707 condominium units, 65 single family residential lots, a central operations building, a new golf clubhouse, other additional infrastructure, and conversion of the two existing 18-hole golf courses into a 27-hole golf course. New construction will result in additional artificial lights within the KL property. A portion of these construction activities have already been completed. New construction activities will occur on approximately 230 acres of the 600-acre KL property.

Despite its artificial nature, the KL resort's water features, as well as grounds maintenance and continued predator management, have attracted the Hawaiian goose, Hawaiian moorhen, Hawaiian duck, Hawaiian stilt, and Hawaiian coot to the KL property. These five waterbird species are known to nest on the KL property. Currently, the nesting Hawaiian goose population at the KL resort property is one of the largest and most productive in the State. The Hawaiian goose and the other waterbirds are at risk of injury and mortality due to golfing activities (collisions with golf carts and golf balls) and course operations, and the future construction activities at KL. Hawaiian geese and Hawaiian coots have been documented to be hurt or killed from golf course operations. Construction activities, such as site clearing, mass grading, or building construction, also pose a threat to the Hawaiian goose and the other waterbirds.

The KL property is adjacent to Lihue International Airport on the island of Kauai. Hawaiian geese have been onsite residents of KL since the late 1990s. In the ensuing 10 years since the geese became established, the nesting activity on the property has increased from 5 nests in 1999 to 66 nests in 2009, predominantly due to predator management and the presence of created water features. The close proximity of nesting and roosting Hawaiian geese and waterbirds to the Lihue International Airport poses a threat to human safety because of the risk of bird strikes to aircraft. In order to address the potential safety issue, the Service and Hawaii's Division of Forestry and Wildlife (DOFAW) have participated in a multi-agency effort to safely translocate some Hawaiian geese to other suitable locations on Kauai. Further efforts to reduce the population growth of Hawaiian geese in the vicinity of the Airport are ongoing, and the Service is working with FAA to address airport maintenance and operations pursuant to section 7 of the ESA. On April 14, 2011, Hawaii Governor Neil Abercrombie signed a Proclamation requiring the translocation of Hawaiian geese from KL over the next five years. The Proclamation suspends State laws as necessary to expedite DOFAW's effort to move birds to suitable locations on other islands.

The Hawaiian petrel, Newell's shearwater, and the band-rumped storm petrel are seabird species that spend a large part of the year at sea, forage in the open ocean, and breed on Kauai. Beginning in March and April, adults initiate breeding at colonial nesting grounds in the interior mountains of Kauai. Fledglings (*i.e.,* young birds learning how to fly) travel from the nesting colony to the sea in the fall (mid-September to mid-December). They are known to be attracted to artificially lighted areas, which can result in disorientation and subsequent fallout (ceasing to be able to fly and involuntarily descending) due to exhaustion. Adult seabirds can collide with towers, power lines, and other tall structures while flying at night between their nesting colonies and at-sea foraging areas. To date, one Newell's shearwater has been found on KL property.

**Proposed Plan**

The draft HCP describes the impacts of take associated with KL's activities, and includes measures to minimize, mitigate, and monitor the impacts of incidental take on each of the covered species. KL is proposing the following mitigation measures: (1) On-site cooperation with plans to translocate Hawaiian geese to reduce the risk of bird strikes by aircraft; (2) funding for the development of a plan to address translocation of geese off of KL; and (3) continuation of ongoing monitoring efforts and predator control. To reduce the potential of collisions between airplanes and birds, KL will not purposely enhance the suitability of the resort as a breeding habitat for the Hawaiian goose. For unavoidable take of listed seabirds, KL proposes to pay into the Kauai Seabird Habitat Conservation Plan (currently being developed by DOFAW) so that funds can be used to assist in the enhancement of known seabird colonies through predator management, habitat restoration and monitoring. The HCP also includes numerous avoidance and minimization measures that will significantly limit the take of the covered species due to resort operations and construction.

The draft EA contains an analysis of two alternatives: (1) Proposed Action (issuance of a permit to KL on the basis of the activities described in the proposed HCP); and (2) No Action (no permit issuance and no measures by the applicant to reduce or eliminate the take of covered species). The draft EA considers the direct, indirect, and cumulative effects of the alternatives, including any measures under the Proposed Action alternative intended to minimize and mitigate such impacts. The draft EA also identifies additional alternatives that were considered but not fully analyzed, as they did not meet the purpose and need of the Proposed Action.

The Service invites comments and suggestions from all interested parties on the draft documents associated with the permit application, and requests that comments be as specific as possible. In particular, information and comments regarding the following topics are requested: (1) Whether the proposed HCP sufficiently minimizes and mitigates the impacts of take to the covered species to the maximum extent practicable over its 30-year term; (2) additional adaptive management or monitoring provisions that may be incorporated into the Proposed Action

alternative, and their benefits to listed species; (3) the direct, indirect, or cumulative effects that implementation of either alternative could have on the human environment; (4) other plans or projects that might be relevant to this action; and (5) any other information pertinent to evaluating the effects of the proposed action on the human environment.

### Authority

This notice is provided pursuant to section 10(c) (16 U.S.C. 1539(c)) of the ESA and NEPA regulations (40 CFR 1506.6). The public process for the proposed Federal permit action will be completed after the public comment period, at which time we will evaluate the permit application, the HCP and associated documents (including the EA), and comments submitted thereon to determine whether or not the proposed action meets the requirements of section 10(a) (16 U.S.C. 1539(a)) of the ESA and has been adequately evaluated under NEPA.

Dated: June 23, 2011.

**Richard Hannan,**

*Deputy Regional Director, Region 1, Portland, Oregon.*

[FR Doc. 2011–17452 Filed 7–11–11; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Indian Affairs

### Advisory Board for Exceptional Children

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice of meeting.

**SUMMARY:** The Bureau of Indian Education (BIE) is announcing that the Advisory Board for Exceptional Children (Advisory Board) will hold its next meeting in Tampa, Florida. The BIE Advisory Board will hold its meeting in conjunction with the BIE Special Education Academy. The purpose of the meeting is to meet the mandates of the Individuals with Disabilities Education Act of 2004 (IDEA) for Indian children with disabilities.

**DATES:** The Advisory Board will meet on Sunday, September 11, 2011, from 6 p.m. to 8 p.m. and Monday, September 12, 2011, from 8 a.m. to 4 p.m. Eastern Daylight Time.

**ADDRESSES:** The meeting will be held at the Hyatt Regency Tampa, 211 North Tampa Street, Tampa, Florida 33602; telephone number (813) 225–1234. The Advisory Board will meet in the Garrison Suite.

**FOR FURTHER INFORMATION CONTACT:** Sue Bement, Designated Federal Official, Bureau of Indian Education, Albuquerque Service Center, Division of Performance and Accountability, 1011 Indian School Road NW., Suite 332, Albuquerque, NM 87104; telephone number (505) 563–5274.

**SUPPLEMENTARY INFORMATION:** In accordance with the Federal Advisory Committee Act, the BIE is announcing that the Advisory Board will hold its next meeting in Tampa, Florida. The Advisory Board was established under the Individuals with Disabilities Act of 2004 (20 U.S.C. 1400 *et seq.*) to advise the Secretary of the Interior, through the Assistant Secretary—Indian Affairs, on the needs of Indian children with disabilities. The meetings are open to the public.

The following items will be on the agenda:

- Report from Gloria Yepa, Supervisory Education Specialist, BIE, Division of Performance and Accountability.
- Report from BIE Director's Office.
- Report from Dr. Jeffrey Hamley, Associate Deputy Director, BIE.
- Priority Groups.
- Annual Report.
- Public Comment (via conference call, September 12, 2011, meeting only*).
- BIE Advisory Board-Advice and Recommendations:

*During the September 12, 2011, meeting, time has been set aside for public comment via conference call from 11:30–12 p.m. Eastern Standard Time. The call-in information is: Conference Number 1–888–417–0376, Passcode 1509140.

Dated: July 6, 2011.

**Larry Echo Hawk,**

*Assistant Secretary, Indian Affairs.*

[FR Doc. 2011–17392 Filed 7–11–11; 8:45 am]

**BILLING CODE 4310–6W–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[F–14948–A; LLAK965000–L14100000–KC0000–P]**

### Alaska Native Claims Selection

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of Decision Approving Lands for Conveyance.

**SUMMARY:** As required by 43 CFR 2650.7(d), notice is hereby given that the Bureau of Land Management (BLM) will issue an appealable decision to the Nunakauiak Yupik Corporation. The decision approves the surface estate in the lands described below for conveyance pursuant to the Alaska Native Claims Settlement Act. These lands lie entirely within the Clarence Rhode National Wildlife Refuge established on December 6, 1960, and January 20, 1969. The subsurface estate will be reserved to the United States in the conveyance to the Nunakauiak Yupik Corporation. The lands are in the vicinity of Toksook Bay, Alaska, and are described as:

**Seward Meridian, Alaska**

T. 4 N., R. 89 W.,
Sec. 18.
Containing approximately 80 acres.

Notice of the decision will also be published four times in the *Tundra Drums*.

**DATES:** Any party claiming a property interest in the lands affected by the decision may appeal the decision within the following time limits:

1. Unknown parties, parties unable to be located after reasonable efforts have been expended to locate, parties who fail or refuse to sign their return receipt, and parties who receive a copy of the decision by regular mail which is not certified, return receipt requested, shall have until August 10, 2011 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

3. Notices of appeal transmitted by electronic means, such as facsimile or e-mail, will not be accepted as timely filed.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4, subpart E, shall be deemed to have waived their rights.

**ADDRESSES:** A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7504.

**FOR FURTHER INFORMATION CONTACT:** The BLM by phone at 907–271–5960 or by e-mail at *ak.blm.conveyance@blm.gov*. Persons who use a Telecommunications Device for the Deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the BLM during normal business hours. In addition, the FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the BLM. The BLM

will reply during normal business hours.

**Jennifer Noe,**

*Land Law Examiner, Land Transfer Adjudication II Branch.*

[FR Doc. 2011–17437 Filed 7–11–11; 8:45 am]

**BILLING CODE 4310–JA–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

**[NPS–WASO–NRNHL–0611–7767; 2280–665]**

### National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before June 18, 2011. Pursuant to section 60.13 of 36 CFR Part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation. Comments may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., MS 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service,1201 Eye St. NW., 8th floor, Washington DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by July 27, 2011. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

**James Gabbert,**

*Acting Chief, National Register of Historic Places/National Historic Landmarks Program.*

**ARIZONA**

**Pima County**

Valley of the Moon, 2544 E. Allen Rd., Tucson, 11000480

**DISTRICT OF COLUMBIA**

**District of Columbia**

Saint Paul African Union Methodist Church, 401 I St. SE., Washington, 11000481

**NORTH CAROLINA**

**Macon County**

Highlands North Historic District, 608–650, 507–615 Hickory St., 760–856, 827 N. 5th St., 23–29, 425 Brock Ct., 802, 850–854 N. 4th St. 29 Martha's Ln., Highlands, 11000482

**McDowell County**

Carson—Young House, 842 Major Conley Rd., Marion, 11000483

**Wake County**

Hi-Mount Historic District, (Post-World War II and Modern Architecture in Raleigh, NC, 1845–1965 MPS) Roughly bounded by E. Whitaker Mill Rd., Bernard, Peebles, Main & Hilton Sts., Raleigh, 11000484

**SOUTH DAKOTA**

**Codington County**

Melham, Andrew and Lulu, House, (North End Neighborhood MPS) 721 1st St., NW., Watertown, 11000485

**Hamlin County**

Hanson, M.O., Building, 126 E. Main St., Castlewood, 11000486

**VIRGINIA**

**Smyth County**

Marion Historic District (Boundary Increase), W. Cherry, E. Main, N. Main, Maple, N. Chestnut, Broad & N. Commerce Sts., Marion, 11000487

WISCONSIN

**Lafayette County**

Pecatonica Battlefield, 2995 Cty. Rd. Y, Wiota, 11000488

[FR Doc. 2011–17239 Filed 7–11–11; 8:45 am]

**BILLING CODE 4312–51–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 337–TA–701]**

### In the Matter of Certain Electronic Devices, Including Mobile Phones, Portable Music Players, and Computers; Notice of Commission Determination To Grant a Joint Motion by Complainants and Respondent To Terminate the Investigation in Its Entirety on the Basis of a Settlement Agreement

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined to grant the joint motion by Complainants and Respondent to terminate the investigation on the basis of a settlement agreement.

**FOR FURTHER INFORMATION CONTACT:** Panyin A. Hughes, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–3042. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** The Commission instituted this investigation on January 28, 2010, based on a complaint filed by Nokia Corporation of Finland and Nokia Inc. of White Plains, New York (collectively, ''Nokia''). 75 FR 4583–4 (Jan. 28, 2010). The complaint alleged violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain electronic devices, including mobile phones, portable music players, and computers by reason of infringement of various claims of United States Patent Nos. 6,895,256; 6,518,957; 6,714,091; 6,834,181; 6,924,789; 6,073,036; and 6,262,735. The complaint named Apple Inc. of Cupertino, California (''Apple'') as respondent.

On March 25, 2011, the ALJ issued his final Initial Determination (''ID''), finding no violation of section 337 by Apple with respect to any of the asserted claims of the pending patents. On May 26, 2011, the Commission determined, upon Nokia's and the Commission investigative attorney's (''IA'') respective petitions and Apple's contingent petition, to review the ID in part, and requested briefing from the parties on the issues under review. 76 FR 31938 (June 2, 2011). On June 9, 2011, the parties submitted their respective briefs on the issues under review.

On June 16, 2011, Nokia and Apple filed a joint motion to terminate the investigation on the basis of a settlement agreement. On June 17, 2011, the IA filed a response in support of the motion.

Having examined the record of this investigation, the Commission has determined to grant the joint motion to terminate the investigation.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in sections 210.21 and 210.50 of the Commission's Rules of Practice and Procedure (19 CFR 210.21 and 210.50).

By order of the Commission.

Issued: July 7, 2011.

**James R. Holbein,**

*Secretary to the Commission.*

[FR Doc. 2011–17459 Filed 7–11–11; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Inv. No. 337–TA–685]**

### In the Matter of Certain Flash Memory and Products Containing Same; Notice of Commission Determination To Grant the Consent Motion To Terminate the Investigation on the Basis of Settlement; Termination of Investigation

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined to GRANT the consent motion to terminate the above-captioned investigation based upon settlement. The investigation is terminated.

**FOR FURTHER INFORMATION CONTACT:** Megan M. Valentine, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 708–2301. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** The Commission instituted Inv. No. 337–TA–685 on September 2, 2009, based on a complaint filed by Samsung Electronics Co. (''Samsung'') of Suwon City, South Korea on July 31, 2009. 74 FR 45469 (Sept. 2, 2009). The complaint, as amended, alleged violations of Section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain flash memory and products containing same by reason of infringement of certain claims of U.S. Patent Nos. 6,930,050 (''the '050 patent'') and 5,740,065 (''the '065 patent''). The '050 patent was subsequently terminated from the investigation. The Commission's notice of investigation named Spansion Japan Limited of Kanagawa, Japan (''Spansion Japan''); Alpine Electronics, Inc. of Fukushima, Japan and Alpine Electronic of America, Inc. of Torrance, California; Slacker, Inc. of San Diego, California; Synology Inc. of Taipei, Taiwan and Synology North America Corp. of Redmond, Washington; Egreat USA of Fairfax, California; Appro International, Inc. of Milpitas, California; Shenzhen Egreat Co., Ltd. of Shenzhen, China (''Shenzhen Egreat''); and Spansion and D-Link as respondents. Many of these respondents were later terminated from the investigation based on consent orders, for cause, or withdrawal of the complaint. Shenzen Egreat was found in default. Comm'n Notice (Jan. 31, 2011). Spansion and D-Link, hereinafter ''Respondents,'' are the only remaining participating respondents.

On February 28, 2008, the ALJ issued his final ID, finding a violation of Section 337 by Respondents. On March 14, 2011, Respondents and the Commission investigative attorney (''IA'') filed separate petitions seeking review of the ALJ's determination concerning the ALJ's findings on claim construction, infringement, invalidity, and domestic industry. On April 29, 2011, the Commission issued a Notice of its determination to review several aspects of the final ID and to pose certain questions to the parties. 76 FR 25707–9 (May 5, 2011).

On June 16, 2011, Samsung filed a consent motion for termination of the investigation in its entirety based on a settlement agreement. On June 20, 2011, Samsung filed a corrected motion, clarifying that the settlement agreement, which is between it and Spansion, is intended to terminate the investigation also with respect to D-Link and Shenzen Egreat. On June 22, 2011, the Commission extended the target date of the investigation by one month to July 28, 2011, to accommodate the schedule for addressing the motion for termination.

Having examined the record of this investigation, the Commission has determined to grant the consent motion to terminate the investigation. Section 337(c) provides, in relevant part, that the Commission may terminate an investigation ''on the basis of an agreement between the private parties to the investigation.'' When the investigation is before the Commission, as is the case here, the Commission may act on a motion to terminate on the basis of settlement. *See Certain Insect Traps,* Inv. No. 337–TA–498, Notice of Commission Determination To Terminate the Investigation in Its Entirety on the Basis of a Settlement Agreement, 69 FR 63176 (Oct. 29, 2004). Commission Rule 210.21(b), which implements Section 337(c), requires that a motion for termination based upon a settlement contain a copy of that settlement agreement, as well as a statement that there are no other agreements, written or oral, express or implied, between the parties concerning the subject matter of the investigation. The corrected motion complies with these requirements.

The Commission also considers the public interest when terminating an investigation based upon a settlement agreement. 19 CFR 210.50(b)(2). We find no evidence that termination of the investigation will prejudice the public interest or that settlement will adversely impact the public health and welfare, competitive conditions in the United States economy, the products of like or directly competitive articles in the United States, or United States consumers. Moreover, the public interest favors settlement to avoid needless litigation and to conserve public and private resources.

Accordingly, the Commission hereby GRANTS the consent motion to terminate this investigation on the basis of a settlement agreement.

The authority for the Commission's determination is contained in Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in section 210.21 of the Commission's Rules of Practice and Procedure (19 CFR 210.21).

By order of the Commission.

Issued: July 7, 2011.

**James R. Holbein,**

*Secretary to the Commission.*

[FR Doc. 2011–17460 Filed 7–11–11; 8:45 am]

**BILLING CODE 7020–02–P**

## DEPARTMENT OF JUSTICE

**[OMB Number 1105–NEW]**

### Agency Information Collection Activities; Proposed Collection; Comments Requested: New Collection [Creation of a Concept Map]

**ACTION:** 30-Day notice and request for comments.

The Department of Justice (DOJ), Civil Division 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 of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 76, Number 71, page 20708–20709, on April 13, 2011, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until August 11, 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 *oria_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. If you have questions concerning the collection, please call Laurie Feinberg at 202–305–1789 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. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

**Summary of Collection**

(1) *Type of Information Collection:* New collection.

(2) *Title of the Form/Collection:* Elder Justice Roadmap Project.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* None

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Adult practitioners, advocates, and researchers in professions related to elder abuse. *Other:* none.

*Need for Collection:* The Department of Justice engages in activities targeted at elder abuse. A recent survey of the literature related to elder justice indicted that the field remains fragmented and without a clear set of priorities or a roadmap for advancement. The purpose of this data collection is to identify policy, practice, and research priorities in the field of elder abuse, neglect, and exploitation and to help develop a strategic roadmap for activities to address those priorities. In the first phase of the study, concept mapping will be used to create a visual representation of the ways that professionals in the field perceive the priorities for elder justice. Concept mapping is a well-documented method of applied research that makes explicit, implicit theoretical models that can be used for planning and action. The process requires respondents to brainstorm a set of statements relevant to the topic of interest (''brainstorming'' task), individually sort these statements into piles based on perceived similarity (''sorting'' task), rate each statement on one or more scales (''rating'' task), and interpret the graphical representation that result from several multivariate analyses. The collection of data for all concept mapping activities will be facilitated via a dedicated project Web site. The second phase of the study includes a series of six face-to-face facilitated discussions with relevant stakeholder groups, practitioners, and researchers. In addition up to 9–12 interviews with experts in the various aspects of the field will be conducted to obtain their reaction to the preliminary concept map generated by the brainstorming, sorting, and rating process and asked to provide information about what may be missing, need amplification, or to be interrelated in a different manner than on the preliminary concept map. Guiding questions and discussion prompts, derived from the concept mapping results, will be used to gather information from the respondents on the meaning and potential use of the concept mapping results. This input will be aggregated and linked to the emerging conceptual framework that will result in a better understanding of the complex interrelationships between policy, practice, and research elements in the field of elder justice. Thus, the challenges, and needs of practitioners on the front lines will inform the work of researchers, and the researchers' findings will inform the work of policy makers and practitioners, and the policy makers will communicate with researchers and practitioners about what information they need to properly inform policy. A single concept mapping process will provide an efficient means for managing participation while simultaneously integrating perspectives that are complementary and mutually informative.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: It is estimated that 750 respondents total will participate in the concept mapping phase of this collection, 60 respondents total will participate in the facilitated discussions, and 9–12 respondents will participate in the expert interviews. The table below shows the estimated number of respondents for each portion of the collection:

| Task | Estimated time (minutes) per participant | Total participants per task | Total minutes per task |
|---|---|---|---|
| Brainstorming | 10 | 750 | 7,500 |
| Sorting | 90 | 250 | 22,500 |
| Rating | 60 | 750 | 45,000 |
| Facilitated Discussions | 300 | 60 | 18,000 |

| Task | Estimated time (minutes) per participant | Total participants per task | Total minutes per task |
|---|---|---|---|
| Expert Interviews | 90 | 12 | *1,080 |
| Total | | | 94,080 (= 1568 hours) |

* = total minutes (= 1,568 hours).

The estimates assume 100% participation by all invited participants; the actual participation in brainstorming, sorting, and rating is likely to be less, but since we cannot predict the response rate, we are calculating the burden for all invited participants. The brainstorming task will take respondents 5–10 minutes to complete. The sorting task will take respondents approximately 60–90 minutes to complete. The rating task will take respondents approximately 30–60 minutes to complete. None of these tasks will require participants to complete in one sitting; rather, participants who respond on a Web site can return to work on task completion as often as they choose, until the task deadline. Respondents will have approximately 4 weeks to brainstorm and approximately 6 weeks to sort and rate. Facilitated discussions will require approximately 4–5 hours of respondents' time. Expert interviews will require no more than 90 minutes of respondents' time.

(6) An estimate of the total public burden (in hours) associated with the collection: There are an estimated 1,568 total public burden hours associated with this collection. This is planned to be a one-time data collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Policy and Planning Staff, Justice Management Division, Two Constitution Square, Room 2E–808, 145 N Street, NE., Washington, DC 20530.

**Jerri Murray,**

*Department Clearance Officer, PRA, United States Department of Justice.*

[FR Doc. 2011–17338 Filed 7–11–11; 8:45 am]

**BILLING CODE 4410–12–P**

## DEPARTMENT OF JUSTICE

**[OMB Number 1122–0007]**

## Agency Information Collection Activities: Extension of a Currently Approved Collection Semi-Annual Progress Report for the Legal Assistance for Victims Grant Program

**ACTION:** 60-Day Notice of Information Collection Under Review.

The Department of Justice, Office on Violence Against Women (OVW) 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 of 1995. Comments are encouraged and will be accepted for ''sixty days'' until September 12, 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. If you have questions concerning the collection, please Cathy Poston, Office on Violence Against Women, at 202–514–5430 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. Your 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 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:* Semi-Annual Progress Report for Grantees of the Legal Assistance for Victims Grant Program.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* 1122–0007. U.S. Department of Justice, Office on Violence Against Women

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* The affected public includes the approximately 200 grantees of the Legal Assistance for Victims Grant Program (LAV Program) whose eligibility is determined by statute. In 1998, Congress appropriated funding to provide civil legal assistance to domestic violence victims through a set-aside under the Grants to Combat Violence Against Women, Public Law 105–277. In the Violence Against Women Act of 2000 and again in 2005, Congress statutorily authorized the LAV Program. 42 U.S.C. 3796gg–6. The LAV Program is intended to increase the availability of legal assistance necessary to provide effective aid to victims of domestic violence, stalking, or sexual assault who are seeking relief in legal matters arising as a consequence of that abuse or violence. The LAV Program awards grants to law school legal clinics, legal aid or legal services programs, domestic violence victims' shelters, bar associations, sexual assault programs, private nonprofit entities, and Indian tribal governments. These grants are for providing direct legal services to

victims of domestic violence, sexual assault, and stalking in matters arising from the abuse or violence and for providing enhanced training for lawyers representing these victims. The goal of the Program is to develop innovative, collaborative projects that provide quality representation to victims of domestic violence, sexual assault, and stalking.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that it will take the approximately 200 respondents (LAV Program grantees) approximately one hour to complete a semi-annual progress report. The semi-annual progress report is divided into sections that pertain to the different types of activities that grantees may engage in and the different types of grantees that receive funds. An LAV Program grantee will only be required to complete the sections of the form that pertain to its own specific activities.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total annual hour burden to complete the data collection forms is 400 hours, that is 200 grantees completing a form twice a year with an estimated completion time for the form being one hour.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, 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. 2011–17376 Filed 7–11–11; 8:45 am]

**BILLING CODE 4410–FX–P**

## DEPARTMENT OF JUSTICE

**[OMB Number 1122–0016]**

## Agency Information Collection Activities: Extension of a Currently Approved Collection

**ACTION:** 60-Day Notice of Information Collection Under Review: Semi-Annual Progress Report for the Transitional Housing Assistance Grant Program.

The Department of Justice, Office on Violence Against Women (OVW) 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 of 1995. Comments are encouraged and will be accepted for ''sixty days'' until September 12, 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. If you have questions concerning the collection, please contact Cathy Poston, Office on Violence Against Women, at 202–514–5430 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. Your 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 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:* Semi-Annual Progress Report for Grantees of the Transitional Housing Assistance Grant Program.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* 1122–0016. U.S. Department of Justice, Office on Violence Against Women.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* The affected public includes the approximately 120 grantees of the Transitional Housing Assistance Grant Program (Transitional Housing Program) whose eligibility is determined by statute. This discretionary grant program provides transitional housing, short-term housing assistance, and related support services for individuals who are homeless, or in need of transitional housing or other housing assistance, as a result of fleeing a situation of domestic violence, dating violence, sexual assault, or stalking, and for whom emergency shelter services or other crisis intervention services are unavailable or insufficient. Eligible applicants are States, units of local government, Indian tribal governments, and other organizations, including domestic violence and sexual assault victim services providers, domestic violence or sexual assault coalitions, other nonprofit, nongovernmental organizations, or community-based and culturally specific organizations, that have a documented history of effective work concerning domestic violence, dating violence, sexual assault, or stalking.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that it will take the 120 respondents (grantees) approximately one hour to complete the Semi-Annual Progress Report. The semi-annual progress report is divided into sections that pertain to the different types of activities that grantees may engage in and the different types of grantees that receive funds. A Transitional Housing Program grantee will only be required to complete the sections of the form that pertain to its own specific activities.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total annual hour burden to complete the data collection forms is 240 hours, that is 120 grantees completing a form twice a year with an estimated completion time for the form being one hour.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Avenue, 145 N Street, NE., Room 2E–508, Washington, DC 20530.

**Jerri Murray,**

*Department Clearance Officer, United States Department of Justice.*

[FR Doc. 2011–17377 Filed 7–11–11; 8:45 am]

**BILLING CODE 4410–FX–P**

## DEPARTMENT OF JUSTICE

### Bureau of Alcohol, Tobacco, Firearms, and Explosives

**[OMB Number 1140–0047]**

### Agency Information Collection Activities: Proposed Collection Comments Requested Race and National Origin Identification

**ACTION:** 30-Day notice.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) 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 of 1995. This notice requests comments from the public and affected agencies concerning the proposed information collection. This proposed information collection was previously published in the **Federal Register**, Volume 76, Number 91, page 27350–27351, on May 11, 2011, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until August 11, 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 *oria_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. If you have questions concerning the collection, please call Ann Marie Hannon, 202–648–9081 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. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

**Summary of Information Collection**

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Race and National Origin Identification.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* ATF F 2931.1. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

*Primary:* Individuals or households. *Other:* none.

*Need for Collection:* The information collection is used to maintain Race and National Origin data on all employees and new hires to meet diversity/EEO goals and act as a component of a tracking system to ensure that personnel practices meet the requirements of Federal laws.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There will be an estimated 10,000 respondents, who will complete the form within approximately 3 minutes.

(6) *An estimate of the total burden (in hours) associated with the collection:* There are an estimated 500 total burden hours associated with this collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Policy and Planning Staff, Justice Management Division, Two Constitution Square, Room 2E–508, 145 N Street, NE., Washington, DC 20530.

**Jerri Murray,**

*Department Clearance Officer, PRA, United States Department of Justice.*

[FR Doc. 2011–17339 Filed 7–11–11; 8:45 am]

**BILLING CODE 4410–FY–P**

## FOREIGN CLAIMS SETTLEMENT COMMISSION

**[F.C.S.C. Meeting and Hearing Notice No. 5–11]**

### Sunshine Act Meeting

The Foreign Claims Settlement Commission, pursuant to its regulations (45 CFR 503.25) and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of oral hearings, as follows:

Thursday, July 21, 2011 10 a.m. Claim No. LIB–I–006; 10:45 a.m. Claim No. LIB–II–003; 1 p.m. Claim No. LIB–I–017; 1:45 p.m. Claim No. LIB–I–015; 2:30 p.m. Claim No. LIB–I–016; 3:15 p.m. Claim No. LIB–I–007; 4 p.m. Claim No. LIB–II–007

Friday, July 22, 2011 10 a.m. Claim No. LIB–II–001; 10:45 a.m. Claim No. LIB–II–002; 11:30 a.m. Claim No. LIB–II–004; 1 p.m. Claim No. LIB–II–012; 1:45 p.m. Claim No. LIB–II–013; 2:30 p.m. Claim No. LIB–II–028.

*Status:* Open.

All meetings are held at the Foreign Claims Settlement Commission, 600 E Street, NW., Washington, DC. Requests for information, or advance notices of intention to observe an open meeting, may be directed to: Judith H. Lock, Executive Officer, Foreign Claims Settlement Commission, 600 E Street, NW., Suite 6002, Washington, DC 20579. Telephone: (202) 616–6975.

**Judith H. Lock,**

*Executive Officer.*

[FR Doc. 2011–17632 Filed 7–8–11; 4:15 pm]

**BILLING CODE 4410–BA–P**

## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

**[Docket No. OSHA–2011–0066]**

### Vertical Tandem Lifts in Marine Terminals; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

**AGENCY:** Occupational Safety and Health Administration (OSHA), Labor.

**ACTION:** Request for public comments.

**SUMMARY:** OSHA solicits public comments concerning its proposal to extend OMB approval of the information collection requirements contained in the Standard on Vertical Tandem Lifts (VTLs) in Marine Terminals (29 CFR part 1917). The collection of information (paperwork) provisions of the Standard specify the

development and implementation of a written plan for transporting vertically coupled containers in a terminal.

**DATES:** Comments must be submitted (postmarked, sent, or received) by September 12, 2011.

**ADDRESSES:**

*Electronically:* You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

*Facsimile:* If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

*Mail, hand delivery, express mail, messenger, or courier service:* When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2011–0066, U.S. Department of Labor, Occupational Safety and Health Administration, Room N–2625, 200 Constitution Avenue, NW., Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m. to 4:45 p.m., E.T.

*Instructions:* All submissions must include the Agency name and OSHA docket number (OSHA–2011–0066) for the Information Collection Request (ICR). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov*. For further information on submitting comments see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION**.

*Docket:* To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Theda Kenney at the address below to obtain a copy of the ICR.

**FOR FURTHER INFORMATION CONTACT:** Theda Kenney or Todd Owen, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Room N–3609, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2222.

**SUPPLEMENTARY INFORMATION:**

## I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining information (29 U.S.C. 657).

The VTL Standard for Marine Terminals (29 CFR part 1917) specifies two collection of information (paperwork) requirements. The purpose of each of these requirements is to provide the workers with safe work practices when using VTLs.

Paragraph (j)(2) of 1917.71 requires the employer to develop, implement, and maintain a written plan for transporting vertically connected containers in the terminal. The transport plan helps ensure the safety of terminal employees and enhances productivity. Paragraph (k)(2) of 1917.71 requires that the written transport plan include the safe work zone and procedures to ensure that employees are not in the zone when a VTL is in motion.

Written plans give employers, workers, and OSHA compliance officers assurance that VTLs are safe to use and provide the compliance officers with an efficient means to assess employer compliance with the Standard.

## II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

## III. Proposed Actions

OSHA is requesting that OMB extend its approval of the information collection requirements contained in the Standard on Vertical Tandem Lifts for Marine Terminals (29 CFR part 1917). OSHA is proposing to increase the existing burden hour estimate for the collection of information requirements specified by the Standard from 80 to 2,040 hours, a total increase of 1,960 hours. The increase in the burden hours is the result of the Agency estimating that more establishments are using VTLs. The Agency will summarize the comments submitted in response to this notice and will include this summary in the request to OMB.

*Type of Review:* Extension of a currently approved collection.

*Title:* Vertical Tandem Lifts (VTLs) in Marine Terminals (29 CFR Part 1917).

*OMB Number:* 1218–0260.

*Affected Public:* Business or other for-profits; Not-for-profit organizations; Federal Government; State, Local, or Tribal Government.

*Number of Respondents:* 1,020.

*Frequency of Response:* On occasion.

*Average Time per Response:* The average time is 4 hours for employers to generate, develop, and maintain a written plan for transporting vertically coupled containers in a terminal.

*Estimated Total Burden Hours:* 2,040.

*Estimated Cost (Operation and Maintenance):* $0.

## IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. All comments, attachments, and other material must identify the Agency name and the OSHA docket number for the ICR (Docket No. OSHA–2011–0066). You may supplement electronic submissions by uploading document

files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the Agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627).

Comments and submissions are posted without change at *http://www.regulations.gov*. Therefore, OSHA cautions commenters about submitting personal information such as Social Security numbers and dates of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download through this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* Web site to submit comments and access the docket is available at the Web site's ''User Tips'' link. Contact the OSHA Docket Office for information about materials not available through the Web site and for assistance in using the Internet to locate docket submissions.

### V. Authority and Signature

David Michaels, PhD, M.P.H., Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 5–2010 (72 FR 55355).

Signed at Washington, DC, on July 6, 2011.

**David Michaels,**

*Assistant Secretary of Labor for Occupational Safety and Health.*

[FR Doc. 2011–17417 Filed 7–11–11; 8:45 am]

**BILLING CODE 4510–26–P**

## NATIONAL LABOR RELATIONS BOARD

### Public Availability of National Labor Relations Board's FY 2010 Service Contract Inventory

**AGENCY:** National Labor Relations Board.

**ACTION:** Notice of public availability of FY 2010 Service Contract inventories.

**SUMMARY:** In accordance with Section 743 of Division C of the Consolidated Appropriations Act of 2010 (Pub. L. 111–117), the National Labor Relations Board (NLRB) is publishing this notice to advise the public of the availability of the FY 2010 Service Contract inventory. This inventory provides information on service contract actions over $25,000 that were made in FY 2010. The information is organized by function to show how contracted resources are distributed throughout the agency. The inventory has been developed in accordance with guidance issued on November 5, 2010 by the Office of Management and Budget's Office of Federal Procurement Policy (OFPP). OFPP's guidance is available at *http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/service-contract-inventories-guidance-11052010.pdf.* The NLRB has posted its inventory and a summary of the inventory on the NLRB homepage at the following link: *http://www.nlrb.gov/service-contract-inventories.*

**FOR FURTHER INFORMATION CONTACT:** Questions regarding the service contract inventory should be directed to David Graham in the Acquisitions Management Branch at 202–273–4047 or *david.graham@nlrb.gov.*

By Direction of the Board.

**Lester A. Heltzer,**

*Executive Secretary.*

[FR Doc. 2011–17412 Filed 7–11–11; 8:45 am]

**BILLING CODE 7545–01–P**

## NATIONAL TRANSPORTATION SAFETY BOARD

### Sunshine Act Meeting

**TIME AND DATE:** 9:30 a.m., Tuesday, July 26, 2010.

**PLACE:** NTSB Conference Center, 429 L'Enfant Plaza, SW., Washington, DC 20594.

**STATUS:** The ONE item is open to the public.

**MATTER TO BE CONSIDERED:** 8202 Highway Accident Report—Rollover of a Truck-Tractor and Cargo Tank Semitrailer Carrying Liquefied Petroleum Gas and Subsequent Fire, Indianapolis, Indiana, October 22, 2009.

**NEWS MEDIA CONTACT:** Telephone: (202) 314–6100.

The press and public may enter the NTSB Conference Center one hour prior to the meeting for set up and seating.

Individuals requesting specific accommodations should contact Rochelle Hall at (202) 314–6305 by Friday, July 22, 2010. The public may view the meeting via a live or archived webcast by accessing a link under ''News & Events'' on the NTSB home page at *http://www.ntsb.gov.*

**FOR FURTHER INFORMATION CONTACT:** Candi Bing, (202) 314–6403 or by e-mail at *bingc@ntsb.gov.*

Dated: Friday, July 8, 2011.

**Candi R. Bing,**

*Federal Register Liaison Officer.*

[FR Doc. 2011–17633 Filed 7–8–11; 4:15 pm]

**BILLING CODE 7533–01–P**

## NUCLEAR REGULATORY COMMISSION

**[NRC–2011–0151]**

### Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

### Background

Pursuant to Section 189a. (2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (the Commission or NRC) is publishing this regular biweekly notice. The Act requires the Commission publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from June 16, 2011 to June 29, 2011. The last biweekly notice was published on June 28, 2011 (96 FR 37845).

**ADDRESSES:** Please include Docket ID NRC–2011–0151 in the subject line of your comments. Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal Rulemaking Web site, *http://www.regulations.gov.* Because your comments will not be edited to remove any identifying or contact information,

the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

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

You may submit comments by any one of the following methods.

• *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2011–0151. Address questions about NRC dockets to Carol Gallagher 301–492–3668; e-mail *Carol.Gallagher@nrc.gov.*

• *Mail comments to:* Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

• *Fax comments to:* RADB at 301–492–3446.

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

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

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

• *Federal Rulemaking Web site:* Public comments and supporting materials related to this notice can be found at *http://www.regulations.gov* by searching on Docket ID: NRC–2011–0151.

**Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing**

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in Title 10 of the Code of Federal Regulations (10 CFR) 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Within 60 days after the date of publication of this notice, any person(s) whose interest may be affected by this action may file a request for a hearing and a petition to intervene with respect to issuance of the amendment to the subject facility operating license. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. NRC regulations are accessible electronically from the NRC Library on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the requestor/petitioner seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the requestor/petitioner shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the requestor/petitioner intends to rely in proving the contention at the hearing. The requestor/petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the requestor/petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the

applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the requestor/petitioner to relief. A requestor/petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of any amendment.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov,* or by telephone at 301–415–1677, to request (1) A digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in NRC's ''Guidance for Electronic Submission,'' which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through the Electronic Information Exchange System, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by e-mail at *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd1.nrc.gov/EHD,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are

requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 60 days from the date of publication of this notice. Non-timely filings will not be entertained absent a determination by the presiding officer that the petition or request should be granted or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

For further details with respect to this license amendment application, see the application for amendment which is available for public inspection at the Commission's PDR, located at One White Flint North, Room O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available documents created or received at the NRC are accessible electronically through ADAMS in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.*

*FirstEnergy Nuclear Operating Company (the licensee), Docket Nos. 50–334 and 50–412, Beaver Valley Power Station, Unit 1 and 2, Beaver County, Pennsylvania Docket No. 50–346, Davis-Besse Nuclear Power Station, Unit 1, Ottawa County, Ohio*

*Date of amendment request:* April 29, 2011.

*Description of amendment request:* The proposed amendment would revise the Technical Specifications (TSs) to define a new time limit for restoring inoperable reactor coolant system (RCS) leakage detection instrumentation to operable status, establish alternate methods of monitoring RCS leakage when one or more required monitors are inoperable, and make TS Bases changes that reflect the proposed changes and more accurately reflect the contents of the facility design basis related to operability of the RCS leakage detection instrumentation. The proposed changes are consistent with Nuclear Regulatory Commission (NRC) approved Revision 3 to Technical Specification Task Force (TSTF) change traveler TSTF–513, ''Revise [Pressurized-Water Reactor] PWR Operability Requirements and Actions for RCS Leakage Instrumentation''.

*Basis for proposed no significant hazards consideration determination:* As required by Title 10 of the *Code of Federal Regulations* (10 CFR) 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the Proposed Amendment Involve a Significant increase in the Probability or Consequences of an Accident Previously Evaluated?

Response: No.

The proposed change clarifies the operability requirements for the RCS leakage detection instrumentation and reduces the time allowed for the plant to operate when the only TS-required operable RCS leakage detection monitor is the containment atmospheric gaseous radiation monitor. The monitoring of RCS leakage is not a precursor to any accident previously evaluated. The monitoring of RCS leakage is not used to mitigate the consequences of any accident previously evaluated.

Therefore, it is concluded that the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the Proposed Change Create the Possibility of a New or Different Kind of Accident from any Accident Previously Evaluated?

Response: No.

The proposed change clarifies the operability requirements for the RCS leakage detection instrumentation and reduces the time allowed for the plant to operate when the only TS-required operable RCS leakage detection monitor is the containment atmospheric gaseous radiation monitor. The proposed change does not involve a physical alteration of the plant (no new or different type of equipment will be installed) or a change in the methods governing normal plant operation. The proposed change maintains sufficient continuity and diversity of leak detection capability that the probability of piping evaluated and approved for Leak-Before-Break progressing to pipe rupture remains extremely low.

Therefore, it is concluded that the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the Proposed Change Involve a Significant Reduction in a Margin of Safety?

Response: No.

The proposed change clarifies the operability requirements for the RCS leakage detection instrumentation and reduces the time allowed for the plant to operate when the only TS-required operable RCS leakage detection monitor is the containment atmospheric gaseous radiation monitor. Reducing the amount of time the plant is allowed to operate with only the containment atmospheric gaseous radiation monitor operable increases the margin of safety by increasing the likelihood that an increase in RCS leakage will be detected before it potentially results in a gross failure.

Therefore, it is concluded that the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the requested amendments involve no significant hazards consideration.

*Attorney for licensee:* David W. Jenkins, Attorney, FirstEnergy Corporation, 76 South Main Street, Akron, Ohio 44308.

*NRC Branch Chief:* Jacob I. Zimmerman.

*South Carolina Electric and Gas Company (SCE&G, the licensee), South Carolina Public Service Authority, Docket No. 50–395, Virgil C. Summer Nuclear Station, Unit 1, Fairfield County, South Carolina*

*Date of amendment request:* March 18, 2011.

*Description of amendment request:* The proposed change would relocate several requirements of Technical Specification (TS) Section 6.0, Administrative Controls, to the new Virgil C. Summer Nuclear Station, Unit 1 Quality Assurance Program Description.

*Basis for proposed no significant hazards consideration determination:* As required by Title 10 of the Code of Federal Regulations (10 CFR) 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed changes involve the relocation of several administrative requirements from the TS to a document subject to the controls of 10 CFR 50.54(a), and is, therefore, administrative in nature. The relocated requirements involve review and audit, procedure review and approval, and record retention requirements. The change will not alter the physical design or operational procedures associated with any plant structure, system, or component. The change does not reduce the duties and responsibilities of the organizations performing the review, audit, and approval functions essential to ensuring the safe operation of the plant.

2. Does the proposed amendment create the possibility of a new or different kind of

accident from any accident previously evaluated?

Response: No.

The proposed changes are administrative in nature. The changes do not alter the physical design, safety limits, or safety analysis assumptions, associated with the operation of the plant. Accordingly, the changes do not create the possibility of a new or different kind of accident from any accident previously evaluated because the proposed changes do not introduce a new or different accident initiator or introduce a new or different equipment failure mode or mechanism.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed changes conform to NRC regulatory guidance regarding the content of plant Technical Specifications. The guidance is presented in the Final Policy Statement published on July 22, 1993 (58 FR 39132), and Administrative Letter AL 95–06. The relocation of these administrative requirements will not reduce the quality assurance commitments as accepted by the NRC, nor reduce administrative controls essential to the safe operation of the plant. Future changes to these administrative requirements will be performed in accordance with 10 CFR 50.54(a), consistent with the guidance identified above. Accordingly, the relocation results in an equivalent level of regulatory control.

Therefore, these changes do not involve a significant reduction in a margin of safety because the proposed changes do not reduce the margin of safety that exists in the present Technical Specifications.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

*Attorney for licensee:* J. Hagood Hamilton, Jr., South Carolina Electric & Gas Company, Post Office Box 764, Columbia, South Carolina 29218.

*NRC Branch Chief:* Gloria Kulesa.

*South Carolina Electric and Gas Company, South Carolina Public Service Authority, Docket No. 50–395, Virgil C. Summer Nuclear Station, Unit 1, Fairfield County, South Carolina*

*Date of amendment request:* May 2, 2011.

*Description of amendment request:* The proposed change would revise Technical Specifications (TS) 3.4.6.1, ''RCS Leakage Detection Systems'', to (1) Define a new time limit for restoring inoperable Reactor Coolant System (RCS) leakage detection instrumentation to operable status, and (2) Establish alternate methods of monitoring RCS leakage when one or more required monitors are inoperable.

*Basis for proposed no significant hazards consideration determination:* As required by Title 10 of the *Code of Federal Regulations* (10 CFR) 50.91(a), the licensee (i.e., SCE&G) has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the Proposed Change Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated?

Response: No

The proposed change clarifies the operability requirements for the RCS leakage detection instrumentation, provides appropriate allowed operating times and compensatory measures when RCS leakage detection monitors are inoperable, and revises the TS LCO [Limiting Condition for Operation], Actions, and Bases to conform more closely with the corresponding STS [Standard Technical Specification] requirements. The monitoring of RCS leakage is not a precursor to any accident previously evaluated. The monitoring of RCS leakage is not used to mitigate the consequences of any accident previously evaluated.

Therefore, it is concluded that the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the Proposed Change Create the Possibility of a New or Different Kind of Accident from any Accident Previously Evaluated?

Response: No

The proposed change clarifies the operability requirements for the RCS leakage detection instrumentation, provides appropriate allowed operating times and compensatory measures when RCS leakage detection monitors are inoperable, and revises the TS LCO, Actions, and Bases to conform more closely with the corresponding STS requirements. The proposed change does not involve a physical alteration of the plant (no new or different type of equipment will be installed) or a change in the methods governing normal plant operation. The proposed change maintains sufficient continuity and diversity of leak detection capability that the probability of piping evaluated and approved for Leak-Before-Break progressing to pipe rupture remains extremely low.

Therefore, it is concluded that the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the Proposed Change Involve a Significant Reduction in a Margin of Safety?

Response: No

The proposed change clarifies the operability requirements for the RCS leakage detection instrumentation, provides appropriate allowed operating times and compensatory measures when RCS leakage detection monitors are inoperable, and revises the TS LCO, Actions, and Bases to conform more closely with the corresponding STS requirements. The proposed change maintains sufficient continuity and diversity of leak detection capability (consistent with the STS) that an increase in RCS leakage will be detected before it potentially results in gross failure.

Therefore, it is concluded that the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

*Attorney for licensee:* J. Hagood Hamilton, Jr., South Carolina Electric & Gas Company, Post Office Box 764, Columbia, South Carolina 29218.

*NRC Branch Chief:* Gloria Kulesa.

**Previously Published Notices of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing**

The following notices were previously published as separate individual notices. The notice content was the same as above. They were published as individual notices either because time did not allow the Commission to wait for this biweekly notice or because the action involved exigent circumstances. They are repeated here because the biweekly notice lists all amendments issued or proposed to be issued involving no significant hazards consideration.

For details, see the individual notice in the **Federal Register** on the day and page cited. This notice does not extend the notice period of the original notice.

*Southern Nuclear Operating Company, Inc., Docket Nos. 50–424 and 50–425, Vogtle Electric Generating Plant, Units 1 and 2, Burke County, Georgia*

*Date of amendment request:* March 3, 2011.

*Brief description of amendment request:* The proposed amendments would revise license and Technical Specifications (TSs) 3.3.1, ''Reactor Protection System Instrumentation,'' and TS 3.3.2, ''Engineered Safety Features Actuation System (ESFAS) Instrumentation.'' Specifically, the amendment would correct a non-conservative error associated with the ESFAS Permissive P–14, ''Steam Generator Water Level High-High'' instrument setpoint and associated allowable value. The proposed change is described in Technical Specification Task Force Traveler TSTF–493–A, Revision 4, ''Clarify Application of Setpoint Methodology for LSSS [Limiting Safety System Setting]

Functions,'' Option A as described in the Notice of Availability published in the **Federal Register** on May 11, 2010 (75 FR 26294). TSTF–493–A revises the Improved Standard TS to address Nuclear Regulatory Commission concerns that the TS requirement for LSSS may not be fully in compliance with the intent of Title 10 of the *Code of Federal Regulations* (10 CFR) 50.36.

*Date of publication of individual notice in* ***Federal Register:*** May 24, 2011 (76 FR 30206)

*Expiration date of individual notice:* Comments, June 23, 2011; Hearing, July 25, 2011.

**Notice of Issuance of Amendments to Facility Operating Licenses**

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for A Hearing in connection with these actions was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.22(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) The applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available documents created or received at the NRC are accessible electronically through the Agencywide Documents Access and Management System (ADAMS) in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr.resource@nrc.gov.*

*Duke Energy Carolinas, LLC, Docket Nos. 50–269, 50–270, and 50–287, Oconee Nuclear Station, Units 1, 2, and 3, Oconee County, South Carolina*

*Date of application of amendments:* June 29, 2009, as supplemented June 24, 2010, February 15, 2011, June 6, 2011, and June 15, 2011.

*Brief description of amendments:* The amendments authorize changes to the Updated Final Safety Analysis Report, to allow the use of fiber reinforced polymer on masonry brick walls for uniform pressure loads resulting from a tornado event.

*Date of Issuance:* June 27, 2011.

*Effective date:* As of the date of issuance and shall be implemented within 90 days from the date of issuance.

*Amendment Nos.:* 373, 375, and 374.

*Renewed Facility Operating License Nos. DPR–38, DPR–47, and DPR–55:* Amendments revised the licenses and the technical specifications.

*Date of initial notice in* ***Federal Register:*** December 14, 2010 (75 FR 77908), and renoticed May 25, 2011 (76 FR 30399).

The supplements dated June 24, 2010, February 15, 2011, June 6, 2011, and June 15, 2011, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated June 27, 2011.

*No significant hazards consideration comments received:* No.

*Exelon Generating Company, LLC, Docket No. 50–219, Oyster Creek Nuclear Generating Station, Ocean County, New Jersey*

*Date of application for amendment:* June 25, 2010, as supplemented by letters dated October 18, 2010, December 1, 2010, March 9, 2011, and May 16, 2011.

*Brief description of amendment:* The amendment revises the Oyster Creek Nuclear Generating Station Technical Specifications (TSs) governing actions to be taken if a single emergency diesel generator (EDG) is inoperable. Specifically, the amendment removes the requirement to test the other EDG daily. Instead, the licensee is required to either test the other EDG once, or determine that it is not inoperable due to a common cause failure.

*Date of issuance:* June 16, 2011.

*Effective date:* As of its date of issuance, and shall be implemented within 60 days.

*Amendment No.:* 278.

*Renewed Facility Operating License No. DPR–16:* The amendment revised the License and Technical Specifications

*Date of initial notice in* ***Federal Register:*** January 11, 2011 (76 FR 1647). The supplements dated October 18, 2010, December 1, 2010, and March 9, 2011, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the NRC staff's original proposed no significant hazards determination.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated June 16, 2011.

*No significant hazards consideration comments received:* No.

*Attorney for licensee:* Mr. J. Bradley Fewell, Associate General Counsel, Exelon Generation Company LLC, 4300 Winfield Road, Warrenville, IL 60555.

*NRC Branch Chief:* Harold Chernoff.

*Exelon Generating Company, LLC, Docket No. 50–219, Oyster Creek Nuclear Generating Station, Ocean County, New Jersey*

*Date of application for amendment:* June 11, 2010, as supplemented by letter dated May 6, 2011.

*Brief description of amendment:* The amendment revises the administrative requirements for the Responsibility and Review and Audit sections of the Environmental Technical Specifications for consistency with the fleet Quality Assurance Topical report.

*Date of issuance:* June 28, 2011.

*Effective date:* As of its date of issuance, and shall be implemented within 60 days.

*Amendment No.:* 279.

*Renewed Facility Operating License No. DPR–16:* The amendment revised the License and Technical Specifications

*Date of initial notice in* ***Federal Register:*** November 2, 2010 (75 FR 67402). The supplement dated May 6, 2011, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change

the NRC staff's original proposed no significant hazards determination.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated June 28, 2011.

*No significant hazards consideration comments received:* No.

*Florida Power and Light Company, Docket Nos. 50–250 and 50–251, Turkey Point Plant, Units 3 and 4, Miami-Dade County, Florida*

*Date of application for amendments:* June 25, 2009, as supplemented by letters dated July 21, July 30, August 26, 2009, February 10, March 15, April 14, April 28, May 21, June 11, June 23, June 25, September 2, September 15, October 13, December 14, 2010, and May 11, 2011.

*Brief description of amendments:* The amendments revised the licensing bases to adopt the alternative source term as allowed in Title 10 of the Code of Federal Regulations (10 CFR) 50.67.

*Date of issuance:* June 23, 2011.

*Effective date:* As of the date of issuance and shall be implemented by the completion of the Cycle 26 refueling outage for Unit 3 and Cycle 27 refueling outage for Unit 4.

*Amendment Nos.:* Unit 3–244 and Unit 4–240.

*Renewed Facility Operating License Nos. DPR–31 and DPR–41:* Amendments revised the Operating Licenses and the Technical Specifications.

*Date of initial notice in* ***Federal Register:*** December 29, 2009 (74 FR 68870). The supplements dated July 21, July 30, August 26, 2009, February 10, March 15, April 14, April 28, June 11, June 23, June 25, September 2, September 15, October 13, December 14, 2010, and May 11, 2011, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**. The supplement dated May 21, 2010, changed the scope of the application as originally noticed. Due to the changes, the application was renoticed and published in the **Federal Register** on July 13, 2010 (75 FR 39978).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated June 23, 2011.

*No significant hazards consideration comments received:* No.

Dated at Rockville, Maryland, this 30th day of June 2011.

For the Nuclear Regulatory Commission.

**Allen G. Howe,**

*Deputy Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.*

[FR Doc. 2011–17439 Filed 7–11–11; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[NRC–2010–0216]**

## Notice of Issuance of Regulatory Guide

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of Issuance and Availability of Regulatory Guide 1.152, Revision 3, ''Criteria for Use of Computers in Safety Systems of Nuclear Power Plants.''

**FOR FURTHER INFORMATION CONTACT:** Mark P. Orr, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *telephone:* 301–251–7495 or *e-mail: Mark.Orr@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is issuing a revision to an existing guide in the agency's ''Regulatory Guide'' series. This series was developed to describe and make available to the public information such as methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

Revision 3 of Regulatory Guide 1.152, ''Criteria for Use of Computers in Safety Systems of Nuclear Power Plants,'' was issued with a temporary identification as Draft Regulatory Guide, DG–1249, for public comments on June 22, 2010 (75 FR 35508). The public comment period closed on August 20, 2010. All comments that were received were considered and, where appropriate, the final guide was revised to address the comments. Editorial changes and clarifications were made to Regulatory Guide 1.152 as a result of the public comments. These include minor changes to the discussion section to improve consistency with other NRC regulations and guidance, clarification of the regulatory criteria to more clearly indicate that licensees are responsible for demonstrating establishment of a secure development and operational environment, and clarification of regulatory criteria to precisely state the expectations of actions taken to protect developmental activities. This guide describes a method that the staff of the NRC considers acceptable to implement Title 10, of the Code of Federal Regulations, part 50, ''Domestic Licensing of Production and Utilization Facilities'' (10 CFR part 50); 10 CFR 50.55a(h); General Design Criterion (GDC) 21, ''Protection System Reliability and Testability,'' of Appendix A, ''General Design Criteria for Nuclear Power Plants,'' to 10 CFR part 50; and Criterion III, ''Design Control,'' of Appendix B, ''Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants,'' to 10 CFR part 50 with regard to the use of computers in safety systems of nuclear power plants. This guide applies to all types of commercial nuclear power plants. Regulatory Guide 1.152 was not uniquely developed for non-power reactors; therefore, the applicability of this guide for those facilities should be determined on a case-by-case basis.

This regulatory guide describes a method that the NRC staff deems acceptable for complying with the Commission's regulations for promoting high functional reliability, design quality, and a secure development and operational environment for the use of digital computers in the safety systems of nuclear power plants. In this context, the term ''computer'' identifies a system that includes computer hardware, software, firmware, and interfaces.

### II. Further Information

Electronic copies of Regulatory Guide 1.152, Revision 3 are available through the NRC's public Web site under ''Regulatory Guides'' at *http://www.nrc.gov/reading-rm/doc-collections/.* The regulatory analysis may be found through the NRC's Agencywide Documents Access and Management System (ADAMS) under Accession No. ML101320317.

In addition, regulatory guides are available for inspection at the NRC's Public Document Room (PDR) located at Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852–2738. The PDR's mailing address is USNRC PDR, Washington, DC 20555–0001. The PDR can also be reached by telephone at 301–415–4737 or 800–397–4209, by fax at 301–415–3548, and by e-mail to *pdr.resources@nrc.gov.*

Regulatory guides are not copyrighted, and NRC approval is not required to reproduce them.

Dated at Rockville, Maryland, this 5th day of July, 2011.

For the Nuclear Regulatory Commission.

**Harriet Karagiannis,**

*Acting Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.*

[FR Doc. 2011–17441 Filed 7–11–11; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[NRC–2011–0006]**

### Sunshine Federal Register Notice

**AGENCY HOLDING THE MEETINGS:** Nuclear Regulatory Commission.

**DATE:** Weeks of July 11, 18, 25, August 1, 8, 15, 2011.

**PLACE:** Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

**STATUS:** Public and Closed.

**Week of July 11, 2011**

*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 webcast 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 webcast 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 webcast 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.

**Week of August 15, 2011—Tentative**

There are no meetings scheduled for the week of August 15, 2011.

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* 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.

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The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/public-involve/public-meetings/schedule.html.*

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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: July 7, 2011.

**Rochelle C. Bavol,**

*Policy Coordinator, Office of the Secretary.*

[FR Doc. 2011–17574 Filed 7–8–11; 11:15 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket Nos. 50–272 and 50–311; NRC–2009–0390]**

### PSEG Nuclear, LLC, Salem Nuclear Generating Station, Units 1 and 2; Notice of Issuance of Renewed Facility Operating License Nos. DPR–70 and DPR–75 for an Additional 20-Year Period

Notice is hereby given that the U.S. Nuclear Regulatory Commission (the Commission) has issued Renewed Facility Operating License Nos. DPR–70 and DPR–75 to PSEG Nuclear LLC (the licensee), the operator of the Salem Nuclear Generating Station, Units 1 and 2 (Salem). Renewed Facility Operating License Nos. DPR–70 and DPR–75 authorize the licensee to operate Salem at reactor core power levels not in excess of 3,459 megawatts thermal in accordance with the provisions of the Salem renewed license and its technical specifications.

The notice also serves as the record of decision for the renewal of Facility Operating License Nos. DPR–70 and DPR–75, consistent with Title 10 of the *Code of Federal Regulations* (10 CFR) 51.103, ''Record of Decision—General.'' As discussed in the final supplemental environmental impact statement for Salem (NUREG–1437, Supplement 45, ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 45, Regarding Hope Creek Generating Station and Salem Nuclear Generating Station, Units 1 and 2, Final Report,'' issued March 2011), the Commission has considered a range of reasonable alternatives that included generation from coal-fired generation, natural gas combined-cycle generation, a combined alternative, and the no-action alternative. The factors considered in the record of decision can be found in the supplemental environmental impact statement for Salem.

Salem's units are pressurized-water reactors located in Lower Alloways Creek Township, Salem County, NJ. The application for the renewed license complied with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations. As required by the Act and the Commission's regulations in 10 CFR Chapter I, ''Nuclear Regulatory Commission,'' the Commission has made appropriate findings, which are set forth in the license. Prior public notice of the action involving the proposed issuance of the renewed license and of an opportunity for a hearing regarding the proposed issuance of the renewed license was published in the **Federal Register** on October 23, 2009 (74 FR 54854).

For further details with respect to this action, see (1) PSEG Nuclear LLC's license renewal application for Salem Nuclear Generating Station, Units 1 and 2, dated August 18, 2009, as supplemented by letters dated through May 18, 2011, (2) the Commission's safety evaluation report (NUREG–2101, ''Safety Evaluation Report Related to the License Renewal of the Salem Nuclear Generating Station,'' issued June 2011), (3) the licensee's updated safety analysis report, and (4) the Commission's final environmental impact statement (NUREG–1437, Supplement 45), for Salem, published in March 2011. These

documents are available at the NRC's Public Document Room, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852, and are available online in the NRC Library at *http://www.nrc.gov/reading-rm.html.*

Copies of Renewed Facility Operating License Nos. DPR–70 and DPR–75 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 safety evaluation report for Salem (NUREG–2101) and the final environmental impact statement (NUREG–1437, Supplement 45) 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.gpoaccess.gov*), 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, Maryland, this 30th 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. 2011–17443 Filed 7–11–11; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 50–225; NRC–2008–0277]**

### Rensselaer Polytechnic Institute Critical Experiments Facility; Notice of Issuance of Renewed Facility Operating License No. CX–22

The U.S. Nuclear Regulatory Commission (NRC, the Commission) has issued renewed Facility Operating License No. CX–22, held by the Rensselaer Polytechnic Institute (the licensee), which authorizes continued operation of the Rensselaer Polytechnic Institute Critical Experiments Facility (RCF), located in Schenectady, Schenectady County, New York. The RCF is a tank-type, light-water-moderated, critical facility licensed to operate at steady-state power levels up to and including 100 watts thermal power. The renewed Facility Operating License No. CX–22 will expire at midnight 20 years from its date of issuance.

The renewed facility operating license complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the NRC's regulations in Title 10 of the *Code of Federal Regulations* (10 CFR), and sets forth those findings in the renewed facility operating license. The agency afforded an opportunity for hearing in the Notice of Opportunity for Hearing published in the **Federal Register** on May 15, 2008 (73 FR 28170). The NRC received no request for a hearing or petition for leave to intervene.

The NRC staff prepared a safety evaluation report for the renewal of Facility Operating License No. CX–22 and concluded, based on that evaluation, that the licensee can continue to operate the facility without undue risk to the health and safety of the public. The NRC staff also prepared an Environmental Assessment and Finding of No Significant Impact for license renewal, noticed in the **Federal Register** on June 14, 2011 (76 FR 34770), and concluded that renewal of the facility operating license will not have a significant impact on the quality of the human environment.

For details with respect to the application for renewal, see the licensee's letter dated November 19, 2002 (ML023380455 and ML072210835), as supplemented on July 21 (ML082060048), July 28 (ML082190523), and September 3, 2008 (ML101260200); June 28 (ML101820298), August 31 (ML102790045), October 14 (ML103070074), and October 28, 2010 (ML103080207); and February 14 (ML110490531) and May 9, 2011 (ML11131A180). Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff at 1–800–397–4209 or 301–415–4737, or send an e-mail to *pdr.resource@nrc.gov.*

Dated at Rockville, Maryland, this 27th day of June, 2011.

For the Nuclear Regulatory Commission.

**Jessie Quichocho,**

*Chief, Research and Test Reactors Licensing Branch, Division of Policy and Rulemaking, Office of Nuclear Reactor Regulation.*

[FR Doc. 2011–17440 Filed 7–11–11; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[NRC–2011–0150; Docket Nos. 50–003, 50–247, and 50–286; License Nos. DPR–5, DPR–26, and DPR–64]**

### Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, Entergy Nuclear Operations, Inc.; Receipt of Request for Action

Notice is hereby given that by petition dated March 28, 2011, Eric T. Schneiderman, Attorney General for the State of New York, the petitioner, has asked the U.S. Nuclear Regulatory Commission (NRC) to take enforcement action against Entergy Nuclear Operations, Inc. (Entergy), and its affiliates for violations of the agency's 1980 fire safety regulations at Indian Point Nuclear Generating Unit 1, 2, and 3. The petitioner asked the NRC to take immediate action by issuing an order that requires the following actions:

- Identify the violations of paragraphs F and G of Section III of Appendix R, ''Fire Protection Program for Nuclear Power Facilities Operating prior to January 1, 1979,'' to Title 10 of the *Code of Federal Regulations* (10 CFR) part 50, ''Domestic Licensing of Production and Utilization Facilities,'' that exist as of the date of the petition (i.e., March 28, 2011) at Indian Point Units 1, 2, and 3.
- Compel Entergy and its affiliates to comply on or before September 20, 2011, with the requirements in paragraphs F and G for all the fire zones in Indian Point Units 2 and 3 and any Indian Point Unit 1 fire zone or system, structure, or component relied on by Indian Point Units 2 and 3.
- Convene an evidentiary hearing before the Commission to adjudicate the violations by Entergy and its affiliates of paragraphs F and G at Indian Point Units 1, 2, and 3.

As the basis for the request, the petitioner stated, in part, the following:

- The petitioner cited the population centers adjacent to the Indian Point facility. The petitioner described past investigations by both the NRC Office of Investigations and the Government Accountability Office on fire barriers, most specifically Thermo-Lag and Hemyc. The petitioner implied that the NRC staff has not been aggressive in resolving fire barrier issues or in taking

meaningful enforcement action toward Indian Point.

• The petitioner focused on the exemptions to Appendix R to 10 CFR Part 50 that the licensee submitted in March 2009. The exemptions include operator manual actions in a large number of fire areas at Indian Point. The petitioner stated that the regulations do not authorize operator manual actions as a means for protecting a redundant system from fire. The petitioner referenced the ongoing situation in Japan and questioned whether plant operators would be physically able to perform these duties.

• The petitioner stated that (1) the NRC should reserve exemptions for extraordinary circumstances, (2) the NRC should not approve the exemptions, and (3) Entergy has not made a serious effort to comply with Federal regulations.

The NRC is treating the request under 10 CFR 2.206, ''Requests for Action under This Subpart,'' and has referred the request to the Director of the Office of Nuclear Reactor Regulation (NRR). In accordance with 10 CFR 2.206, the NRC will take appropriate action on this petition within a reasonable period of time. The petitioner met with the NRR Petition Review Board on May 9, 2011, to discuss the petition. The Petition Review Board considered the results of that discussion in its determination of the petitioner's request for immediate action and in the establishment of the schedule for the review of the petition. A copy of the petition is available for inspection at the NRC's Public Document Room (PDR) located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, MD. Publicly available documents created or received at the NRC are accessible electronically through the Agencywide Documents Access and Management System (ADAMS) in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR reference staff by telephone at 1–800–397–4209 or 301–415–4737 or by e-mail at *PDR.Resources@nrc.gov.*

Dated at Rockville, Maryland, this 30th day of June 2011.

For the Nuclear Regulatory Commission.

**Eric J. Leeds,**

*Director, Office of Nuclear Reactor Regulation.*

[FR Doc. 2011–17438 Filed 7–11–11; 8:45 am]

**BILLING CODE 7590–01–P**

## RAILROAD RETIREMENT BOARD

### Sunshine Act; Notice of Public Meeting

Notice is hereby given that the Railroad Retirement Board will hold a meeting on July 20, 2011, 10 a.m. at the Board's meeting room on the 8th floor of its headquarters building, 844 North Rush Street, Chicago, Illinois 60611. The agenda for this meeting follows:

**Executive Committee Reports**

The entire meeting will be open to the public. The person to contact for more information is Martha P. Rico, Secretary to the Board, Phone No. 312–751–4920.

Dated: July 5, 2011.

**Martha P. Rico,**

*Secretary to the Board.*

[FR Doc. 2011–17620 Filed 7–8–11; 4:15 pm]

**BILLING CODE 7905–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Investment Company Act Release No. 29715; 812–13885]**

### WNC Tax Credits 40, LLC, WNC Tax Credits 41, LLC, WNC Housing Tax Credits Manager 2, LLC, WNC National Partners, LLC and WNC & Associates, Inc.; Notice of Application

July 6, 2011.

**AGENCY:** Securities and Exchange Commission (''Commission'').

**ACTION:** Notice of an application for an order under sections 6(c) and 6(e) of the Investment Company Act of 1940 (the ''Act'') granting relief from all provisions of the Act, except sections 37 through 53 of the Act and the rules and regulations under those sections other than rule 38a–1 under the Act.

*Applicants:* WNC Tax Credits 40, LLC (''Fund 40'') and WNC Tax Credits 41, LLC (''Fund 41'') (each a ''Fund,'' and collectively, the ''Funds''), WNC Housing Tax Credits Manager 2, LLC (the ''Manager''), WNC National Partners, LLC (''WNC National Partners'') and WNC & Associates, Inc. (''WNC & Associates'').

*Summary of the Application:* Applicants request an order to permit each Fund to invest in limited liability companies that engage in the ownership and operation of apartment complexes for low and moderate income persons (''Apartment Complexes'').

**DATES:** *Filing Date:* The application was filed on April 4, 2011.

*Hearing or Notification of Hearing:* An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on August 1, 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, 17782 Sky Park Circle, Irvine, CA 92614.

**FOR FURTHER INFORMATION CONTACT:** Emerson S. Davis, Sr., Senior Counsel, (202) 551–6868, or Daniele Marchesani, Branch Chief, (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or an applicant by using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

**Applicants' Representations**

1. Fund 40 and Fund 41 each was formed as a California limited company in 2011. Each Fund will operate as a ''two-tier'' partnership, *i.e.,* each Fund will invest as a limited partner or member in other limited partnerships or limited liability companies that are characterized as partnerships for Federal income tax purposes (''Local Limited Partnerships''). The Local Limited Partnerships in turn will engage in the ownership and operation of Apartment Complexes expected to be qualified for the low income housing tax credit under the Internal Revenue Code of 1986, as amended. The Manager is a California limited liability company whose sole member is WNC National Partners. WNC National Partners is a California limited liability company whose sole member is WNC & Associates, a California corporation. The objectives of each Fund are to provide current tax benefits in the form of (a) A predictable stream of low income housing credits which investors may use to offset their Federal income tax liabilities, and (b) tax losses.

2. Each Fund intends to conduct a private placement of its units of limited liability company member interest (the ''Units'') on a commencement date to be determined by the Manager. Each Fund's placement will be conducted as described in, and by means of a private placement memorandum, to be supplemented periodically with updated information for each Fund's placement (the ''Memorandum''). Purchasers of Units in a Fund will be admitted as limited liability company members (''Members'') of the issuing Fund. The Units will be offered pursuant to the exemption from the registration requirements of the Securities Act of 1933 (the ''Securities Act''), provided by Rule 506 of Regulation D under the Securities Act. Each Member will be required, as condition to acceptance of a subscription, to qualify as an ''accredited investor,'' as that term is defined in Rule 501(a) of Regulation D (an ''Accredited Investor''). Each Fund intends to offer its Units at a price to be determined by the Manager prior to commencement of the Fund's placement. The minimum investment per Accredited Investor will be determined prior to commencement of the offerings. Each Fund will establish its minimum and maximum capitalization, and will disclose it by supplement to its Memorandum and deliver the supplement to all prospective Accredited Investors prior to subscription.

3. Each Fund will not accept any subscriptions for Units until the requested exemptive order is granted or the Fund receives an opinion of counsel that it is exempt from registration under the Act. Subscriptions for Units must be approved by the Manager. The Accredited Investor will execute representations confirming suitability and the basis for such suitability. In addition, transfers of Units will be permitted only if the transferee meets the same suitability standards as had been imposed on the transferor Member.

4. Although a Fund's direct control over the management of each Apartment Complex will be limited, the Fund's ownership of interests in Local Limited Partnerships will, in an economic sense, be the substantial equivalent of direct ownership of the Apartment Complexes themselves. A Fund normally will acquire at least a 90% interest in the profits, losses, and tax credits of the Local Limited Partnerships. However, in certain cases, at the discretion of the Manager, the Fund may acquire a lesser interest in a Local Limited Partnership.

5. Each Fund will have certain voting rights with respect to each Local Limited Partnership. The voting rights will include the right to dismiss and replace the local general partner on the basis of performance, to approve or disapprove a sale or refinancing of the Apartment Complex owned by such Local Limited Partnership, to approve or disapprove the dissolution of the Local Limited Partnership, and to approve or disapprove amendments to the Local Limited Partnership agreement materially and adversely affecting the Fund's investment.

6. Each Fund will be controlled by the Manager, pursuant to an operating agreement (the ''Operating Agreement''). The Members of each Fund, consistent with their limited liability status, will not be entitled to participate in the control of the Fund's business operations. However, a majority-in-interest of the Members will have the right to amend the Operating Agreement of their Fund (subject to certain limitations) with the consent of the Manager, which shall not be unreasonably withheld, to dissolve the Fund with the consent of the Manager, which shall not be unreasonably withheld, and to remove any Manager and elect a replacement. In addition, under the Operating Agreement, each Member is entitled to review all books and records of the Member's Fund at any and all reasonable times.

7. Applicants state that the Operating Agreement and Memorandum of the Funds contain provisions to ensure fair dealing by the Manager with the Members. Applicants also state that all compensation to be paid to the Manager and its affiliates by a Fund is specified in the Operating Agreement and Memorandum, and no compensation will be payable to the Manager or any of its affiliates by the Fund unless so specified. Applicants believe that the fees and other forms of compensation that will be paid by each Fund to the Manager and its affiliates are fair and on terms no less favorable to the Fund than would be the case if such arrangements had been made with independent third parties.

8. During the offering and organizational phase, WNC Capital Corporation, an affiliate of the Manager, will receive a dealer-manager fee from each Fund for its services in managing a group of independent broker-dealers who will sell the Units. The Manager or an affiliate will also receive from each Fund a nonaccountable organizational and offering expense allowance. In exchange for this allowance, the Manager has agreed to pay all organizational and offering expenses of each Fund (excluding retail selling commissions, the dealer-manager fee, and the nonaccountable organizational and offering expense allowance). During its acquisition phase, each Fund will pay to the Manager or its affiliates an acquisition fee for analyzing and evaluating potential investments in Local Limited Partnerships and for various other services. The Manager or its affiliates will receive from each Fund a nonaccountable acquisition expense allowance in consideration of which the Manager or its affiliates will pay all acquisition expenses of each Fund. All fees and expenses paid to all persons in connection with the organization of each Fund, the offering of Units and the acquisition of Local Limited Partnership interests will not exceed an amount equal to 22% of the Fund's gross offering proceeds.

9. During the operating phase, the Manager will receive a yearly asset management fee from each Fund in an amount equal to 0.75% of the Fund's invested assets for services rendered by the Manager in connection with the administration of the affairs of the Fund and the management of the Fund's assets. During the liquidation phase, each Fund will pay the Manager or its affiliates a disposition fee in an amount of up to 3% of the gross sales price of an Apartment Complex or a Local Limited Partnership interest.

10. All proceeds of the private placement of a Fund's Units initially will be placed in an escrow account with U.S. Bank, National Association (''Escrow Agent''). Pending release of offering proceeds to the Fund, the Escrow Agent will deposit escrowed funds in accordance with instructions from time to time received from the Manager in short-term United States Government securities, securities issued or guaranteed by the United States Government, and certificates of deposit or time or demand deposits in commercial banks. Upon receipt of a prescribed minimum amount of gross operating proceeds for a Fund, funds in escrow will be released to the Fund and held by it pending investment in Local Limited Partnerships. Any of a Fund's offering proceeds available for investment in Local Limited Partnership interests that the Fund has not either invested or committed to invest within 24 months following the termination of its offering of Units will be distributed to investors pro rata as a return of capital.

11. If more than one entity that the General Partner or its affiliates advises or manages may invest in a particular investment opportunity, the decision as to the entity that will be allocated the investment will be based upon such factors as the effect of the acquisition on

diversification of each entity's portfolio, the estimated income tax effects of the purchase on each entity, the amount of funds of each entity available for investment, and the length of time such funds have been available for investment.

**Applicants' Legal Analysis**

1. Applicants believe that the Funds will not be ''investment companies'' under sections 3(a)(1)(A) or 3(a)(1)(C) of the Act. If the Funds are deemed to be investment companies, however, applicants request an exemption under section 6(c) and 6(e) of the Act from all provisions of the Act, except sections 37 through 53 of the Act and the rules and regulations under those sections, except rule 38a-1 thereunder.

2. Section 3(a)(1)(A) of the Act provides that an issuer is an ''investment company'' if it is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities. Applicants believe that the Funds will not be investment companies under section 3(a)(1)(A) because each Fund will be in the business of investing in and being a beneficial owner of Apartment Complexes, not securities.

3. Section 3(a)(1)(C) of the Act provides that an issuer is an ''investment company'' if it is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire ''investment securities'' having a value exceeding 40% of the value of such issuer's total assets (exclusive of Government securities and cash items). Applicants state that although the Local Limited Partnership interests may be deemed ''investment securities,'' they are not readily marketable, cannot be sold without severe adverse tax consequences, and have no value apart from the value of the Apartment Complexes owned by the Local Limited Partnerships.

4. Applicants believe that the two-tier structure is consistent with the purposes and criteria set forth in the Commission's release concerning two-tier real estate partnerships (the ''Release'').[1] The Release states that investment companies that are two-tier real estate partnerships that invest in limited partnerships engaged in the development and operation of housing for low and moderate income persons may qualify for an exemption from the Act pursuant to section 6(c). Section 6(c) provides that the Commission may exempt any person from any provision of the Act and any rule thereunder, if, and to the extent that, such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 6(e) permits the Commission to require companies exempted from the registration requirements of the Act to comply with certain specified provisions of the Act as though the company were a registered investment company.

5. The Release lists two conditions, designed for the protection of investors, which must be satisfied by two-tier partnerships to qualify for the exemption under section 6(c). First, interests in the issuer should be sold only to persons for whom investments in limited profit, essentially tax shelter, investments would not be unsuitable. Second, requirements for fair dealing by the general partner of the issuer with the limited partners of the issuer should be included in the basic organizational documents of the company.

6. Applicants represent that Units will be sold only to persons for whom investment in limited profit, essentially tax shelter, investments would be suitable. Applicants further state that the requirements for fair dealing by the Manager with the Members are included in the basic organizational documents of each Fund. Applicants assert, among other things, that the suitability standards set forth in the application, the requirements for fair dealing provided by the Operating Agreement, and pertinent governmental regulations imposed on each Local Limited Partnership by various Federal, state, and local agencies provide protection to Accredited Investors in Units. In addition, applicants assert that the requested exemption is both necessary and appropriate in the public interest.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011–17430 Filed 7–11–11; 8:45 am]

**BILLING CODE 8011–01–P**

[1] Investment Company Act Release No. 8456 (Aug. 9, 1974).

## 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 14, 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 Walter, 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 14, 2011 will be:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings;

Adjudicatory matters; 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: July 7, 2011.

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. 2011–17520 Filed 7–8–11; 11:15 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–64817; File No. SR–CBOE–2011–059]**

### Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to an Extension of the Waiver of the Transaction Fee for Public Customer Orders in SPY Options Executed in Open Outcry or in the Automated Improvement Mechanism

July 6, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

notice is hereby given that on June 29, 2011, the Chicago Board Options Exchange, Incorporated (the ''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as one establishing or changing a due, fee, or other charge imposed by CBOE under 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 its Fees Schedule to extend through September 30, 2011, a waiver of the transaction fee for public customer orders in options on Standard & Poor's Depositary Receipts that are executed in open outcry or in the Automated Improvement Mechanism. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary and at the Commission.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

**1. Purpose**

The Exchange currently waives the $.18 per contract transaction fee for public customer (''C'' origin code) orders in options on Standard & Poor's Depositary Receipts (''SPY options'') that are executed in open outcry or in the Automated Improvement Mechanism (''AIM'').[5] This fee waiver is due to expire on June 30, 2011. The Exchange proposes to extend the fee waiver through September 30, 2011.[6] The proposed fee waiver is intended to attract more customer volume on the Exchange in this product.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act,[7] in general, and furthers the objectives of Section 6(b)(4) [8] of the Act in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among CBOE Trading Permit Holders and other persons using its facilities. The Exchange believes the proposed extension of the fee waiver is equitable because the fee waiver would apply uniformly to all public customers trading SPY options. The Exchange believes the proposed extension of the fee waiver is reasonable because it would continue to provide cost savings during the extended waiver period for public customers trading SPY options. Further, the Exchange believes the proposed fee waiver is consistent with other fees assessed [sic] by the Exchange. Specifically, the Exchange assesses manually executed broker-dealer orders a different rate ($.25 per contract) as compared to electronically executed broker-dealer orders ($.45 per contract).[9] Other exchange fee schedules also distinguish between electronically and non-electronically executed orders.[10]

*B. Self-Regulatory Organization's Statement on Burden on Competition*

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The proposed rule change is designated by the Exchange as establishing or changing a due, fee, or other charge, thereby qualifying for effectiveness on filing pursuant to Section 19(b)(3)(A) of the Act [11] and subparagraph (f)(2) of Rule 19b–4 [12] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2011–059 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–CBOE–2011–059. This file number should be included on the subject line if e-mail is used. To help the

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] *See* Securities Exchange Act Release No. 34–62902 (September 14, 2010), 75 FR 57313 (September 20, 2010), Securities Exchange Act Release No. 34–63422 (December 3, 2010), 75 FR 76770 (December 9, 2010), Securities Exchange Act Release No. 34–64197 (April 6, 2011), 76 FR 20390 (April 12, 2011) and CBOE Fees Schedule, footnote 8. AIM is an electronic auction system that exposes certain orders electronically in an auction to provide such orders with the opportunity to receive an execution at an improved price. AIM is governed by CBOE Rule 6.74A.

[6] The Exchange notes that transaction fees are also currently waived for customer orders of 99 contracts or less in ETF (including SPY options), ETN and HOLDRs options. *See* CBOE Fees Schedule, footnote 9.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(4).

[9] *See* CBOE Fees Schedule, Section 1.

[10] NASDAQ OMX PHLX, Inc. categorizes its equity options transaction fees for Specialists, ROTs, SQTs, RSQTs and Broker-Dealers as either electronic or non-electronic. See NASDAQ OMX PHLX Fees Schedule, Equity Options Fees. NYSE Amex, Inc. categorizes its options transaction fees for Non-NYSE Amex Options Market Makers, Broker-Dealers, Professional Customers, Non BD Customers and Firms as either electronic or manual. See NYSE Amex Options Fees Schedule, Trade Related Charges. NYSE Arca, Inc. categorizes its options transaction fees for Customers, Firms and Broker-Dealers as either electronic or manual. See NYSE Arca Options Fees Schedule, Trade Related Charges.

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(2).

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 office of CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2011–059 and should be submitted on or before August 2, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011–17425 Filed 7–11–11; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–64816; File No. PCAOB–2011–02]**

## Public Company Accounting Oversight Board; Notice of Filing of Proposed Board Funding Final Rules for Allocation of the Board's Accounting Support Fee Among Issuers, Brokers, and Dealers, and Other Amendments to the Board's Funding Rules

July 6, 2011.

Pursuant to Section 107(b) of the Sarbanes-Oxley Act of 2002 (the ''Act''), notice is hereby given that on June 21, 2011, the Public Company Accounting Oversight Board (the ''Board'' or the ''PCAOB'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rules described in Items I and II below, which items have been prepared by the Board. The Commission is publishing this notice to solicit comments on the proposed rules from interested persons.

### I. Board's Statement of the Terms of Substance of the Proposed Rules

On June 14, 2011, the Board adopted amendments to its rules relating to the funding of the Board's operations (PCAOB Rules 7100 through 7106), and amended certain definitions that would appear in PCAOB Rule 1001, related to Section 109 of the Sarbanes-Oxley Act, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act[1] (the ''Dodd-Frank Act'') (collectively, ''the proposed rules''). The text of the proposed rules is set out below (additions are italicized; deletions are in [brackets]).

**RULES OF THE BOARD**

SECTION 1. GENERAL PROVISIONS

* * *

Rule 1001. Definitions of Terms Employed in Rules.

* * *

(a)(i) [Accounting Support Fee] *[Reserved]*

[The term ''Accounting Support Fee'' means the fee described in Rule 7100 Sarbanes-Oxley Act of 2002, as amended.]

(a)(iii) Act

The term ''Act'' means the Sarbanes-Oxley Act of 2002, *as amended.*

* * *

*(b)(iii) Broker*

*The term ''broker'' means a broker (as defined in Section 3(a)(4) of the Exchange Act), that is required to file a balance sheet, income statement, or other financial statement under Section 17(e)(1)(A) of that Act, where such balance sheet, income statement, or financial statement is required to be certified by a registered public accounting firm.*

*(b)(iv) Broker-Dealer Accounting Support Fee*

*The term ''broker-dealer accounting support fee'' means the portion of the accounting support fee established by the Board that is to be allocated among brokers and dealers pursuant to the rules of the Board.*

* * *

*(c)(iii) Common Equity*

*The term ''common equity'' means any class of common stock or an equivalent interest, including but not limited to a unit of beneficial interest in a trust or a limited partnership interest.*

* * *

*(d)(iii) Dealer*

*The term ''dealer'' means a dealer (as defined in Section 3(a)(5) of the Exchange Act), that is required to file a balance sheet, income statement, or other financial statement under Section 17(e)(1)(A) of that Act, where such balance sheet, income statement, or financial statement is required to be certified by a registered public accounting firm.*

* * *

(i)(i) Issuer Market Capitalization

The terms ''issuer market capitalization'' and ''market capitalization of an issuer'' mean—

(1) Except as provided in paragraph (i)(i)(2) of this rule, the aggregate market value of all classes of an issuer's *voting and non-voting common [*common stock]*equity* that trade in the United States; or

(2) With respect to an issuer: (i) that is registered under Section 8 of the Investment Company Act or has elected to be regulated as a business development company pursuant to Section 54 of the Investment Company Act, and (ii) whose securities are not traded on a national securities exchange or *whose* [quoted on Nasdaq]*share price is not otherwise publicly available,* the issuer's net asset value.

*(i)(v) Issuer Accounting Support Fee*

*The term ''issuer accounting support fee'' means the portion of the accounting support fee established by the Board that is to be allocated among issuers pursuant to the rules of the Board.*

* * *

(*i*[n])(*vi*) [Notice]*Invoice*

The term ''[notice]*invoice''* means the document sent by the Board to an issuer*, broker, or dealer,* pursuant to Rule 710*3*[2], setting forth such issuer's*, broker's, or dealer's* share of the accounting support fee under Section 109 of the Act and Rules 7101*,* [and]7102*, and 7103.*

* * *

*(s)(v) Self-Regulatory Organization*

*The term ''self-regulatory organization'' means any national securities exchange, registered securities association, or registered clearing agency, or (solely for purposes of Sections 19(b), 19(c), and 23(b) of the Exchange Act) the Municipal Securities Rulemaking Board established by Section 15B of the Exchange Act.*

* * *

*(t)(ii) Tentative Net Capital*

*The term ''tentative net capital'' has the same meaning as such term is defined under Rule 15c3–1(c)(15) under the Exchange Act.*

*(t)(iii) Total Accounting Support Fee*

*The term ''total accounting support fee'' means the fee described in Rule 7100.*

* * *

SECTION 7. FUNDING

* * *

Rule 7100. Accounting Support Fee*s.*

The Board shall [calculate]*establish* a *total*[n] accounting support fee each year *in accordance with the Act. The total accounting support fee shall be equitably allocated between issuers (the ''issuer accounting support fee'') and brokers and dealers (the ''broker-dealer accounting support fee'').* [The accounting support fee

[13] 17 CFR 200.30–3(a)(12).

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

shall equal the budget of the Board, as approved by the Commission, less the sum of all registration fees and annual fees received during the preceding calendar year from public accounting firms, pursuant to Section 102(f) of the Act and the Rules of the Board.]*The accounting support fees shall then be equitably allocated among issuers, in accordance with Rule 7101(b), and among brokers and dealers, in accordance with Rule 7102(b).*

Rule 7101. Allocation of *Issuer* Accounting Support Fee.

(a) Classes of Issuers

For purposes of allocating the *issuer* accounting support fee, those entities that are issuers as of the date the *issuer* accounting support fee is calculated[ under Rule 7100] shall be divided into four classes:

(1) Equity Issuers

All issuers whose average, monthly issuer market capitalization *is greater than $75 million* during the [preceding]calendar year *preceding the date the issuer accounting support fee is calculated*[is greater than $25 million], other than those described in paragraphs (a)(2) and (a)(3) of this Rule, and whose share price on a monthly, or more frequent, basis is publicly available.

Note: *The* [Average,]monthly *issuer* market capitalization will be based on closing [stock]*share* price[s] *of all classes of the issuer's voting and non-voting common equity* on the closest trading day on or before the last day of each calendar month [measured]*during which trading in the common equity occurred.*

(2) Investment Company Issuers

All issuers (i) who, as of the date the accounting support fee is calculated[ under Rule 7100], are registered under Section 8 of the Investment Company Act or have elected to be regulated as business development companies pursuant to Section 54 of the Investment Company Act, other than those described in paragraph (a)(3), (ii) whose average, monthly issuer market capitalization *is greater than $500 million* during the [preceding ]calendar year *preceding the date the issuer accounting support fee is calculated*[is greater than $250 million], and (iii) whose share price (or net asset value) on a monthly, or more frequent, basis is publicly *[-]*available.

Note: [Average]*The*[,] monthly *issuer* market capitalization will be based on closing [stock]*share* price[s]*of all classes of the issuer's voting and non-voting common equity* on the closest trading day on or before the last day of each calendar month [measured]*during which trading in the common equity occurred.*

(3) Issuers Permitted Not to File Audited Financial Statements and Bankrupt Issuers that File Modified Reports

All issuers that, as of the date the *issuer* accounting support fee is calculated[ under Rule 7100], (i) have a basis, under *the federal securities laws,* a Commission rule*,* or pursuant to other action of the Commission or its staff, not to file audited financial statements *with the Commission,* (ii) are employee stock purchase, savings, and similar plans, interests in which constitute securities registered under the Securities Act, or (iii) are subject to the jurisdiction of a bankruptcy court and [satisfy]*have provided an opinion of counsel that the issuer satisfies* the modified reporting requirements of Commission Staff Legal Bulletin No. 2.

Note: [As of April 16, 2003, i]*I*ssuers within paragraph (a)(3)(i) of this Rule include (A) asset-backed issuers, (B) unit investment trusts, as defined in Section 4(2) of the Investment Company Act, that have not filed or updated a registration statement that became effective during the [preceding]*calendar* year *preceding the date the issuer accounting support fee is calculated,* and (C) Small Business Investment Companies registered on Form N–5 under the Investment Company Act[,] that have not filed or updated a registration statement that became effective during the *calendar year preceding the date the issuer accounting support fee is calculated*[preceding year].

(4) All Other Public Company Issuers

All issuers other than those described in paragraphs (a)(1), (a)(2)*,* or (a)(3) of this Rule.

(b) Allocation of *Issuer* Accounting Support Fee Among Issuers

The *issuer* accounting support fee shall be allocated among the classes in paragraph (a) of this Rule as follows:

(1) Equity and Investment Company Issuers

Each issuer described in paragraph (a)(1) and (a)(2) of this Rule shall be allocated a share of the *issuer* accounting support fee in an amount equal to the *issuer* accounting support fee multiplied by a fraction –

(i) the numerator of which is the average, monthly market capitalization of the issuer during the [preceding ]calendar year *preceding the date the issuer accounting support fee is calculated,* except that for issuers described in paragraph (a)(2) of this Rule, the numerator is one-tenth of the average, monthly *issuer* market capitalization of the issuer; and

(ii) the denominator of which is the sum of the average, monthly market capitalizations of the issuers described in paragraph (a)(1) of this Rule and one-tenth of the average, monthly market capitalizations of the issuers described in paragraph (a)(2) of this Rule.

(2) All Other Classes

Each issuer described in paragraphs (a)(3) and (a)(4) of this Rule shall be allocated a share of the *issuer* accounting support fee equal to $0.

(c) Adjustments

After the *issuer* accounting support fee is calculated [under Rule 7100 ]and allocated under this Rule, any adjustment to the share allocated to an issuer shall not affect the share allocated to any other issuer.

*Rule 7102. Allocation of Broker-Dealer Accounting Support Fee*

*(a) Classes of Brokers and Dealers*

*For purposes of allocating the broker-dealer accounting support fee, those entities that are brokers or dealers as of the date the broker-dealer accounting support fee is calculated shall be divided into two classes:*

*(1) Brokers and Dealers with Average, Quarterly Tentative Net Capital Greater than $5 million.*

*All brokers and dealers whose average, quarterly tentative net capital is greater than $5 million during the calendar year preceding the date the broker-dealer accounting support fee is calculated, other than those described in paragraphs (a)(2) of this Rule.*

*Note: Average, quarterly tentative net capital will be based on the tentative net capital reported by the broker or dealer in the calendar quarterly reports filed pursuant to Commission rules during the calendar year preceding the date the broker-dealer accounting support fee is calculated.*

*(2) Brokers and Dealers Permitted Not to File Audited Financial Statements and Brokers and Dealers Not Described in Paragraph (a)(1) of This Rule.*

*All brokers and dealers that, as of the date the broker-dealer accounting support fee is calculated, (i) have a basis, under the federal securities laws, a Commission rule, or pursuant to other action of the Commission or its staff, not to file audited financial statements or (ii) are not described in paragraph (a)(1) of this Rule.*

*(b) Allocation of Broker-Dealer Accounting Support Fee*

*The broker-dealer accounting support fee shall be allocated among the classes in paragraph (a) of this Rule as follows;*

(1) *Brokers and Dealers with Average, Quarterly Tentative Net Capital Greater than $5 million.*

*Each broker and dealer described in paragraph (a)(1) of this Rule shall be allocated a share of the broker-dealer accounting support fee in an amount equal to the broker-dealer accounting support fee multiplied by a fraction—*

*(i) the numerator of which is the average, quarterly tentative net capital of the broker or dealer during the calendar year preceding the date the broker-dealer accounting support fee is calculated; and*

*(ii) the denominator of which is the sum of the average, quarterly tentative net capital of the brokers and dealers described in paragraph (a)(1) of this Rule.*

*(2) All Other Brokers and Dealers*

*Each broker and dealer described in paragraph (a)(2) of this Rule shall be allocated a share of the broker-dealer accounting support fee equal to $0.*

*(c) Adjustments*

*After the broker-dealer accounting support fee is calculated and allocated under this Rule, any adjustment to the share allocated to a broker or dealer shall not affect the share allocated to any other broker or dealer.*

Rule 710*3*[2]. Assessment of Accounting Support Fees*.*

(a) Amount of Assessment

Each issuer *and each broker and dealer* is required to pay its share of the accounting support fee, as allocated under Rule*s* 7101 *and 7102,* rounded to the nearest [hundred]*$100.*

Note: If *the allocated*[an issuer's] share of the accounting support fee *to an issuer,*

*broker, or dealer* is less than $50, [that issuer]*the assessed share of the accounting support fee* will [not]be [assessed]*zero.* If the [issuer's]*allocated* share of the accounting support fee is [exactly]$50 *or $50* more than [a]*the closest* multiple of $100, then the *assessed* share will be rounded up to the nearest $100.

(b) Notice of Assessment

The Board will use its best efforts to send a*n* [notice]*invoice* to each issuer*, broker, and dealer,* either electronically or by first-class mail, at the address shown *in* [on such issuer's]*the* most recent periodic report filed with the Commission *by the issuer, or with the designated self-regulatory organization by the broker or dealer,* at the address [submitted to]*contained in* the Commission's EDGAR system *or the broker's or dealer's designated self-regulatory organization,* or at such other address as the issuer*, broker, or dealer* provides to the Board. The Board's failure to send an issuer*, broker, or dealer* a*n* [notice]*invoice,* or the [issuer's]failure to receive a*n* [notice]*invoice* sent by the Board, shall not constitute a waiver of the Board's right to assess *the issuer, broker, or dealer*[such issuer] for its share of the accounting support fee or of the issuer's*, broker's, or dealer's* responsibility to pay its share of the accounting support fee.

(c) Petition for Correction

Any issuer*, broker, or dealer* who disagrees with the class in which it has been placed, or with the calculation by which its share of the accounting support fee was determined, may petition the Board for a correction of the share of the accounting support fee it was allocated. Any such petition shall include an explanation of the nature of the claimed mistake in classification or calculation in writing *and must be filed with the Board,* on or before the *6[*3]0th day after the [notice]*invoice* is sent*, or within such longer period as the Board allows for good cause shown.* After a review of such a petition, the Board will determine whether the allocation is consistent with Section 109 of the Act and the Board's rules thereunder and provide the issuer a written explanation of its decision. The provisions of Rule 710*4[*3] shall be suspended while such a petition is pending before the Board.

Rule 710*4*[3]. Collection of Accounting Support Fee*s.*

(a) Accounting Support Fee Payment Due Date

Unless the Board directs otherwise, payment shall be due on the 30th day after the [notice]*invoice* is sent. Beginning on the 31st day, payment shall be deemed past due and interest shall accrue at a rate of 6 percent per annum.

(b) [Confirmation]*Determination* of Payment of Accounting Support Fee*s* by Registered Accounting Firm

(1) Except as provided in paragraph (b)(2) of this Rule, no registered public accounting firm shall*:*

*(i)* sign an unqualified audit opinion with respect to an issuer's*, broker's, or dealer's* financial statements, [or]

*(ii)* issue a consent to include an audit [opinion]*report* issued previously, *or*

*(iii) sign a document, report, notice, or other record concerning procedures or controls of any issuer, broker, or dealer required under the securities laws* unless the registered public accounting firm has ascertained that the issuer *(including any broker or dealer subsidiary of the issuer), broker, or dealer* has outstanding no past-due share of the *issuer* accounting support fee *or broker-dealer accounting support fee, whichever is applicable,* or has a petition pursuant to Rule 710*3*[2](c) pending.

(2) A registered public accounting firm may*:*

*(i)* sign an unqualified audit opinion with respect to an issuer's*, broker's, or dealer's* financial statements, [or]

*(ii)* issue a consent to include an audit [opinion]*report* issued previously, *or*

(iii) *sign a document, report, notice, or other record concerning procedures or controls of any issuer, broker, or dealer required under the securities laws* even though the issuer *(including any broker or dealer subsidiary of the issuer), broker, or dealer* has outstanding a past-due share of the accounting support fee and has not filed a petition under Rule 710*3*[2](c), if the issuer*, broker, or dealer* needs the *audit* report or consent in order to submit a report to, or make a filing with, the Commission or*, in the case of an issuer only,* to issue securities. The [issuer]*registered public accounting firm* shall submit to the Board a notice of the signing of the opinion or issuance of the consent not later than the next business day after the filing is made with the Commission. This exception to paragraph (b)(1) of this Rule shall not continue longer than 15 business days after the earlier of the date of the notice's submission or the filing of the report with the Commission, and may not be invoked for more than one such period with respect to any share of the accounting support fee that the issuer*, broker, or dealer* is assessed under Rule 710*3*[2].

Note 1: A registered public accounting firm may ascertain that an issuer*, broker, or dealer* has no outstanding past-due share of the accounting support fee by obtaining a representation from the issuer*, broker, or dealer[*or a confirmation from the Board that no past-due share of the accounting support fee is outstanding].

Note 2: A notice pursuant to paragraph (b)(2) of this Rule must be submitted electronically by e-mail to rule710*4[*3]stay@pcaobus.org.

*Note 3: For purposes of Rule 7104, the term ''audit'' means an examination of the financial statements, reports, documents, procedures, controls, or notices of any issuer, broker, or dealer by an independent public accounting firm in accordance with the rules of the Board or the Commission, for the purpose of expressing an opinion on the financial statements or providing an audit report. For purposes of Rule 7104, the term ''audit report'' means a document, report, notice, or other record (1) prepared following an audit performed for purposes of compliance by an issuer, broker, or dealer with the requirements of the securities laws; and (2) in which a public accounting firm either (i) sets forth the opinion of that firm regarding a financial statement, report, notice, or other document, procedures, or controls; or (ii) asserts no such opinion can be expressed.*

(c) Report*s* [to the Commission ]of Non-payment[ of an Accounting Support Fee].

*(1)* If an issuer has not paid its share of the *issuer* accounting support fee by the 60th day after the [notice]*invoice* was sent, and the issuer does not have a petition pursuant to Rule 710[2]*3*(c) pending, the Board may send a second [notice]*invoice* to such issuer by certified mail. If the Board has sent such a second [notice]*invoice* and has not been paid by the 90th day after the original [notice]*invoice* was sent, the Board may report the issuer's nonpayment to the Commission.

Note: Section 13(b)(2) of the Exchange Act provides, in part, that: ''Every issuer which has a class of securities registered pursuant to section 12 of this title and every issuer which is required to file reports pursuant to section 15(d) of this title shall—* * * (C) notwithstanding any other provision of law, pay the allocable share of such issuer of a reasonable accounting support fee or fees, determined in accordance with Section 109 of the Sarbanes-Oxley Act of 2002.''

*(2) If a broker or dealer has not paid its share of the broker-dealer accounting support fee by the 60th day after the invoice was sent, and the broker or dealer does not have a petition pursuant to Rule 7103(c) pending, the Board may send a second invoice to such broker or dealer by certified mail. If the Board has sent such a second invoice and has not been paid by the 90th day after the original invoice was sent, the Board may report the broker's or dealer's nonpayment to the Commission and/or the broker's or dealer's designated self-regulatory organization.*

*Note: Section 109(h)(1) of the Act provides that ''[e]ach broker or dealer shall pay to the Board the annual accounting support fee allocated to such broker or dealer under this section.''*

[(d) Excess Fees

If in any Board fiscal year, the Board receives fees in excess of the budget for that fiscal year, the Board shall hold those excess fees in escrow. Such escrowed excess fees shall be released to the Board at the beginning of the next fiscal year and shall reduce the Board's accounting support fee in that next fiscal year.]

Rule 710*5*[4]. Service as Designated Collection Agent.

If the Board is designated to serve as collection agent for an accounting support fee of a standard-setting body designated by the Commission pursuant to Section 19(b) of the Securities Act, the assessment and collection of the accounting support fee shall be governed by Rules 710*3 and* [2 and ]7104[3] as if the accounting support fee of the standard-setting body were the *issuer* accounting support fee of the Board.

*Rule 7106. [*(d) ]*Excess* [Fees]*Funds.*

If in any Board fiscal year, the Board receives [fees]*funds* in excess of the budget *of the Board* for that fiscal year, *as approved by the Commission,* the Board shall hold those excess [fees]*funds* in escrow. Such escrowed excess [fees]*funds* shall be released to the Board at the beginning of the next

fiscal year and shall reduce the Board's *total* accounting support fee in that next fiscal year.

## II. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rules

In its filing with the Commission, the Board included statements concerning the purpose of, and basis for, the proposed rules and discussed any comments it received on the proposed rules. The text of these statements may be examined at the places specified in Item IV below. The Board has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

### *A. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rules*

(a) Purpose

Section 109 of the Sarbanes-Oxley Act, as originally enacted, provided that funds to cover the Board's annual budget (less registration and annual fees paid by public accounting firms) [2] would be collected from issuers [3] based on each issuer's relative average, monthly equity market capitalization.[4] The amount due from issuers was referred to as the Board's ''accounting support fee.''

Section 982 of the Dodd-Frank Act granted the Board oversight of the audits of brokers and dealers registered with the Commission.[5] To provide funds for the Board's oversight of those audits, the Dodd-Frank Act amended Section 109 of the Sarbanes-Oxley Act to require that the Board allocate a portion of the accounting support fee among brokers and dealers, or classes of brokers and dealers, based on their relative ''net capital (before or after any adjustments).'' [6]

As amended by the Dodd-Frank Act, Section 109 of the Sarbanes-Oxley Act requires that the rules of the Board provide for the equitable allocation, assessment, and collection by the Board of the accounting support fee among issuers, brokers, and dealers, and allow ''for differentiation among classes of issuers, brokers, and dealers, as appropriate.'' [7] This section further provides that ''[t]he amount due from a broker or dealer shall be in proportion to the net capital of the broker or dealer (before or after any adjustments), compared to the total net capital of all brokers and dealers (before or after any adjustments), in accordance with rules issued by the Board.'' [8]

Accordingly, the Board adopted amendments to its funding rules to allocate a portion of the accounting support fee among brokers and dealers,[9] to establish classes of brokers and dealers for funding purposes, to describe the methods for allocating the appropriate portion of the accounting support fee to each broker and dealer within each class, and to address the collection of the assessed share of the broker-dealer accounting support fee from brokers and dealers.

In addition, the proposed rules include amendments to the Board's funding rules with respect to the allocation, assessment, and collection of the accounting support fee among issuers. The proposed rules (i) revise the basis for calculating an issuer's market capitalization to include the market capitalization of all classes of the issuer's voting and non-voting common equity, and (ii) increase the average, monthly market capitalization thresholds in the funding rules for classes of equity issuers and investment companies. Further, based on eight years' experience administering the funding process, the proposed rules include technical amendments to the Board's funding rules.

On December 14, 2010, the Board published for public comment proposed amendments to its funding rules to provide for a portion of the accounting support fee to be allocated among brokers and dealers with average, quarterly tentative net capital of greater than $5 million.[10] The Board sought comment on all aspects of the proposed rules. The Board received eight comments in total, consisting of four comments from accounting firms, two from associations of accountants or auditors, one from an organization representing independent broker-dealers, and one from a small broker and dealer. Generally, commenters supported the amendments. As discussed more fully in Exhibit 3 in the PCAOB's filing with the Commission, on June 14, 2011, the Board adopted the proposed rules, which are substantially similar to those proposed on December 14, 2010.

(b) Statutory Basis

The statutory basis for the proposed rules is Title I of the Sarbanes-Oxley Act.

### *B. Board's Statement on Burden on Competition*

The Board does not believe that the proposed rules on funding will result in any burden on competition. The proposed rule changes would apply equally to all issuers, brokers, and dealers and pursuant to the statutory formula, issuers, brokers, and dealers will generally pay a fee that is proportionate to the size of their equity market capitalization, for issuers, and tentative net capital, for brokers and dealers. In addition, the proposed rules would provide for a fee of zero for issuers with average, monthly equity market capitalization of less than $75 million (or, for investment company issuers, less than $500 million) and for brokers and dealers with $5 million or less of average, quarterly tentative net capital.

### *C. Board's Statement on Comments on the Proposed Rules Received From Members, Participants or Others*

The Board released the proposed rules for public comment in PCAOB Release No. 2010–009 (December 14, 2010). The Board received eight written comment letters relating to its initial proposed rules. The Board has carefully considered all comments received. The Board's response to the comments it received and the changes made to the

[2] Section 102(f) of the Sarbanes-Oxley Act, states that registered public accounting firms shall pay fees sufficient for the Board to recover the costs of processing and reviewing registration applications and annual reports.

[3] Section 2(a)(7) of the Sarbanes-Oxley Act and PCAOB rules define ''issuer'' to mean an issuer (as defined in Section 3 of the Securities Exchange Act of 1934 (''Exchange Act'')), the securities of which are registered under Section 12 of the Exchange Act, or that is required to file reports under Section 15(d) of the Exchange Act, or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933, and that it has not withdrawn. *See* PCAOB Rule 1001(i)(iii).

[4] Section 109(g) of the Sarbanes-Oxley Act.

[5] For information regarding the audit of brokers' and dealers' financial statements and examination of reports regarding compliance with Commission requirements, *see generally* Rule 17a–5 under the Exchange Act and related SEC rules and forms.

[6] Sections 109(d)(2) and 109(h) of the Sarbanes-Oxley Act, which state, in part, that amounts due from brokers and dealers ''shall be in proportion to the net capital of the broker or dealer (before or after any adjustments).''

[7] Section 109(d)(2) of the Sarbanes-Oxley Act. Pursuant to Section 109(e) of the Sarbanes-Oxley Act, the Financial Accounting Standards Board (''FASB'') accounting support fee is to be allocated among issuers. Brokers and dealers therefore will not be allocated a portion of the FASB annual accounting support fee.

[8] Section 109(h)(3) of the Sarbanes-Oxley Act.

[9] The PCAOB is amending its rules to add definitions of ''broker'' and ''dealer'' consistent with the definitions that the Dodd-Frank Act added to Section 110 of the Sarbanes-Oxley Act. These definitions incorporate the definition of ''broker'' in Section 3(a)(4) of the Exchange Act and ''dealer'' in Section 3(a)(5) of the Exchange Act, but only include those brokers or dealers that are required to file a balance sheet, income statement, or other financial statement certified by a registered public accounting firm. *See* Sections 110(3) and (4) of the Sarbanes-Oxley Act.

[10] PCAOB Release No. 2010–009, *Board Funding: Proposal for Allocation of the Board's Accounting Support Fee Among Issuers, Brokers, and Dealers, and Other Amendments to the Board's Funding Rules* (December 14, 2010); PCAOB Rulemaking Docket Matter No. 033 (the ''proposing release'').

rules in response to the comments received are discussed below.

Brokers and Dealers

As amended by the Dodd-Frank Act, Section 109 of the Sarbanes-Oxley Act requires that the rules of the Board provide for the equitable allocation, assessment, and collection by the Board of the accounting support fee among issuers, brokers, and dealers, and allow ''for differentiation among classes of issuers, brokers, and dealers, as appropriate.'' [11] This section further provides that ''[t]he amount due from a broker or dealer shall be in proportion to the net capital of the broker or dealer (before or after any adjustments), compared to the total net capital of all brokers and dealers (before or after any adjustments), in accordance with rules issued by the Board.''[12]

Accordingly, the Board is adopting amendments to its funding rules to allocate a portion of the accounting support fee among brokers and dealers,[13] to establish classes of brokers and dealers for funding purposes, to describe the methods for allocating the appropriate portion of the accounting support fee to each broker and dealer within each class, and to address the collection of the assessed share of the broker-dealer accounting support fee from brokers and dealers.

Pursuant to Section 109(d)(3) of the Sarbanes-Oxley Act, as amended by the Dodd-Frank Act, the PCAOB is to begin the allocation, assessment, and collection of the accounting support fee from brokers and dealers to fund the first full fiscal year beginning after the date of the enactment of the Dodd-Frank Act, which is the Board's 2011 fiscal year. Accordingly, the amendments to its funding rules for brokers and dealers are effective, subject to approval by the SEC, for the allocation, assessment, and collection of the accounting support fee for brokers and dealers in 2011.[14]

*A. The Broker-Dealer Accounting Support Fee*

The Report of the Senate Committee on Banking, Housing, and Urban Affairs that accompanied the legislation that would become the Dodd-Frank Act stated:

> The Committee expects that the PCAOB will reasonably estimate the amounts required to fund the portions of its programs devoted to the oversight of audits of brokers and dealers, as contrasted to the oversight of audits of issuers, in deciding the total amounts to be allocated to, assessed, and collected from all brokers and dealers * * * Cost accounting for each program is not required.[15]

In accordance with this expectation, the Board each year will reasonably estimate amounts required to fund the portions of the Board's programs devoted to the oversight of audits of issuers and the amounts required to fund the portions of its programs devoted to the oversight of the audits of brokers and dealers. At the time the Board establishes a total accounting support fee, it also will allocate the respective portions of the total accounting support fee among issuers (the ''issuer accounting support fee'') and among brokers and dealers (the ''broker-dealer accounting support fee''). In accordance with Section 109(b) of the Sarbanes-Oxley Act, the Board's budget, which includes the total accounting support fee and the portion of the total accounting support fee to be allocated to issuers and the portion to be allocated to brokers and dealers, is subject to the Commission's approval.

*B. Classes of Brokers and Dealers*

The Board is establishing classes of brokers and dealers for funding purposes to allow for the equitable distribution of the accounting support fee. Establishing classes allows the Board to allocate the broker-dealer accounting support fee to those brokers and dealers whose audits, due to their relative size and complexity, may require more Board time and resources during an inspection than other audits of brokers and dealers with relatively small and less complex operations.

Further, because Section 109 requires that allocations be based on a broker's or dealer's net capital ''before or after any adjustments,'' the Board is basing the classes of brokers and dealers on the average ''tentative net capital'' reported at the end of the calendar quarters during the previous calendar year. ''Tentative net capital'' is defined in the Board's rules to have the same meaning that the term has in Rule 15c3–1(c)(15) under the Exchange Act.[16] This definition generally provides that the ''tentative net capital'' of a broker or dealer is its net capital before deducting certain securities haircuts and changes in inventory used in calculating the broker's or dealer's net capital. Because the investment decisions made by a broker or dealer can influence the amount of these deductions and thus influence the net capital calculation, ''tentative net capital'' may be a more consistent basis for allocation of the broker-dealer accounting support fee. Both net capital and tentative net capital amounts are reported by brokers and dealers on their quarterly FOCUS reports filed on Form X–17A–5.[17]

In considering the effect of this measurement criterion at the proposal phase, the Board reviewed the tentative net capital of 4,656 brokers and dealers as of the third and fourth quarters of 2009 and the first and second quarters of 2010.[18] Registered brokers and dealers had average, quarterly tentative net capital amounts for the four quarters ranging up to approximately $15.8 billion. Thirty-three brokers and dealers, however, held approximately 80.1% of the total average, quarterly tentative net capital maintained by all 4,656 brokers and dealers. In addition, only 120 brokers and dealers each had average, quarterly tentative net capital in excess of $100 million, 452 brokers and dealers each had average, quarterly tentative net capital in excess of $10 million, and 638 brokers and dealers had average, quarterly tentative net capital in excess of $5 million. The Board has reviewed the tentative net capital of 4,750 brokers and dealers as of the four calendar quarters of 2010 and noted no significant differences with amounts reviewed during the proposal phase of this project.

Approximately 86.3% of the brokers and dealers included in the statistics reviewed by the staff have average, quarterly tentative net capital of less than $5 million. At the same time, the total average, quarterly tentative net

[11] Section 109(d)(2) of the Sarbanes-Oxley Act. Pursuant to Section 109(e) of the Sarbanes-Oxley Act, the Financial Accounting Standards Board (''FASB'') accounting support fee is to be allocated among issuers. Brokers and dealers therefore will not be allocated a portion of the FASB annual accounting support fee.

[12] Section 109(h)(3) of the Sarbanes-Oxley Act.

[13] The PCAOB is amending its rules to add definitions of ''broker'' and ''dealer'' consistent with the definitions that the Dodd-Frank Act added to Section 110 of the Sarbanes-Oxley Act. These definitions incorporate the definition of ''broker'' in Section 3(a)(4) of the Exchange Act and ''dealer'' in Section 3(a)(5) of the Exchange Act, but only include those brokers or dealers that are required to file a balance sheet, income statement, or other financial statement certified by a registered public accounting firm. *See* Sections 110(3) and (4) of the Sarbanes-Oxley Act.

[14] The Board expects that the initial allocation, assessment, and collection of the accounting support fee for brokers and dealers will take place during the fall of 2011.

[15] S. Rep. No. 176, 111th Cong., 2d Sess. (April 30, 2010) at 154.

[16] ''Tentative net capital'' is the net capital of a broker or dealer before certain adjustments. *See* Rule 15c3–1(c)(15) under the Exchange Act.

[17] *See generally,* Rule 17a–5 under the Exchange Act. The tentative net capital and net capital amounts may be reported in Part I, II, and IIA of the FOCUS report and are unaudited.

[18] The data used by the Board for these purposes represents data for brokers and dealers that (i) are members of Financial Industry Regulatory Authority (''FINRA'') and have designated FINRA as their designated examining authority (''DEA''); or (ii) are members of FINRA and have designated another self-regulatory organization as their DEA but file FOCUS information with FINRA on a voluntary basis.

capital for all brokers and dealers in that group was approximately 1.1% of the total average, quarterly tentative net capital for all brokers and dealers. Conversely, approximately 13.7% of all brokers and dealers have approximately 98.9% of the total average, quarterly tentative net capital.

Based on the above analysis, which illustrates the significant number of brokers and dealers with average, quarterly tentative net capital of less than $5 million, the Board is establishing two classes of brokers and dealers for purposes of the accounting support fee: (1) Those with average, quarterly tentative net capital greater than $5 million and (2) those with average, quarterly tentative net capital less than or equal to $5 million or not filing audited financial statements pursuant to a Commission rule or other action of the Commission or its staff (sometimes referred to as a ''$5 million threshold'' in the release).[19] The average would be based on the tentative net capital as of the end of the calendar quarters of the calendar year immediately prior to the Board's calculation of the broker-dealer accounting support fee.[20]

*C. Allocation of the Broker-Dealer Accounting Support Fee*

Consistent with Section 109 of the Sarbanes-Oxley Act, the PCAOB funding rules allocate to brokers and dealers in the class with average, quarterly tentative net capital greater than $5 million a share of the broker-dealer accounting support fee based on a ratio where the numerator is the average, quarterly tentative net capital of the broker or dealer for the calendar quarters of the immediately prior calendar year and the denominator is the sum of the average, quarterly tentative net capital of all the brokers and dealers in this class.

Under these rules, brokers and dealers with average, quarterly tentative net capital equal to or less than $5 million will be allocated a share of the broker-dealer accounting support fee equal to zero.[21] The Board chose the $5 million tentative net capital threshold because it was concerned that, due to the concentration of the industry's aggregate tentative net capital among relatively few brokers and dealers, the allocation of the broker-dealer accounting support fee below the $5 million threshold could impose a relatively costly administrative burden on many smaller brokers and dealers. At the same time, based on the Board's analysis, allocating a share of the broker-dealer accounting support fee equal to zero to such small entities should have a negligible effect on the share of the broker-dealer accounting support fee allocated to the larger brokers and dealers.

For example, based on the data for the third and fourth quarters of 2009 and the first and second quarters of 2010, assuming a broker-dealer accounting support fee of $15 million,[22] if no average, quarterly tentative net capital threshold was applied, 1,557 brokers and dealers would be allocated a share of the broker-dealer accounting support fee of $100 or more.[23] The aggregate share of the broker-dealer accounting support fee allocated to brokers and dealers with average, quarterly tentative net capital of $5 million or less, however, would be $141,700, representing 0.9% of the assumed $15 million broker-dealer accounting support fee.

Under the $5 million threshold, assuming a broker-dealer accounting support fee of $15 million, approximately 638 brokers and dealers would be allocated a share of the broker-dealer accounting support fee. Under this threshold, 919 fewer brokers and dealers are allocated a share of the broker-dealer accounting support fee. In addition, under the $5 million threshold, the share of the broker-dealer accounting support fee assessed to brokers and dealers with average, quarterly tentative net capital less than $45 million (but above the $5 million threshold) would be the same as under the no threshold scenario discussed above.[24] The share of the broker-dealer accounting support fee assessed to brokers and dealers with average, quarterly tentative net capital greater than $45 million under the $5 million threshold would increase by less than 2.0% of the assessed share of the fee under the no threshold scenario.

Because the accounting support fee will be divided into an issuer accounting support fee and a broker-dealer accounting support fee, it is possible that affiliated entities may be allocated separate shares of both the issuer and broker-dealer accounting support fees. For example, if an issuer has one or more broker or dealer subsidiaries, the issuer may be allocated a share of the issuer accounting support fee and each broker or dealer subsidiary may be allocated a share of the broker-dealer accounting support fee. The allocations are designed to support oversight programs tailored to the audits of different types of entities. The issuer is responsible for payment of the allocated share of the issuer accounting support fee and each broker-dealer subsidiary is responsible for payment of its allocated share of the broker-dealer accounting support fee.

*D. Collection*

The Board is adopting amendments to its rules regarding the assessment and collection of the accounting support fee to include appropriate references to brokers and dealers.

Currently, if a share of the accounting support fee allocated to an issuer is

[19] Brokers or dealers with larger tentative net capital amounts may be ''clearing'' or ''carrying'' brokers and dealers rather than ''introducing'' brokers and dealers. Because of the nature of their businesses, audits of the compliance reports for clearing or carrying brokers and dealers may require more testing and documentation than audits of introducing brokers and dealers. PCAOB inspections of audits of brokers' and dealers' financial statements and examinations of reports regarding compliance with Commission and regulatory requirements of brokers and dealers with larger amounts of tentative net capital, consequently, may require more Board resources.

[20] Brokers and dealers generally file quarterly reports within 17 business days after the end of the calendar quarter. *See,* for example, Rules 17a–5(a)(2)(ii) and (iii) under the Exchange Act.

[21] Assigning a broker or dealer a share of the accounting support fee equal to zero when its average, quarterly tentative net capital is equal to or less than $5 million does not affect the Board's oversight of the audits of that broker or dealer. The Dodd-Frank Act amendments to the Sarbanes-Oxley Act state that if the Board establishes a program of inspection for audits of brokers and dealers, it shall consider whether differing inspection schedules are appropriate for auditors of brokers or dealers that do not receive, hold, or handle customer securities, and that the Board may exempt certain auditors from its inspection program and, consequently, from registration with the Board. *See* Section 104(a)(2) of the Sarbanes-Oxley Act. Any Board decisions in these matters would be made only after additional rulemakings specific to the Board's inspection and registration programs for auditors of brokers and dealers and would be subject to Commission approval. If the Board decides at a later time that auditors of certain groups of brokers or dealers are exempt from the Board's inspection program and, therefore, eligible to withdraw from registration with the PCAOB, no share or portion of any accounting support fee paid by any broker or dealer would be refundable.

[22] On November 23, 2010, the Board approved its 2011 budget, which included a total accounting support fee of approximately $202.3 million. The allocated portion of the total accounting support fee to brokers and dealers, which is referred to as the broker-dealer accounting support fee, was approximately $14.4 million for 2011. There is no assurance that future broker-dealer accounting support fees will be the same as the 2011 broker-dealer accounting support fee.

[23] The allocated share for each of the remaining 3,099 brokers and dealers would be less than $50 and, therefore, under the Board's rules rounded down to zero. *See* PCAOB Rule 7103(a).

[24] The allocated share of the broker-dealer accounting support fee for 48 out of 441 brokers and dealers with average, quarterly tentative net capital between $5 million and $45 million may increase by $100 because the additional allocated amount would result in the unrounded allocated share being $50 more than a multiple of $100 and, therefore, under the Board's rules rounded up to the nearest $100. *See* PCAOB Rule 7103(a). For a more detailed discussion of the Board's analysis, *see* the proposing release.

past-due [25] and the issuer has not filed a petition with the Board seeking correction of its assigned share, then, with certain exceptions, no registered public accounting firm is permitted to sign an unqualified audit opinion with respect to that issuer's financial statements or to sign a consent to the use of prior audit opinions for that issuer. The same concept is being extended to brokers and dealers in that no registered public accounting firm is permitted to sign an audit report or a document, report, notice, or other record concerning procedures or controls for a broker or dealer if its share of the broker-dealer accounting support fee is past-due and no petition for correction has been filed. In addition, for issuers with one or more broker or dealer subsidiaries, if the share of the accounting support fee allocated either to the issuer or any of its broker or dealer subsidiaries is past due and no petition for correction has been filed with respect to that share, no registered public accounting firm may sign an audit report for that issuer.

As explained in the proposing release, to avoid unnecessarily preventing issuers from timely access to the capital markets, the funding rules contain a limited exception to this prohibition on the signing of audit reports and the issuance of consents. The exception was originally adopted because an issuer may have a past-due share of the accounting support fee at a time when, in order to access or preserve its ability to access the capital markets in a timely manner, the issuer needs to submit a report to, or make a filing with, the Commission and the issuer must include an auditor's opinion or consent in that report or filing. If circumstances cause an issuer to rely upon the exception, however, the funding rules have required the issuer to submit an electronic notice to the Board no later than the next business day after the filing is made with the Commission.[26] The rule limits the use of the exception to a single 15 business day period beginning on the earlier of the date of the filing with the Commission or the date of the notice to the Board.

The Board is extending this exception so that it will be available when brokers and dealers, including brokers or dealers that are subsidiaries of issuers, have an outstanding past-due share of the accounting support fee. Under the rules, therefore, if the conditions of the rule are met, a registered public accounting firm may sign an unqualified audit opinion or provide a consent to the use of a previously issued audit report with respect to the financial statements of not only an issuer but also a broker or dealer even though the issuer, broker, dealer, or a broker or dealer subsidiary of an issuer, has outstanding a past-due share of the accounting support fee and has not filed a petition for correction. For example, if a broker subsidiary of an issuer has an outstanding past-due share of the broker-dealer accounting support fee, and the broker subsidiary needs an audit report in order to submit a report to, or make a filing with, the Commission, then, provided the specific conditions in Rule 7104(b) are met, the subsidiary's registered public accounting firm is permitted to sign an unqualified audit opinion with respect to that broker subsidiary's financial statements or issue a consent to include an audit report issued previously.

Under the terms of the rule, however, the exception may be invoked only once with respect to any share of the accounting support fee that a broker or dealer is assessed in a given year.[27] Accordingly, using the example above, the exception could not be invoked again with respect to the outstanding broker-dealer accounting support fee balance if the broker's issuer parent later needs an audit report in order to submit a report to, or make a filing with, the Commission. The outstanding broker-dealer accounting support fee balance would have to be paid before the issuer parent's registered public accounting firm signs an unqualified audit opinion or issues a consent to include an audit report issued previously with respect to that issuer's financial statements. After the broker-dealer accounting support fee is paid, however, the issuer parent could invoke the exception with respect to an outstanding, past-due share of the issuer's accounting support fee.

A note added to the funding rules states that for the purposes of the prohibition on signing unqualified audit reports for issuers, brokers, and dealers with past-due shares of the accounting support fee, the term ''audit'' means an examination of the financial statements, reports, documents, procedures, controls, and notices of any issuer, broker, or dealer by a registered accounting firm for the purpose of expressing an opinion on the financial statements or providing an audit report. ''Audit report'' in these circumstances means a document, report, notice, or other record prepared following an audit performed for purposes of compliance by an issuer, broker, or dealer with the requirements of the securities laws and in which the auditor either (i) sets forth an opinion of the firm regarding the financial statement, report, notice, or other document, procedures, or controls, or (ii) asserts that no such opinion can be expressed.[28] These are the same definitions found in new Section 110 of the Sarbanes-Oxley Act. These definitions recognize that auditors today not only examine entities' financial statements but, for larger issuers, auditors also examine internal control over financial reporting, and, for brokers and dealers, auditors further issue mandated reports under Rule 17a–5 and other applicable regulations.

In addition, consistent with the provisions in the funding rules applicable to issuers, the revised funding rules provide that if the Board does not receive payment within 30 days of a broker or dealer being notified of its share of the accounting support fee, the payment will be deemed past due and interest will accrue at a rate of 6% per year. If payment is not received by the 90th day after the original notice was sent, the Board may report the nonpayment to the Commission or the broker's or dealer's designated examining authority, which may pursue appropriate disciplinary action in accordance with its rules.[29] Section 109(h)(1) of the Sarbanes-Oxley Act, as amended by the Dodd-Frank Act, provides that ''[e]ach broker or dealer shall pay to the Board the annual accounting support fee allocated to such broker or dealer under this section.''

[25] Pursuant to PCAOB Rule 7104(a), payment is due 30 days after the notice setting forth the allocated share of the accounting support fee to the issuer is sent. Under the Board's current rules, the ''notice'' referenced in Rule 7104(a) relates to the document sent by the Board setting forth an entity's share of the accounting support fee under Section 109 of the Sarbanes-Oxley Act and the Board's funding rules. The Board is adopting amendments to replace the term ''notice'' with ''invoice'' in its funding rules so as not to cause any confusion with the definition of ''audit'' and ''audit report,'' which both now contain a reference to ''notice.''

[26] *See* PCAOB Release No. 2003–02, Amended SEC Filing Form 19b–4 (June 30, 2003). As discussed elsewhere in this release, the Board is amending this rule to require that the notice be filed by the registered public accounting firm instead of the issuer.

[27] *See* PCAOB Rule 7104(b), which states ''[t]his exception to paragraph (b)(1) of this Rule * * * may not be invoked for more than one such period with respect to any share of the accounting support fee that the issuer, broker, or dealer is assessed under Rule 7103.''

[28] In connection with other rulemaking projects, the Board may consider amending its rules to apply more broadly the definitions of ''audit'' and ''audit report'' in Section 110 of the Sarbanes-Oxley Act. If such rulemaking occurs, the Board may revisit the need for this Note in the funding rules.

[29] For issuers, nonpayment of PCAOB accounting support fee would continue to be a violation of Section 13(b)(2)(C) of the Exchange Act.

*E. Public Comment Process and Board Responses*

In response to the proposed rules, the Board received three comment letters that addressed establishing classes of brokers and dealers and allocating the broker-dealer accounting support fee. Commenters supported these rules and, in particular, the proposal to have portions of the fee paid only by brokers and dealers with at least $5 million in tentative net capital.[30]

Additional commenters raised issues regarding re-designated Rule 7104(b), *Determination of Payment of Accounting Support Fees by Registered Accounting Firm.* This rule is designed to encourage payment of the accounting support by issuers, brokers, and dealers by prohibiting auditors from signing certain audit opinions and consents to the use of prior opinions unless the appropriate fee has been paid to the PCAOB. An exception to this prohibition, however, is available under specific circumstances. If under the circumstances described in Rule 7104(b) a registered public accounting firm signs an unqualified audit opinion or issues a consent to include an audit report issued previously, that firm must submit a notice to the Board that it and the issuer, broker, or dealer are relying on the exception.[31] The commenters questioned whether the rule is necessary, opposed shifting the requirement to submit the notice from the issuer (or broker or dealer) [32] to the auditor,[33] and one commenter requested that Note 1 to this rule include the word ''solely'' to indicate that an auditor may determine that the fee has been paid solely by obtaining a representation from management to that effect.[34]

The Board adopted the predecessor to new Rule 7104(b) in 2003 as part of the original funding rules. As stated in the adopting release for the funding rules in 2003, the collection measures in the rules are intended to ensure the reliability of the independent funding source the Sarbanes-Oxley Act provides for the Board and to promote fairness to all entities allocated a share of the accounting support fee.[35] This rule may be part of the reason collection of the accounting support fee has worked as intended and the Board has experienced a high collection rate of the accounting support fee. Accordingly, subject to Commission approval, the rule will continue to be part of the Board's funding rules.

Some commenters opposed shifting to auditors the requirement to submit a notice to the Board that the exception in Rule 7104(b) has been used and that an auditor opinion or consent has been signed and filed with the Commission despite non-payment of the accounting support fee. These commenters indicated that the issuer, and potentially the broker or dealer, should make this submission because (1) It is the issuer (or broker or dealer) that is delinquent with its share of the fee, (2) it is the issuer (or broker or dealer) that is filing its documents with the Commission, and (3) a process already has been established with issuers under the existing rule.[36] One commenter noted statements in the proposing release expressing that it is the issuer's circumstances that cause the use of the exception and that submission of the notice is not a condition for reliance on the exception and does not affect the validity of the auditor's opinion or consent. The commenter indicated that given those statements, it is not appropriate to shift the burden for the notice to the auditor.[37]

Shifting the responsibility to the auditor to make the submission, however, better aligns the rule with the Board's general oversight authority over registered public accounting firms. Furthermore, over the past eight years, the Board has received only a few notices under this rule. A cursory review of SEC filings by issuers with outstanding accounting support fee balances, however, provides anecdotal evidence that more notices should have been filed. Such omissions to file might be due to issuers being relatively unfamiliar with PCAOB rules or unaware of the potential consequences of not complying with a PCAOB rule. Auditors should be more familiar with the Board's rules. Also, placing the obligation on auditors to file such notices may make application of the rule more readily subject to the Board's review. Accordingly, the rule is being adopted as proposed.

Finally, one commenter asked that the word ''solely'' be added to Note 1 to proposed Rule 7104(b) in order to make clear that to satisfy the obligation to determine that the fee has been paid by the issuer, broker, or dealer, the auditor only has to receive a management representation to that effect.[38] While the Board has said that it is sufficient if an auditor determines an issuer's payment of the accounting support fee by obtaining a management representation of payment,[39] auditors also may determine such payments through other means. For example, an auditor also may determine an issuer's payment of the accounting support fee by checking the ''List of Issuers with No Outstanding Past-Due Share of the Accounting Support Fee'' that is posted on the Board's Web site.[40] Adding the word ''solely'' to the Note could result in some firms mistakenly believing that the Board prefers management representations over other equivalent means of determining such payments. The rule, therefore, is being adopted as proposed.

*Issuers*

The Board also is adopting amendments to its existing rules for the allocation, assessment, and collection of the issuer accounting support fee. The amendments to the issuer funding rules are effective, subject to approval by the Commission, for the allocation, assessment, and collection of the 2012 accounting support fee for issuers.[41]

*A. Definitions of Market Capitalization and Common Equity*

The Board's rules historically have defined the terms ''issuer market capitalization'' and ''market capitalization of an issuer'' to be the aggregate market value of all classes of an issuer's common stock that trade in the United States. Determining an issuer's market capitalization based on its outstanding common stock, however, has led to interpretive issues, such as whether an entity's ''common stock'' includes limited partnership units or interests, securities convertible into common stock, rights or options to

[30] Letters from the National Association of Independent Broker Dealers, Terminus Securities LLC, and the California Society of Certified Public Accountants.

[31] *See* PCAOB Release No. 2003–02, Amended SEC Filing Form 19b–4 (June 30, 2003). As discussed elsewhere in this release, the Board is amending this rule to require that the notice be filed by the registered public accounting firm instead of the issuer.

[32] The original PCAOB rule applied only to issuers. The amended rule applies to issuers, brokers, and dealers.

[33] *See* the letters from the Center for Audit Quality; Deloitte & Touche LLP; KPMG LLP; McGladrey & Pullen, LLP; and PricewaterhouseCoopers LLP.

[34] *See* the letter from Deloitte & Touche LLP.

[35] *See* Board Funding: Establishment of Accounting Support Fee, PCAOB Release No. 2003–003 (April 18, 2003).

[36] *See* the letters from the Center for Audit Quality; Deloitte & Touche LLP; KPMG LLP; McGladrey & Pullen, LLP; and PricewaterhouseCoopers LLP.

[37] *See* the letter from McGladrey & Pullen, LLP.

[38] *See* the letter from Deloitte & Touche LLP.

[39] *See* Question 26 of the Frequently Asked Questions—The Accounting Support Fee and the Funding Process, dated April 22, 2011. The Frequently Asked Questions are located at e3

[40] The list is located at *http://pcaobus.org/About/Ops/Documents/Support%20Fee/Issuers_Paid.pdf.*

[41] The Board's allocation, assessment, and collection of the accounting support fee for issuers typically takes place during the first half of the Board's fiscal year.

purchase common stock, and other categories of securities.

To reduce issues regarding the meaning of ''common stock'' in the Board's rules, the Board is amending the definition of ''issuer market capitalization'' and ''market capitalization of an issuer'' to replace the reference to ''common stock'' with a reference to ''voting and non-voting common equity.'' As amended, references in the Board's rules to an issuer's ''market capitalization'' are to the issuer's aggregate market value of all classes of voting and non-voting common equity traded in the United States.[42]

The definition of ''common equity'' being adopted by the Board tracks the definition in Rule 12b–2 under the Exchange Act. As applied by the Board for funding purposes, the amount of common equity considered in deriving an issuer's market capitalization is based on any class of common stock or equivalent interest, any beneficial interest in a trust or a limited partnership interest, and any other security that the Commission, by rule, deems to treat as common equity.

*B. Classes of Issuers*

The Board also is adopting amendments to the descriptions of the existing classes of issuers. The funding rules adopted by the Board in 2003 identified four classes of issuers: (1) Equity issuers whose average, monthly market capitalization during the preceding calendar year is greater than $25 million, (2) investment company issuers (and entities that have elected to be regulated as business development companies) whose average, monthly market capitalization during the preceding calendar year is greater than $250 million, (3) issuers that, as of the date the accounting support fee is calculated (i) do not have to file financial statements pursuant to Commission rule or other action of the staff of the Commission, (ii) are employee stock purchase, savings, and similar plans, or (iii) are subject to the jurisdiction of a bankruptcy court and satisfy the modified reporting requirements of Commission Staff Legal Bulletin No. 2 (''SLB No. 2''), and (4) all other issuers.

The Board is amending the description of the classes of issuers in two significant ways. First, the Board is raising the average, monthly market capitalization threshold for the first two classes of issuers. Second, the Board is changing the description of issuers that are subject to the jurisdiction of a bankruptcy court and satisfy the modified reporting requirements of SLB No. 2.

1. Change in Average, Monthly Market Capitalization Threshold

The Board is adopting amendments that raise the average, monthly market capitalization threshold during the preceding calendar year for the first class of issuers from $25 million to $75 million. Equity issuers with a market capitalization between $25 million and $75 million, therefore, are moving from the first class to the fourth class and will be allocated a share of the accounting support fee equal to zero. The Board notes that the aggregate issuer accounting support fee collected from equity issuers with average, monthly market capitalizations between $25 million and $75 million during the past seven years has been a relatively small part (less than 0.4%) of the Board's total accounting support fee from equity issuers.[43] At the same time, approximately 1,100 equity issuers, representing approximately 22.6% of all equity issuers assessed a fee in 2010, have average, monthly market capitalization within that range.[44] In addition, not allocating a share of the issuer accounting support fee to these issuers appears to have a negligible effect on the amounts allocated to other issuers.

The Board similarly is raising the average, monthly market capitalization threshold for the second class of issuers consisting of investment company issuers (and business development companies) currently subject to allocation of the support fee from $250 million to $500 million.[45] Investment companies (including business development companies) with average, monthly market capitalizations between $250 million and $500 million, therefore, are moving from the second class to the fourth class and will be allocated a share of the accounting support fee equal to zero. The Board notes that the aggregate fees collected from investment company issuers (including business development companies) with average, monthly market capitalizations between $250 million and $500 million during the past seven years have been a relatively small part (approximately 5.1%) of the Board's total accounting support fee from investment companies.[46] At the same time, approximately 1,450 investment companies, representing approximately 33.4% of all investment companies assessed a share of the issuer accounting support fee in 2010, have average, monthly market capitalization within that range.[47] In addition, as discussed below, not allocating a share of the issuer accounting support fee to

[42] *See* PCAOB Rule 1001(i)(i)(1).

[43] The Board's use and calculation of $75 million in market capitalization for funding purposes should not be confused with the criteria to determine whether an issuer is deemed an ''accelerated filer,'' as defined by Rule 12b–2 under the Exchange Act. Under that rule, an issuer is an accelerated filer if, among other things, it has an aggregate worldwide market value of the voting and non-voting common equity held by non-affiliates (i.e., public float) of $75 million or more as of the end of the entity's second quarter. *See* Release No. 33–8128 (September 5, 2002).

[44] The aggregate FASB accounting support fee collected on behalf of FASB from equity issuers with average, monthly market capitalizations between $25 million and $75 million for the 2010 accounting support fee was a relatively small part (less than 0.4%) of the FASB accounting support fee from equity issuers despite the fact that approximately 1,100 equity issuers, representing approximately 22.6% of all equity issuers assessed a fee, have average, monthly market capitalization within that range.

[45] Under the Board's original funding rules, market capitalization for an investment company issuer whose shares are not traded on a national exchange or quoted on NASDAQ was the investment company's net asset value. As noted in the proposing release, since the Board's adoption of its funding rules in 2003, NASDAQ Stock Market LLC has become a national securities exchange under Commission rules. In light of this change, the Board proposed to revise PCAOB Rule 1001(i)(i)(2) by replacing the reference to NASDAQ with a reference to the ''OTC Bulletin Board.'' After further consideration, however, the Board does not believe the proposed reference in the rule to the ''OTC Bulletin Board'' is necessary and believes it is preferable for its rules not to refer to any particular market that is currently in operation. Accordingly, PCAOB Rule 1001(i)(i)(2) is being amended to replace the phrase ''quoted on NASDAQ'' with the phrase ''whose share price is not otherwise publicly available.'' This is consistent with the current requirement contained in Rule 7101(a)(2), which references the public availability of the share price in describing investment company issuers eligible to be assessed a share of the issuer accounting support fee. Therefore, starting in 2012, the market capitalization for an issuer that is an investment company whose shares are not traded on a national exchange or whose share price is not otherwise publically available, will be the investment company's net asset value.

[46] Approximately 7.9% of the 2010 accounting support fee was allocated to investment companies. Under the Board's funding rules, when allocating the issuer accounting support fee to investment companies, 10% of the investment company issuer's actual average monthly market capitalization or net asset value is used in the calculation. Accordingly, the amount of the issuer accounting support fee allocated to investment companies over the past seven years has represented a relatively small portion (average of approximately 6.2%) of the total issuer accounting support fee assessed.

[47] The aggregate fees collected on behalf of FASB from investment company issuers (including business development companies) with average, monthly market capitalizations between $250 million and $500 million for the 2010 accounting support fee was a relatively small part (approximately 5.3%) of the FASB accounting support fee from investment companies despite the fact that approximately 1,450 investment companies, representing approximately 33.4% of all investment companies assessed a share of the FASB accounting support fee in 2010, have average, monthly market capitalization within that range.

these investment companies appears to have a negligible effect on the amounts allocated to other investment companies.

Raising the threshold for the first class of issuers from $25 million in average, monthly market capitalization to $75 million and raising the threshold for the second class of issuers from $250 million in average, monthly market capitalization to $500 million should have a negligible effect on the amounts allocated to issuers under Section 109 of the Sarbanes-Oxley Act.[48]

Generally, equity issuers with average, monthly market capitalization of approximately $600 million or greater are likely to see an increase in their allocated share of the issuer accounting support fee.[49] Each entity's allocated share of the fee increases, however, by approximately 1% or less. For investment company issuers, on average, the allocated share of the accounting support fee increases for entities with average, monthly market capitalization of approximately $4 billion or greater, with the entity's allocated share of the fee increasing by approximately 2% or less.[50] Accordingly, the amendments to the average, monthly market capitalization for class one and two issuers should not result in a significant increase in any issuer's assessed share of the accounting support fee.[51] The Board has reviewed the impact of increasing the threshold for equity company issuers and investment company issuers using the information from the allocation, assessment, and collection of the 2011 accounting support fee for issuers and noted no significant differences with amounts reviewed during the proposal phase of this project.

[48] The changes to the thresholds for the first and second classes of issuers are also applicable to the allocation of the FASB accounting support fee, which pursuant to Section 109(e) of the Sarbanes-Oxley Act is allocated among issuers only.

[49] The allocated share of the issuer accounting support fee for 465 out of 1,190 equity issuers with average, monthly market capitalization between $75 million and $600 million may increase by $100 because the additional allocated amount could result in the unrounded allocated share being $50 more than a multiple of $100 and, therefore, under the Board's rules, rounded up to the nearest $100. *See* PCAOB Rule 7103(a).

[50] The allocated share of the issuer accounting support fee for 327 out of 2,367 investment companies with average, monthly market capitalization between $500 million and $4 billion may increase by $100 because the additional allocated amount could result in the unrounded allocated share being $50 more than a multiple of $100 and, therefore, under the Board's rules rounded up to the nearest $100. *See* PCAOB Rule 7103(a).

[51] For a detailed discussion of the Board's analysis, *see* the proposing release.

2. Modified Reporting Requirements of SLB No. 2

The Board also is amending the description of the class of issuers that are not assessed a share of the accounting support fee because they are in bankruptcy. As noted above, under the Board's funding rules adopted in 2003, issuers that are under the jurisdiction of a bankruptcy court and ''satisfy the modified reporting requirements of Commission Staff Legal Bulletin No. 2'' are in the third class and are assigned a share of the accounting support fee equal to zero.[52]

SLB No. 2 states that an issuer under the jurisdiction of a bankruptcy court may request that the Commission's Division of Corporation Finance (''Division'') provide a ''no-action'' letter indicating that the Division will not recommend enforcement action if the issuer files with the Commission modified reports in lieu of the reports required under the Exchange Act. SLB No. 2 describes the information and assertions that should be in a request for a ''no-action'' letter, including information related to the issuer's financial condition, prior compliance with Exchange Act filing requirements, the timing of the announcement by the issuer of its bankruptcy filing, the issuer's ability to continue to file Exchange Act reports, and a description of the current market for and trading in the issuer's securities.[53]

Although acceptance of modified reports is at the discretion of the Commission staff, there is no requirement in SLB No. 2 or elsewhere that an issuer in bankruptcy ask the Division for a ''no-action'' letter prior to filing modified reports. Such ''no-action'' requests are voluntary. An issuer in bankruptcy may choose to file modified reports without providing the Division with the information and assertions in SLB No. 2.[54] Because the Board's funding rules, however, are based on whether an issuer has ''satisf[ied] the modified reporting requirements'' of SLB No. 2, when the issuer has not requested or not received a ''no-action'' letter from the Division, the PCAOB staff has been placed in the position of having to evaluate available public information to determine whether the conditions in SLB No. 2 are satisfied. To address such situations, PCAOB staff generally has requested that issuers provide an analysis demonstrating its compliance with the conditions set forth in SLB No. 2 and/or an opinion of counsel that the issuer meets the conditions set forth in SLB No. 2.[55]

The Board is amending its rules to require that in order to be assigned a share of the accounting support fee equal to zero, an issuer that is subject to the jurisdiction of a bankruptcy court and asserts that it falls within the third class of issuers provide an opinion of counsel that the issuer satisfied the modified reporting requirements of Commission Staff Legal Bulletin No. 2 as of the date that the issuer accounting support fee is calculated. This amendment is consistent with the staff's past practices as noted above. The impact of this amendment is believed to be negligible on the amounts allocated and assessed to issuers under Section 109 of the Sarbanes-Oxley Act.[56]

*C. Public Comment Process and Board Responses*

One commenter supported the Board's proposals to amend the basis for calculating the issuer's market capitalization to include the market capitalization of all classes of an issuer's voting and non-voting common equity and to increase the average monthly market capitalization thresholds in the funding rules for classes of equity issuers and investment companies.[57] The Board did not receive any comments on the proposed description of the class of issuers that are not assessed a share of the accounting support fee because they are in bankruptcy.

As noted above, additional commenters raised issues regarding re-designated Rule 7104(b), *Determination of Payment of Accounting Support Fees by Registered Accounting Firm.* This rule is designed to encourage payment of the accounting support fee by issuers, brokers, and dealers by prohibiting auditors from signing certain audit opinions and consents to the use of

[52] SEC Staff Legal Bulletin No. 2 (CF) (April 15, 1997), available at *http://sec.gov/interps/legal/slbcf2.txt,* reflects the views of the Commission's Division of Corporation Finance that companies under the jurisdiction of a bankruptcy court are not relieved of their reporting obligations under the securities laws but, upon the satisfaction of certain conditions, may file reports that ''differ in form or content'' from the reports required under the Exchange Act.

[53] *Id.*

[54] The Commission may deem such a filing to be deficient and not to satisfy the issuer's obligations under the Exchange Act and Commission rules and forms.

[55] *See* Question 15 of the Frequently Asked Questions—The Accounting Support Fee and the Funding Process, dated April 22, 2011. The Frequently Asked Questions are located at *http://pcaobus.org/About/Ops/Pages/SupportFeeFAQ.aspx.*

[56] For the 2008–2010 accounting support fees, 26 equity issuers that were allocated a share of the accounting support fee had filed for bankruptcy.

[57] *See* the letter from the California Society of Certified Public Accountants.

prior opinions unless the appropriate fee has been paid to the PCAOB. An exception to this prohibition, however, is available under specific circumstances and conditions, including the submission of a notice to the Board that the auditor and the issuer, broker or dealer are relying on the exception.[58] The commenters questioned whether the rule is necessary, opposed shifting the requirement to submit the notice from the issuer (or broker or dealer) [59] to the auditor,[60] and one commenter requested that Note 1 to this rule include the word ''solely'' to indicate that an auditor may determine that the fee has been paid solely by obtaining a representation from management to that effect.[61] For the reasons discussed above, the rule is being adopted as proposed.

*Other Amendments to the Board's Funding Rules*

The Board also is adopting certain technical changes to its funding rules. The most significant of these changes are listed below.

• Rule 7100—The Board is making certain changes to Rule 7100 to reflect that the Board establishes a total accounting support fee each year as part of its budget process.[62] In addition, the amendment to Rule 7100 reflects the Board's obligation under Section 109 of the Sarbanes-Oxley Act to equitably allocate the total accounting support fee between issuers, as a group, and brokers and dealers, as a group.

• Notes to Rule 7101—The Board is adopting technical changes to the notes to Rules 7101(a)(1) and (2) to clarify how an entity's monthly market capitalization is calculated and that such calculation includes market capitalization information for all classes of the issuer's voting and non-voting common equity, consistent with the amendments to the definition of ''issuer market capitalization'' discussed above.

• Rule 7103(c)—The Board is extending the time frame within which any issuer, broker, or dealer may petition the Board for correction of the class in which it has been placed or its allocated share of the accounting support fee. Under the amended rules, an issuer, broker, or dealer would have 60 days, rather than 30 days, after an invoice is sent to submit a petition for correction. In addition, the Board is codifying its existing practice of considering petitions received after the deadline when there is good cause to do so.[63]

• Rule 7104(b)—The Board is adopting amendments to replace the word ''Confirmation'' with ''Determination'' in the caption for Rule 7104(b) and to delete the reference in Note 1 to the rule to obtaining a confirmation from the Board that no past due share of the accounting support fee is outstanding. This amendment clarifies that registered public accounting firms are not required to confirm with the Board whether an issuer broker, or dealer has any outstanding past due share of the accounting support fee prior to signing an unqualified audit opinion, consenting to including an audit report issued previously, or signing a document, report, notice, or other record concerning procedures or controls of any issuer, broker, or dealer required under the securities laws. Confirmation with the Board is one of a number of procedures that a registered public accounting firm may use in determining whether an issuer, broker, or dealer has any outstanding past-due share of the accounting support fee.[64]

The Board did not receive any comments on these technical amendments,[65] and they are being adopted as proposed.

Effective Date

Pursuant to Section 109(d)(3) of the Sarbanes-Oxley Act, as amended by the Dodd-Frank Act, the PCAOB is required to begin the allocation, assessment, and collection of the accounting support fee from brokers and dealers to fund the first full fiscal year beginning after the date of the enactment of the Dodd-Frank Act, which is the Board's 2011 fiscal year. Accordingly, the amendments to the Board's funding rules are effective, subject to approval by the SEC, for the allocation, assessment, and collection of the 2011 broker-dealer accounting support fee for brokers and dealers and its 2012 issuer accounting support fee for issuers.

## III. Date of Effectiveness of the Proposed Rules and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Board consents, the Commission will:

(a) By order approve or disapprove such proposed rule; or

(b) Institute proceedings to determine whether the proposed rule 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 rules are consistent with the requirements of Title I of the Sarbanes-Oxley 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/pcaob.shtml*); or

• Send an e-mail to *rule-comments@sec.gov.* Please include File Number PCAOB–2011–02 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 PCAOB–2011–02. This file number should be included on the subject line if e-mail is used. To help the

[58] *See* PCAOB Release No. 2003–02, Amended SEC Filing Form 19b–4 (June 30, 2003). As discussed elsewhere in this release, the Board is amending this rule to require that the notice be filed by the registered public accounting firm instead of the issuer.

[59] The original PCAOB rule applied only to issuers. The amended rule applies to issuers, brokers, and dealers.

[60] *See* the letters from the Center for Audit Quality; Deloitte & Touche LLP; KPMG LLP; McGladrey & Pullen, LLP; and PricewaterhouseCoopers LLP.

[61] *See* the letter from Deloitte & Touche LLP.

[62] The PCAOB Budget is approved by the Board in the preceding calendar year and must be approved by the Commission. PCAOB Rule 7101(a) refers to the date the issuer accounting supporting fee is calculated. This date is referred to as the ''calculation date.'' As discussed in Question 4 of the Frequently Asked Questions—The Accounting Support Fee and the Funding Process, the issuer calculation date represents the date as of which the allocation of the issuer accounting support fee is determined for equity issuers and investment company issuers. The Frequently Asked Questions are located at *http://pcaobus.org/About/Ops/Pages/SupportFeeFAQ.aspx. See also* Rule 7102(a), as amended, which contains a similar reference to the date the broker-dealer accounting support fee is calculated. Under the amendments to the funding rules, this date is referred to as the ''broker-dealer calculation date.''

[63] *See* Question 6 in the Frequently Asked Questions—The Accounting Support Fee and the Funding Process. The Frequently Asked Questions are located at *http://pcaobus.org/About/Ops/Pages/SupportFeeFAQ.aspx.*

[64] *See* Questions 22–26 in the Frequently Asked Questions—The Accounting Support Fee and the Funding Process. The Frequently Asked Questions are located at *http://pcaobus.org/About/Ops/Pages/SupportFeeFAQ.aspx.*

[65] As noted above, commenters raised issues with respect to other aspects of Rule 7104(b), including the procedures an auditor may use to determine whether an issuer, broker, or dealer has an outstanding past-due share of the accounting support fee.

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/pcaob/shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule changes 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 inspection and copying 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 will also be available for inspection and copying at the principal office of the PCAOB. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. PCAOB–2011–02 and should be submitted on or before August 2, 2011.

For the Commission, by the Office of the Chief Accountant, pursuant to delegated authority.

**Elizabeth M. Murphy,**

*Secretary.*

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**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–64814; File No. PCAOB–2011–01)**

## Public Company Accounting Oversight Board; Notice of Filing of Proposed Temporary Rule for an Interim Program of Inspection Related to Audits of Brokers and Dealers

July 6, 2011.

Pursuant to Section 107(b) of the Sarbanes-Oxley Act of 2002 (the ''Act''), notice is hereby given that on June 21, 2011, the Public Company Accounting Oversight Board (the ''Board'' or the ''PCAOB'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rules described in Items I and II below, which items have been prepared by the Board. The Commission is publishing this notice to solicit comments on the proposed rules from interested persons.

### I. Board's Statement of the Terms of Substance of the Proposed Rules

On June 14, 2011, the Board adopted a temporary rule for an interim inspection program related to audits of brokers and dealers. The proposed Rule 4020T amends Section 4 of the Board's rules. The Board also adopted amendments to Section 1 of its rules to add notes following Rules 1001(a)(v), 1001(a)(vi), and 1001(p)(vi).

The text of the proposed amendments is set out below. Language added by the amendments is underlined.

**Rules of the Board**

Section 1. General Provisions

* * *

Rule 1001. Definitions of Terms Employed in Rules.

* * *

(a)(v) Audit

* * *

*Note: Effective [insert effective date of Rule 4020T], pursuant to Rule 4020T, when used in Rule 3502, Section 5 of the Rules of the Board, or the definition of ''disciplinary proceeding'' in Rule 1001(d)(i), the term ''audit'' has the meaning provided in Section 110 of the Act.*

(a)(vi) Audit Report

* * *

*Note: Effective [insert effective date of Rule 4020T], pursuant to Rule 4020T, when used in Rule 3502, Section 5 of the Rules of the Board, or the definition of ''disciplinary proceeding'' in Rule 1001(d)(i), the term ''audit report'' has the meaning provided in Section 110 of the Act.*

* * *

(p)(vi) Professional Standards

* * *

*Note: Effective [insert effective date of Rule 4020T], pursuant to Rule 4020T, when used in Rule 3502, Section 5 of the Rules of the Board, or the definition of ''disciplinary proceeding'' in Rule 1001(d)(i), the term ''professional standards'' has the meaning provided in Section 110 of the Act.*

* * *

Section 4. Inspections

* * *

*Rule 4020T. Interim Inspection Program Related to Audits of Brokers and Dealers.*

*(a) Purposes of Interim Inspection Program*

*This rule provides for an interim program of inspection in connection with audits of brokers and dealers in order, among other things—*

*(1) to assess the degree of compliance of registered public accounting firms and their associated persons with the Act, the Board's rules, the Commission's rules, and professional standards in connection with the performance of audits, issuance of audit reports, and related matters involving brokers and dealers;*

*(2) to inform the Board's consideration, in connection with establishing a permanent program of inspection to assess the matters described in paragraph (1), of—*

*(i) whether to differentiate among classes of brokers and dealers;*

*(ii) whether to exempt any category of public accounting firms; and*

*(iii) the establishment of minimum inspection frequency schedules.*

*(b) Definitions*

*When used in this rule, the term ''interim program,'' means the interim program of inspection described in paragraph (c). When used in this rule, Rule 3502, Section 5 of the Rules of the Board, or the definition of ''disciplinary proceeding'' in Rule 1001(d)(i), the terms ''audit,'' ''audit report,'' and ''professional standards'' have the meaning provided in Section 110 of the Act.*

*(c) Interim Program of Inspection*

*On an interim basis, the Board shall conduct a program of inspection, for the purposes described in paragraph (a), that may include inspection procedures to assess the policies, practices, and procedures of any registered public accounting firm related to the performance of audits or the issuance of audit reports for any broker or dealer after July 21, 2010 and related matters involving brokers and dealers. The provisions of Rules 4000(b), 4000(c), 4004, 4006, 4007, 4008, 4009 and 4010 shall apply to the interim program.*

*(d) Reporting*

*No less frequently than every twelve months, beginning twelve months after the date this rule takes effect and continuing until rules for a permanent program of inspection in connection with audits of brokers and dealers take effect, the Board will publish a report that describes the progress of the interim program, including data about the number of registered public accounting firms and the number of broker or dealer audits that have been subjected to inspection procedures and any significant observations from those procedures.*

### II. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rules

In its filing with the Commission, the Board included statements concerning the purpose of, and basis for, the proposed rules and discussed any comments it received on the proposed rules. The text of these statements may be examined at the places specified in Item IV below. The Board has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

*A. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rules*

(a) Purpose

On July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act [1] amended the Sarbanes-

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

Oxley Act to give the Board oversight authority with respect to audits of brokers and dealers that are registered with the Commission. Among other things, the amended Act authorizes the Board to establish an inspection program by rule.[2] Section 104(a)(2) of the Act (1) Provides that, in establishing the program, the Board may allow for differentiation among classes of brokers and dealers; (2) requires that the Board consider whether differing inspection schedules would be appropriate with respect to auditors that issue audit reports only for brokers or dealers that do not receive, handle, or hold customer securities or cash or are not members of the Securities Investor Protection Corporation; and (3) provides that if the Board exempts any public accounting firm from such an inspection program, the firm would not be required to register with the Board.

In a release issued on December 14, 2010, the Board explained that it intended to take a careful and informed approach to those questions in establishing a permanent program that appropriately protects the public interest and the interests of investors, including consideration of potential costs and regulatory burdens that would be imposed on different categories of registered public accounting firms and classes of brokers and dealers. The Board also explained that it did not intend to make the necessary judgments without first gathering and assessing relevant information, but that it did not intend to postpone all use of its new inspection authority until after those judgments were made. Accordingly, the Board proposed for public comment a temporary rule for an interim program of inspection that would allow the Board to begin inspections of relevant audits and auditors and provide a source of information to help guide decisions about the scope and elements of a permanent program.

(b) Statutory Basis

The statutory basis for the proposed rules is Title I of the Act.

*B. Board's Statement on Burden on Competition*

The Board does not believe that the proposed rule changes will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule changes would apply equally to all registered public accounting firms that audit brokers and dealers.

[2] Section 104(a)(2)(A) of the Act, as amended.

*C. Board's Statement on Comments on the Proposed Rules Received From Members, Participants or Others*

The Board released the proposed rule amendment for public comment in Release 2010–008 (December 14, 2010). A copy of Release No. 2010–008 and the comment letters received in response to the PCAOB's request for comment are available on the PCAOB's Web site at *http://www.pcaobus.org/Rules/Rulemaking/Pages/Docket032.* The Board received twelve written comment letters. The Board has carefully considered the comment letters, as discussed below.

1. Scope of the Interim Program

The temporary rule that the Board proposed did not reflect any exercise of the Board's authority to differentiate among classes of brokers and dealers or to exempt any category of public accounting firm. The Board received a number of comments addressing the inclusive scope of the proposed interim program. Some commenters supported the proposed scope, while nevertheless suggesting that the Board focus its interim inspection efforts on audits of certain categories of brokers and dealers, such as those that have possession and control of customer cash and securities or act as clearing, carrying, or custodial brokers. One of those commenters also suggested that the Board consider, in connection with a permanent program, whether the public interest would be best served by focusing on those that carry accounts and maintain customer cash and securities.

Other commenters disagreed with the proposed approach. They argued, and some submitted data intended to support the argument, that certain categories of brokers and dealers pose little or no risk to the investing public. They suggested that the Board could identify those categories by focusing on factors such as whether the broker or dealer has custody of, or meaningful access to, client assets, or whether it is exclusively an introducing broker or dealer. These commenters suggested that the Board either should exempt the auditors of low-risk categories of firms from the Board's authority without delay or should collect and study currently available data on the question before subjecting auditors of all brokers and dealers to an inspection program. One commenter expressed concern that PCAOB regulation would significantly increase the cost of an audit to these entities, potentially forcing some of them out of business, with no corresponding contribution to meaningful protection of investors. Other commenters similarly expressed concern that the costs of compliance with PCAOB regulation may negatively impact auditors of introducing brokers and dealers, which are typically small businesses.

After considering these comments, the Board decided to adopt a temporary rule for an interim program of the same scope as proposed. The Board explained in the release that the inclusive scope of the interim program should not be construed as either foreshadowing the likely scope of a permanent program or suggesting that every broker or dealer auditor will be inspected as part of the interim program. The Board expects to be able to gather the information necessary to inform its consideration of a permanent program without having to inspect most firms during the interim program. The Board intends to consider carefully whether there should be exemptions from the permanent program. For example, the Board expects to give consideration to whether a broker's or dealer's meaningful access to client assets is a relevant factor in determining the investor protection and public interest benefits of PCAOB oversight of the auditor of that broker or dealer.

The Board continues to believe, however, that information gathered during the course of the interim program will be relevant to making appropriate judgments about that question and other significant elements of a permanent inspection program. While data of the type submitted by commenters who favor immediate exemptions will also be relevant to those judgments, the Board believes that it is not prepared at the present time to conclude that such data is the only type of information that will be relevant or that an analysis of all such data necessarily compels the exemptions urged by these commenters.

2. Processes Relating to Inspectors' Firm-Specific Observations

A few commenters requested clarification on how the Board will bring deficiencies to the firm's attention and what the Board's expectations would be for the firm to address the issues. Two commenters suggested that the Board address that point in the text of the rule. In response to the commenters, the Board described in the release the general communication process between PCAOB inspectors and the audit engagement team or other representatives of the firm. The Board anticipates that communications with firms will follow a course similar to that in inspections of auditors of issuers, but the Board believes that the details of the

process are subject to variation in light of circumstances during an inspection.

The proposing release included references to the possibility of firm-specific inspection reports during the interim program.[3] Commenters sought clarification on what they saw as a tension between references to that possibility and the statement in the proposing release that the Board would expect results of inspection procedures performed under the interim program to be included in firm-specific reports, if at all, only after rules for a permanent program take effect.

The Board intends for inspection procedures performed on a firm as part of the interim program to constitute a foundational portion of the first inspection of the firm's audit practice related to brokers and dealers, which would be completed after a permanent program is established. This means that, for firms that audit brokers or dealers but not issuers, the Board does not expect to issue a firm-specific inspection report unless and until a permanent program replaces the interim program, the firm is included in the scope of the permanent program, and the firm has been inspected under the permanent program.[4] Unusual circumstances, however, could give rise to exceptions. As a precaution in light of that possibility, the Board has incorporated in the final version of Rule 4020T the provisions of PCAOB Rule 4007, Procedures Concerning Draft Inspection Reports, PCAOB Rule 4008, Procedures Concerning Final Inspection Reports, and PCAOB Rule 4009, Firm Response to Quality Control Defects.[5]

Commenters also expressed concern about including observations from the interim inspection program in a firm-specific inspection report that may be issued years later, after the permanent program is established and after the relevant standards and rules, as well as the firm's practices, may have changed. The commenters urged the Board to reconsider including observations from interim program procedures in the first firm-specific report. These commenters also requested clarification on whether the eventual report would present cumulative findings or deficiencies observed.

During the interim program, the Board will be obtaining a broad view of practice related to audits of brokers and dealers under current standards and interpretive guidance, and at the same time the standards and rules applicable to the audits will be evolving. Having both that broad view and the new standards as a foundation will be helpful to making consistent and meaningful evaluations of the types of quality control issues that, going forward, firms need to address in their practices related to audits of brokers and dealers. It is possible that observations from interim program procedures will be relevant to the Board's inspection-related dialogue with a particular firm—though not necessarily with every firm—even after standards and rules have changed, and it may be appropriate for aspects of those observations to be included in the first inspection report that addresses the firm's audit practice related to audits of brokers and dealers. The Board does not contemplate that firms' first reports will routinely serve as historical records of all observations from interim program procedures. Depending on the circumstances, however, aspects of some observations may retain their relevance to an assessment of audit quality issues at a particular firm even at the time of the first report, and those aspects may be discussed in a report. If that occurs, the Board intends that the report will make clear the timing of the original inspection observation at issue.

3. General Reports During the Inspection Period

The temporary rule provides that the Board will publish a report on the interim program no less frequently than every twelve months, beginning twelve months after the date the rule takes effect and continuing until rules for a permanent program take effect. Each report will describe the progress of the interim program and any significant observations that either may bear on the Board's consideration of a permanent program or the publication of which may otherwise be appropriate to protect the interests of investors or to further the public interest.

Commenters supported the Board's proposal to publish a report at least annually on the progress of the interim inspection program. Some commenters suggested that the Board include in the report sufficient details on the nature and types of brokers and dealers inspected and group the inspection observations based on these classifications to help public accounting firms understand the specific issues identified in the report. The Board will take those suggestions into consideration when preparing the progress reports.

4. Voluntary Cooperation

When Rule 4020T takes effect, cooperation with Board inspection procedures under the interim program will be mandatory for registered firms and their associated persons. The proposing release also noted, however, that even before the rule takes effect, the Board might conduct relevant procedures with the voluntary cooperation of certain firms. Two commenters inquired about the Board's expectations for voluntary cooperation. Specifically, commenters sought clarification on whether the procedures with which the Board may request voluntary cooperation would include actual inspections of audits of brokers and dealers or be limited in scope. These commenters also requested information on the timing of the voluntary cooperation and the identity of registered public accounting firms expected to cooperate voluntarily.

The Board explained in the release that it does not have any expectation for particular firms to cooperate voluntarily, or have a view that there is a particular scope of procedures to which firms should voluntarily consent. The Board's ongoing inspections of auditors of issuers include inspections of some firms that audit brokers and dealers in addition to issuers. During regular inspections of any such firm's

[3] The proposing release stated that nothing in the temporary rule ''would necessarily preclude the Board from issuing a firm-specific inspection report on, or including, inspection observations from the interim program before a permanent program takes effect.'' Proposing release at 11, n.21. The proposing release also noted that inspection procedures performed in the interim program would be carried out in accordance with, and subject to, the provisions of Section 104 of the Act, including provisions concerning a firm's opportunities to respond to a draft inspection report and to seek Commission review of certain matters in a final inspection. *See* proposing release at 6, n.10.

[4] While the interim program is in place, a Board inspection of a firm that performs audit work for issuers and for brokers or dealers would include the full, regular inspection—including the firm-specific inspection report—of the firm's issuer practice. Such an inspection could also include inspection procedures under the interim program with respect to the firm's broker and dealer practice. As with firms that audit brokers or dealers but not issuers, the Board, absent unusual circumstances, would not incorporate any evaluation of the firm's broker and dealer practice into the public portion of a firm-specific report before the report on the first inspection of the firm that occurs after a permanent program takes effect and would not include observations from the interim program procedures in the nonpublic portion of any such report.

[5] Rule 4007 was not incorporated in the version of Rule 4020T that the Board proposed, and commenters noted the discrepancy between the omission of a provision incorporating Rule 4007 and the proposing release's references to the possibility of firm-specific inspection reports. To fully address that discrepancy, the Board has also incorporated Rules 4008 and 4009 in the final version of Rule 4020T.

issuer audit practice before Rule 4020T takes effect, inspection staff may discuss with the firm the possibility of the firm submitting voluntarily to inspection procedures concerning its audit practice related to brokers and dealers. The Board does not contemplate discussing the possibility of voluntary cooperation with any firm that the Board is not otherwise inspecting because of the firm's issuer audit practice.

**III. Date of Effectiveness of the Proposed Rules and Timing for Commission Action**

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) As the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Board consents, the Commission will:

(a) By order approve or disapprove such proposed rule; or

(b) Institute proceedings to determine whether the proposed rule 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 rules are consistent with the requirements of Title I of the Sarbanes-Oxley 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/pcaob.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number PCAOB–2011–01 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 PCAOB–2011–01. 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/pcaob/shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule changes 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 inspection and copying 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 will also be available for inspection and copying at the principal office of the PCAOB. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. PCAOB–2011–01 and should be submitted on or before August 2, 2011.

For the Commission, by the Office of the Chief Accountant, pursuant to delegated authority.

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. 2011–17387 Filed 7–11–11; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–64825; File No. SR–C2–2011–014]**

## Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to PULSe Fees

July 6, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 1, 2011, C2 Options Exchange, Incorporated (the ''Exchange'' or ''C2'') 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 Exchange has designated this proposal as one establishing or changing a due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange is proposing to amend its Fees Schedule to extend a fee waiver related to the PULSe workstation and to adopt a limited fee waiver for new users of the PULSe workstation. The text of the proposed rule change is available on the Exchange's Web site (*http://www.c2exchange.com*), at the Exchange's Office of the Secretary 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, Proposed Rule Change*

1. Purpose

The purpose of this proposed rule change is to extend a fee waiver related to the PULSe workstation and to adopt a limited fee waiver for new users of the PULSe workstation. By way of background, the PULSe workstation is a front-end order entry system designed for use with respect to orders that may be sent to the trading systems of C2. In addition to providing the capability to send orders to the C2 market, the PULSe workstation will also provide a user with the capability to send options orders to other U.S. options exchanges and stock orders to other U.S. stock exchanges through a PULSe Routing Intermediary.[5]

The first purpose of this proposed rule change is to extend the waiver of the PULSe Routing Intermediary fee. Currently the Exchange has waived the Routing Intermediary fee through June 30, 2011. The Exchange is proposing to extend this waiver through September 30, 2011. Thus this fee will be assessed beginning October 1, 2011.

[5] For a more detailed description of the PULSe workstation and its other functionalities, *see, e.g.,* Securities Exchange Act Release No. 63246 (November 4, 2010), 75 FR 69478 (November 12, 2010) (SR–C2–2010–007).

The second purpose of this proposed rule change is to adopt a limited waiver for new users of the PULSe workstation. The Exchange currently charges a fee of $350 per month for the first 10 users of a Trading Permit Holder (''TPH'') and $100 per month for all subsequent users. TPHs may also make the workstation available to their customers, which may include non-broker dealer public customers and non-TPH broker dealers (referred to herein as ''non-TPHs''). For such non-TPH workstations, the Exchange currently charges a fee of $350 per month per workstation.[6]

In order to give new users time to become familiar with and fully acclimated to the PULSe workstation functionality, the Exchange is proposing to adopt a fee waiver applicable to new PULSe workstation users. Specifically, the Exchange is proposing to waive the monthly workstation fees for the first month for the first new user of a TPH using the PULSe workstation. Similarly the Exchange is proposing to waive the monthly workstation fees for the first new user of a non-TPH using the PULSe workstation. The proposed fee waivers are based on C2's billing period, which is based on a calendar month (*i.e.,* begins on the first day of each month and ends on the last day of each month). So, if a new user begins using the PULSe workstation on July 15th, the user's workstation fees would be waived from July 15th–July 31st. This new user fee waiver will be operative July 1, 2011.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Section 6(b)(4) of the Act,[8] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among C2 Permit Holders in that the same fees and fee waivers are applicable to all Permit Holders that use the PULSe workstation. The Exchange also believes that the fee waivers will serve as an incentive for TPHs and their sponsored user customers to use the PULSe workstation as an additional trading tool on their trading desks.

[6] In instances where two or more TPHs wish to make a PULSe workstation available to the same non-TPH customer, a fee reduction applies. Under the reduction, if two or more TPHs make the PULSe workstation available to the same non-TPH customer, then the monthly fee is reduced from $350 to $250 per workstation per TPH.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(4).

*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 purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

No written comments were solicited or received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The proposed rule change is designated by the Exchange as establishing or changing a due, fee, or other charge, thereby qualifying for effectiveness on filing pursuant to Section 19(b)(3)(A)(ii) of the Act[9] and subparagraph (f)(2) of Rule 19b–4[10] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–C2–2011–014 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–C2–2011–014. 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–C2–2011–014 and should be submitted on or before August 2, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011–17383 Filed 7–11–11; 8:45 am]

**BILLING CODE 8011–01–P**

[9] 15 U.S.C. 78s(b)(3)(A)(ii).

[10] 17 CFR 240.19b–4(f)(2).

[11] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

### Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated: Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to PULSe Fees

July 6, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 1, 2011, the Chicago Board Options Exchange, Incorporated (''CBOE'' 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 CBOE. The Exchange has designated

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

this proposal as one establishing or changing a due, fee, or other charge imposed by CBOE under Section 19(b)(3)(A)(ii) of the Act [3] and Rule 19b–4(f)(2) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange is proposing to amend its Fees Schedule to extend a fee waiver related to the PULSe workstation and to adopt a limited fee waiver for new users of the PULSe workstation. In addition, the Exchange is proposing to make a non-substantive numbering correction to the Fees Schedule. The text of the proposed rule change is available on the Exchange's Web site *http://www.cboe.org/legal*), at the Exchange's Office of the Secretary and at the Commission'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, CBOE 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. CBOE has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, Proposed Rule Change*

1. Purpose

The purpose of this proposed rule change is to extend a fee waiver related to the PULSe workstation and to adopt a limited fee waiver for new users of the PULSe workstation. In addition, the Exchange is proposing to make a non-substantive numbering correction to the Fees Schedule.

By way of background, the PULSe workstation is a front-end order entry system designed for use with respect to orders that may be sent to the trading systems of CBOE and CBOE Stock Exchange, LLC (''CBSX''). In addition, the PULSe workstation provides a user with the capability to send options orders to other U.S. options exchanges and stock orders to other U.S. stock exchanges through a PULSe Routing Intermediary.[5]

The first purpose of this proposed rule change is to extend the waiver of the PULSe Routing Intermediary fee. Currently the Exchange has waived the Routing Intermediary fee through June 30, 2011. The Exchange is proposing to extend this waiver through September 30, 2011. Thus this fee will be assessed beginning October 1, 2011.

The second purpose of this proposed rule change is to adopt a limited waiver for new users of the PULSe workstation. The Exchange currently charges a fee of $350 per month for the first 10 users of a Trading Permit Holder (''TPH'') and $100 per month for all subsequent users. TPHs may also make the workstation available to their customers, which may include non-broker dealer public customers and non-TPH broker dealers (referred to herein as ''non-TPHs''). For such non-TPH workstations, the Exchange currently charges a fee of $350 per month per workstation.[6] In addition, the Exchange has a PULSe workstation that is configured for use on the CBOE trading floor by CBOE TPHs (the ''PULSe On-Floor Workstation'') for which it currently charges a fee of $225 per month per workstation (referred to in the Fees Schedule as a ''login ID'').

In order to give new users time to become familiar with and fully acclimated to the PULSe workstation functionality, the Exchange is proposing to adopt a fee waiver applicable to new PULSe workstation users. Specifically, the Exchange is proposing to waive the monthly workstation fees for the first month for the first new user of a TPH using the PULSe workstation. Similarly the Exchange is proposing to waive the monthly workstation fees for the first new user of a non-TPH using the PULSe workstation and the first new user of a TPH using the PULSe On-Floor Workstation. The proposed fee waivers are based on CBOE's billing period, which is based on a calendar month (*i.e.,* begins on the first day of each month and ends on the last day of each month). So, for example, if a new user begins using the PULSe workstation on July 15th, the user's workstation fees would be waived from July 15th–July 31st. This new user fee waiver will be operative July 1, 2011.

Finally, the third purpose of this proposed rule change is to make a non-substantive numbering correction to the Fees Schedule. In particular, the Exchange is proposing to renumber Section 8(F)(10)(c) through (e) to (d) through (f) in order to correct a numbering error (there are currently two paragraphs numbered with (c)).

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Section 6(b)(4) of the Act,[8] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among Trading Permit Holders in that the same fees and fee waivers are applicable to all Trading Permit Holders that use the PULSe workstation. The Exchange also believes that the fee waivers will serve as an incentive for TPHs and their sponsored user customers to use the PULSe workstation as an additional trading tool on their trading desks.

The Exchange also believes the proposed correction to the section numbering of the Fees Schedule is consistent with the Section 6(b)(5) [9] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes the proposed correction would protect investors and the public interest by eliminating any potential confusion.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of 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.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] For a more detailed description of the PULSe workstation and its other functionalities, *see, e.g.,* Securities Exchange Act Release Nos. 62286 (June 11, 2010), 75 FR 34799 (June 18, 2010) (SR–CBOE–2010–051) and 63721 (January 14, 2011), 76 FR 3929 (January 21, 2011) (SR–CBOE–2011–001).

[6] In instances where two or more TPHs wish to make a PULSe workstation available to the same non-TPH customer, a fee reduction applies. Under the reduction, if two or more TPHs make the PULSe workstation available to the same non-TPH customer, then the monthly fee is reduced from $350 to $250 per workstation per TPH.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78f(b)(5).

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The proposed rule change is designated by the Exchange as establishing or changing a due, fee, or other charge, thereby qualifying for effectiveness on filing pursuant to Section 19(b)(3)(A)(ii) of the Act [10] and subparagraph (f)(2) of Rule 19b–4 [11] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2011–063 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–CBOE–2011–063. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2011–063 and should be submitted on or before August 2, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011–17381 Filed 7–11–11; 8:45 am]

**BILLING CODE 8011–01–P**

[10] 15 U.S.C. 78s(b)(3)(A)(ii).

[11] 17 CFR 240.19b–4(f)(2).

[12] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–64819; File No. SR–OPRA–2011–02]**

## Options Price Reporting Authority; Notice of Filing and Immediate Effectiveness of Proposed Amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information To Adopt a New Hosted Solution Fee and Other Changes to the Fee Schedule

July 6, 2011.

Pursuant to Section 11A of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 608 thereunder,[2] notice is hereby given that on June 24, 2011, the Options Price Reporting Authority (''OPRA'') submitted to the Securities and Exchange Commission (''Commission'') an amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information (''OPRA Plan'').[3] The proposed amendment would make several change to the fees payable by OPRA Vendors and to the terms that describe when those fees are payable. The Commission is publishing this notice to solicit comments from interested persons on the proposed OPRA Plan amendment.

**I. Description and Purpose of the Plan Amendment**

The purpose of this amendment is to make several changes in the fees payable by OPRA Vendors and in the terms that describe when those fees are payable.

The first change is to adopt a new fee (referred to in this filing as the ''Hosted Solution Fee'') that will be payable by any OPRA Vendor that supplies OPRA Data to a ''Hosted Solution'' sponsored by a ''Client Organization.'' The terms ''Hosted Solution'' and ''Client Organization'' are defined in a revised Policy entitled ''Policy with respect to Hosted Solutions.'' The revised Policy replaces a Policy entitled ''OPRA Policy on Persons Providing Internet Access to Real-Time OPRA Data.'' The definitions of the terms ''Hosted Solution'' and ''Client Organization'' are described below.

The second change is to permit a Client Organization that sponsors a Hosted Solution that displays delayed OPRA Data not to pay a Redistribution Fee as a result of its sponsorship of the Hosted Solution.

The third change is to add a new footnote to OPRA's Fee Schedule to clarify the circumstances in which an OPRA Vendor may pay OPRA's ''Internet Service Only'' Redistribution Fee ($650/month) instead of the standard Redistribution Fee ($1500/month).

*(a) New Hosted Solution Fee; Revised Policy*

OPRA is proposing to adopt a new fee, referred to in this filing as the ''Hosted Solution Fee.'' The fee will be payable by OPRA Vendors that supply OPRA Data to ''Hosted Solutions.'' A ''Hosted Solution'' is a market data delivery vehicle, such as a Web site or a page on a website, that satisfies certain requirements: (i) The delivery vehicle displays ''current'' or ''delayed'' OPRA Data,[4] and the OPRA Data is displayed only on a ''per inquiry'' basis; [5] (ii) the

[1] 15 U.S.C. 78k–1.

[2] 17 CFR 242.608.

[3] The OPRA Plan is a national market system plan approved by the Commission pursuant to Section 11A of the Act and the Rule 608 thereunder (formerly Rule 11Aa3–2). *See* Securities Exchange Act Release No. 17638 (March 18, 1981), 22 S.E.C. Docket 484 (March 31, 1981). The full text of the OPRA Plan is available at *http://www.opradata.com.*

[4] OPRA defines the term ''current'' to refer to OPRA Data that has been transmitted to the Vendor within the immediately preceding 15 minutes, and the term ''delayed'' to refer to OPRA Data that is no longer current. See paragraph 1(e) of the OPRA form of Vendor Agreement, available on OPRA's website (*http://www.opradata.com*).

[5] The requirement that the OPRA Data is displayed only on a ''per inquiry'' basis means that an offering of OPRA Data on a bulk data feed basis does not qualify as a Hosted Solution. (A recipient of OPRA Data on a bulk data feed basis has the ability to select data for display on a continuous basis and to format the display.)

delivery vehicle is offered (''sponsored'') by a second company (a ''Client Organization''); (iii) the delivery vehicle is administered by the OPRA Vendor; [6] and (iv) the delivery vehicle clearly and prominently identifies the OPRA Vendor that administers the delivery vehicle.

The Hosted Solution Fee would be payable by the OPRA Vendors that administer Hosted Solutions, not the Client Organizations that sponsor Hosted Solutions. For current OPRA Data the Hosted Solution Fee would be $100 per month per Hosted Solution. For delayed OPRA Data the Hosted Solution Fee would be $50 per month per Hosted Solution. The Hosted Solution Fee would also include two ''Enterprise Fee'' alternatives: an OPRA Vendor would be authorized to provide delayed OPRA Data to an unlimited number of Hosted Solutions for an Enterprise Fee of $5,000 per month, or would be authorized to provide current and/or delayed OPRA Data to an unlimited number of Hosted Solutions for an Enterprise Fee of $10,000 per month.[7] The Hosted Solution fee would be in addition to any other applicable fees payable by the Vendor, including the Redistribution Fee, Usage-based Vendor Fees, Nonprofessional Subscriber Fees and Direct Access Fee.[8]

The current Policy applies only to ''an Internet site on which there is a link or a framed page through which OPRA data provided by a person that is an OPRA Vendor may be accessed.'' OPRA believes that ''links'' and ''framed pages'' are now used relatively rarely, and that the more common arrangement is for the upstream Vendor to supply data to the Web site of the downstream client of the Vendor in response to queries to the Web site.[9] Accordingly, OPRA believes that there is uncertainty under its current Policy as to the circumstances in which the downstream entity that sponsors a website must itself become a Vendor and pay a Redistribution Fee. The revised Policy addresses this uncertainty by replacing the references to ''links'' and ''framed pages'' with the more general ''Hosted Solution'' definition.

The revised Policy also differs from the existing Policy in that it eliminates an alternative arrangement that OPRA believes has never been used. The existing Policy contemplates, as an alternative to the ordinary arrangement in which the upstream Vendor controls the entitlement process for persons who have access to current OPRA Data via a downstream client's website, that the downstream client may become a ''Correspondent Subscriber'' and control the entitlement process. To become a Correspondent Subscriber for a Vendor, a person must enter into a ''Correspondent Subscriber Agreement'' with the Vendor and the Correspondent Subscriber Agreement must be approved by OPRA.[10] No OPRA Vendor has ever submitted a form of Correspondent Subscriber Agreement to OPRA for approval, and accordingly OPRA believes that the Correspondent Subscriber alternative has never been used to comply with the existing Policy. The revised Policy eliminates the Correspondent Subscriber alternative.

*(b) No Redistribution Fee for a Client Organization That Sponsors a Hosted Solution Displaying Delayed OPRA Data*

In general, if a legal person redistributes current or delayed OPRA Data ''externally'' (*i.e.,* outside its own organization), OPRA classifies the person as a ''Vendor,'' requires the person to execute a Vendor Agreement with OPRA and requires the person to pay an OPRA Redistribution Fee. The existing Policy entitled ''OPRA Policy on Persons Providing Internet Access to Real-Time OPRA Data'' states that OPRA does not regard a person as a Vendor if the person does no more than sponsor a Web site on which real time (*i.e.,* current) OPRA Data is displayed, and accordingly allows such a person not to pay a Redistribution Fee.

The revised Policy extends these concepts so that they apply to delayed OPRA Data as well as current OPRA Data. Accordingly, the revised Policy provides that OPRA will not regard a person as a Vendor if the person does no more than sponsor a Hosted Solution on which either current or delayed OPRA Data is displayed, and accordingly allows such a person not to pay a Redistribution Fee.

*(c) Clarification of Circumstances in Which an OPRA Vendor May Pay OPRA's ''Internet Service Only'' Redistribution Fee*

OPRA has always referred to the basic fee payable by each OPRA Vendor as the ''Redistribution Fee.'' The standard Redistribution Fee has been $1500 per month for many years. OPRA implemented an ''Internet service only'' Redistribution Fee effective January 1, 1999, applicable in lieu of the standard Redistribution Fee to any Vendor whose redistribution of OPRA Data is made solely by means of the Internet.[11]

When OPRA implemented the ''Internet service only'' Redistribution Fee, an ''Internet service only'' was a service that was generally for retail customers and not for high traffic volumes. More recently, Vendors have occasionally asked OPRA if they qualify for the ''Internet service only'' Redistribution Fee in circumstances in which the Fee is not applicable, such as where a Vendor is providing a data feed to a downstream Vendor. OPRA is proposing to add a footnote to its Fee Schedule to provide additional guidance as to the circumstances in which a Vendor is eligible to pay the ''Internet service only'' Redistribution Fee. The footnote would state that a Vendor does not qualify for the ''Internet service only'' rate if the Vendor redistributes OPRA Data via dedicated lines or if the Vendor redistributes OPRA Data to the systems of one or more downstream Vendors or to one or more Hosted Solutions.

*(d) Rationale for the Changes to OPRA's Fees*

OPRA anticipates that these changes may result in a small incremental increase in its revenues, with the Hosted Solution Fees that it receives at least partially offset by revenues that it will not receive from firms that sponsor Hosted Solutions as Client Organizations rather than becoming Vendors. OPRA believes that its overall fee structure is appropriately adjusted by requiring certain Vendors to pay Hosted Solution Fees while providing relief from paying the OPRA Redistribution Fee to Client Organizations that sponsor Hosted Solutions. OPRA believes that the amounts that it is proposing for the new Hosted Solution Fees are reasonable in

[6] The delivery vehicle is ''administered'' by the OPRA Vendor if the Vendor controls the OPRA Data that is displayed or distributed via the delivery vehicle. For current OPRA Data, this means that the OPRA Vendor is responsible for assuring that each person having access to the OPRA Data either has a Subscriber Agreement in place with the Vendor or has a Professional Subscriber Agreement in place with OPRA. (This is stated in paragraph 3 of the revised Policy.)

[7] For example, if an OPRA Vendor were to administer four Hosted Solutions, three of which display current OPRA Data with two of those being sponsored by one Client Organization and the third being sponsored by another Client Organization, and one of which displays delayed OPRA Data, the Hosted Solution Fee payable by the OPRA Vendor would be $350/month.

[8] These fees are all described in OPRA's Fee Schedule.

[9] The terms ''upstream'' and ''downstream'' are used in this filing with reference to the ''flow'' of OPRA Data; an entity is ''upstream'' from a second entity if the first entity is supplying OPRA Data to the second entity.

[10] OPRA's requirements with respect to Correspondent Subscriber Agreements are set out in Section 7 of the OPRA Vendor Agreement.

[11] The ''Internet Service only'' fee implemented effective January 1, 1999 was $600 per month. The fee was changed to its current $650/month in 2002.

terms of the value received by Vendors, and will represent an appropriate revenue contribution to covering the overall costs of OPRA and its member exchanges of collecting, consolidating, processing, disseminating and assuring the reliability and integrity of options market information.

The text of the proposed amendment to the OPRA Plan is available at OPRA, the Commission's Public Reference Room, *http://opradata.com,* and on the Commission's Web site at *http://www.sec.gov*.

**II. Implementation of the OPRA Plan Amendment**

OPRA designated this amendment as qualified to be put into effect upon filing with the Commission in accordance with clause (i) of paragraph (b)(3) of Rule 608 under the Act.[12] OPRA intends to implement the amendment effective as of the first day of a calendar quarter after having given OPRA Vendors at least 30-days notice of the revised fees and the revised Policy.

The Commission may summarily abrogate the amendment within sixty days of its filing and require refiling and approval of the amendment by Commission order pursuant to Rule 608(b)(2) under the Act[13] if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act.

**III. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed OPRA Plan amendment 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–OPRA–2011–02 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–OPRA–2011–02. 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 plan amendment that are filed with the Commission, and all written communications relating to the proposed plan amendment 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 OPRA. 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–OPRA–2011–02 and should be submitted on or before August 2, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

**Cathy H. Ahn,**

*Deputy Secretary.*

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**BILLING CODE 8011–01–P**

[12] 17 CFR 242.608(b)(3)(i).

[13] 17 CFR 242.608(b)(2).

[14] 17 CFR 200.30–3(a)(29).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–64826; File No. SR–NASDAQ–2011–090]**

## Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by the NASDAQ Stock Market LLC Regarding Expansion of the Short Term Option Series Program

July 6, 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 29, 2011, The NASDAQ Stock Market LLC (the ''Exchange'' or ''NASDAQ'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by NASDAQ. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

NASDAQ is filing with the Securities and Exchange Commission (''SEC'' or ''Commission'') a proposal for the NASDAQ Options Market (''NOM'' or ''Exchange'') to amend Chapter IV, Section 6 (Series of Options Contracts Open for Trading) and Chapter XIV, Section 11 (Terms of Index Options Contracts) to expand the Short Term Option Series Program (''STO Program'' or ''Program'')[3] so that the Exchange may select fifteen option classes on which Short Term Option Series[4] may be opened.

The Exchange requests that the Commission waive the 30-day operative delay period contained in Exchange Act Rule 19b–4(f)(6)(iii).[5]

The text of the proposed rule change is available from NASDAQ's Web site at *http://nasdaq.cchwallstreet.com/Filings,* at NASDAQ's principal office, at the Commission's Public Reference Room, and at the Commission's Web site at *http://www.sec.gov.*

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, NASDAQ included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The STO Program was established about a year ago on NASDAQ. *See* Securities Exchange Act Release No. 62297 (June 15, 2010), 75 FR 35111 (June 21, 2010) (SR–NASDAQ–2010–073) (notice of filing and immediate effectiveness permanently establishing Short Term Option Series Program on NASDAQ). Other exchanges have also established permanent short term option programs, including NASDAQ OMX PHLX LLC (''Phlx''), Chicago Board Options Exchange (''CBOE''), International Securities Exchange (''ISE''), NYSE Arca, NYSE Amex, and NYSE OMX BX (''BX'').

[4] Short Term Option Series are series in an option class that is approved for listing and trading on the Exchange in which the series is opened for trading on any Thursday or Friday that is a business day and that expires on the Friday of the next business week. If a Thursday or Friday is not a business day, the series may be opened (or shall expire) on the first business day immediately prior to that Thursday or Friday, respectively. NOM Chapter 1, Section 1(a)(59) and Chapter XIV, Section 2(n).

[5] 17 CFR 240.19b–4(f)(6)(iii).

proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASDAQ has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

The purpose of this proposed rule change is to amend NOM Chapter IV, Section 6 and Chapter XIV, Section 11 to expand the STO Program so that the Exchange may select fifteen option classes on which Short Term Option Series may be opened.

This proposal is based directly on the recent expansion of the STO Program by Phlx.[6]

The STO Program is codified in NOM Chapter IV, Supplementary Material .07 to Section 6 and Chapter XIV, Section 11(h). These sections state that after an option class has been approved for listing and trading on the Exchange, the Exchange may open for trading on any Thursday or Friday that is a business day series of options on no more than five option classes that expire on the Friday of the following business week that is a business day. In addition to the five-option class limitation, there is also a limitation that no more than twenty series for each expiration date in those classes that may be opened for trading.[7] Furthermore, the strike price of each short term option has to be fixed with approximately the same number of strike prices being opened above and below the value of the underlying security at about the time that the short term options are initially opened for trading on the Exchange, and with strike prices being within thirty percent (30%) above or below the closing price of the underlying security from the preceding day. The Exchange does not propose any changes to these additional Program limitations. The Exchange proposes only to increase from five to fifteen the number of option classes that may be opened pursuant to the Program.

The principal reason for the proposed expansion is customer demand for adding, or not removing, short term option classes from the Program. In order that the Exchange not exceed the five-option class restriction, the Exchange has had to discontinue trading short term option classes before it could begin trading other option classes within the Program. Moreover, since there is reciprocity in matching other exchange STO choices, NASDAQ discontinues trading STO classes that other exchanges change from week-to-week. This has negatively impacted investors and traders, particularly retail public customers, who have on several occasions requested the Exchange not to remove short term option classes or add short term option classes.

NASDAQ understands that a retail investor has recently requested another exchange (Phlx) to reinstate a short term option class that the exchange had to remove from trading because of the five-class option limit within the Program. The investor advised that the removed class was a powerful tool for hedging a market sector, and that various strategies that the investor put into play were disrupted and eliminated when the class was removed. The Exchange feels that it is essential that such negative, potentially very costly impacts on retail investors are eliminated by modestly expanding the Program to enable additional classes to be traded.

With regard to the impact of this proposal on system capacity, the Exchange has analyzed its capacity and represents that it and the Options Price Reporting Authority (''OPRA'') have the necessary systems capacity to handle the potential additional traffic associated with trading of an expanded number of classes in the Program.

The Exchange believes that the STO Program has provided investors with greater trading opportunities and flexibility and the ability to more closely tailor their investment and risk management strategies and decisions. Furthermore, the Exchange has had to eliminate option classes on numerous occasions because of the limitation imposed by the Program. For these reasons, the Exchange requests an expansion of the current Program and the opportunity to provide investors with additional short term option classes for investment, trading, and risk management purposes.

Finally, the Commission has requested, and the Exchange has agreed for the purposes of this filing, to submit one report to the Commission providing an analysis of the STO Program (the ''Report''). The Report will cover the period from the date of effectiveness of the STO Program through May of 2011, and will describe the experience of the Exchange with the STO Program in respect of the options classes included by the Exchange in such program.[8] The Report will be submitted on a confidential basis under separate cover within one week of the filing.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[9] in general, and furthers the objectives of Section 6(b)(5) of the Act[10] in particular, in that it is 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 expanding the current STO Program will result in a continuing benefit to investors by giving them more flexibility to closely tailor their investment and hedging decisions in greater number of securities.

[6] *See* Securities Exchange Act Release No. 63875 (February 9, 2011), 75 [sic] FR 8793 (February 15, 2011) (SR–Phlx–2010–183) (order granting approval of expansion of short term option program). Other exchanges have similarly expanded their short term option programs. *See* Securities Exchange Act Release Nos. 64009 (March 2, 2011), 76 FR 12771 (March 8, 2011) (SR–BX–2011–014) (notice of filing and immediate effectiveness); 63877 (February 9, 2011), 76 FR 8794 (February 15, 2011) (SR–CBOE–2011–012) (notice of filing and immediate effectiveness); and 63878 (February 9, 2011), 76 FR 8796 (February 15, 2011) (SR–ISE–2011–08)(notice of filing and immediate effectiveness).

[7] If the Exchange opens less than twenty (20) Short Term Option Series for a Short Term Option Expiration Date, additional series may be opened for trading on the Exchange when the Exchange deems it necessary to maintain an orderly market, to meet customer demand or when the market price of the underlying security moves substantially from the exercise price or prices of the series already opened. Any additional strike prices listed by the Exchange shall be within thirty percent (30%) above or below the current price of the underlying security. The Exchange may also open additional strike prices of Short Term Option Series that are more than 30% above or below the current price of the underlying security provided that demonstrated customer interest exists for such series, as expressed by institutional, corporate or individual customers or their brokers. Market-Makers trading for their own account shall not be considered when determining customer interest under this provision. The opening of the new Short Term Option Series shall not affect the series of options of the same class previously opened. NOM Chapter IV, Supplementary Material .07(d) to Section 6 and Chapter XIV, Section 11(h)(1)(iv).

[8] The Report would include the following: (1) Data and written analysis on the open interest and trading volume in the classes for which Short Term Option Series were opened; (2) an assessment of the appropriateness of the option classes selected for the STO Program; (3) an assessment of the impact of the STO Program on the capacity of the Exchange, OPRA, and market data vendors (to the extent data from market data vendors is available); (4) any capacity problems or other problems that arose during the operation of the STO Program and how the Exchange addressed such problems; (5) any complaints that the Exchange received during the operation of the STO Program and how the Exchange addressed them; and (6) any additional information that would assist in assessing the operation of the STO Program.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

*B. Self-Regulatory Organization's Statement on Burden on Competition*

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

Written comments were neither solicited nor received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the proposed rule change: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [11] and Rule 19b–4(f)(6) thereunder.[12]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because the proposal is substantially similar to that of another exchange that has been approved by the Commission.[13] Therefore, the Commission designates the proposed rule change to be operative upon filing with the Commission.[14]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2011–090 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2011–090. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2011–090 and should be submitted on or before August 2, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

**Cathy H. Ahn,**

*Deputy Secretary.*

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[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires that a self-regulatory organization submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[13] *See* Securities Exchange Act Release No. 63875 (February 9, 2011), 76 FR 8793 (February 15, 2011) (SR–Phlx–2010–183) (order approving expansion of Short Term Option Program).

[14] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[15] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–64821; File No. SR–NASDAQ–2011–088)**

## Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Routing Priority

July 6, 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 27, 2011, The NASDAQ Stock Market LLC (the ''Exchange'' or ''NASDAQ'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by NASDAQ. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

NASDAQ is filing with the Securities and Exchange Commission (''Commission'') a proposal for the NASDAQ Options Market (''NOM'') to amend Chapter VI, Trading Systems, Section 11, Order Routing, to address the priority of routed orders, as described further below.

This change is scheduled to be implemented on NOM on or about August 15, 2011; the Exchange will announce the implementation schedule by Options Trader Alert, once the rollout schedule is finalized.

The text of the proposed rule change is available at *http://nasdaq.cchwallstreet.com/,* at NASDAQ's principal office, 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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

The purpose of the proposed rule change is to allow routed orders to retain priority in the rare instances where the routed portion returns without being fully executed, when a portion of the original order submitted by the customer remains on the book, as described in detail below. Currently, Chapter VI, Section 11 governs the routing of orders on NOM and describes when orders are routed. Section 11(a) describes order routing generally and defines the specific routing options. Section 11(b) covers non-System securities, which are options other than options that are currently trading on NOM pursuant to Chapter IV.[3] Section 11(d) governs the obligation to honor trades executed on destination exchanges resulting from routing. Section 11(e) describes the broker-dealer that operates NOM's Routing Facility and how it functions.

Section 11(c) governs the priority of routed orders. Specifically, pursuant to Section 11(c), orders sent by the System to other markets do not retain time priority with respect to other orders in the System and the System continues to execute other orders while routed orders are away at another market center.[4] Once routed by the System, an order becomes subject to the rules and procedures of the destination market including, but not limited to, order cancellation. If a routed order is subsequently returned, in whole or in part, that routed order, or its remainder, receives a new time stamp reflecting the time of its return to the System. Accordingly, under current NOM rules and functionality, a routed order that returns to NOM, in effect, loses its place in line on NOM.

The Exchange proposes to change that result by, instead, having the routed order that returns to NOM retain its original timestamp if any portion of that order remains on NOM. Thus, under this proposal, if a routed order is subsequently returned, in whole or in part, that routed order, or its remainder, receives a new time stamp reflecting the time of its return to the System, unless any portion of the original order remains on the System, in which case the routed order shall re-join the portion that remains on the book, retaining its timestamp and its priority. The Exchange proposes to amend Section 11(c) to reflect this.

Under this proposal, there will now be a situation where a returned routed order will retain its original timestamp and priority, as though the unsuccessful routing had never occurred. The Exchange does not believe that this result is problematic or raises regulatory issues. In fact, in situations where a portion of an order remains on the Exchange and a portion is routed, the Exchange routes such order so as to execute it and comply with the regulatory requirements to avoid trade-throughs and locked and crossed markets. Various market conditions determine the destination(s) to which an order is routed, the portion of the order that should be routed, and whether or not the routed order results in an execution. Accordingly, the Exchange believes that its processes to route and timestamp routed orders, which are spelled out in its rules, are intended to make clear to market participants the various outcomes that result, depending on various market conditions.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[5] in general, and furthers the objectives of Section 6(b)(5) of the Act[6] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms 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 retaining the original timestamp on a partially routed order is designed to promote just and equitable principles of trade and protect investors and the public interest, because maintaining the original order as a single order is the simplest method of handling the order, which should help entering firms manage their order flow. Respecting routable orders, market conditions, not the entering firm, determine whether the order is routed, and ultimately whether it is executed on the destination market, such that the Exchange believes that it is simpler and more logical to treat the unexecuted portion of a routed order together with the original order. In addition, retaining the original timestamp on a partially routed order does not disadvantage other orders on the book, because the partially routed order had time priority and is merely returning, in effect, to its original place in time priority on the book. The portion of the order that was not routed and remained on the book is available for execution; if it is executed in full before the routed portion returns to the Exchange, the returned, routed portion receives a new timestamp book.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

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[7] and Rule 19b–4(f)(6)[8] 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

[3] NOM Rules, Chapter VI, Section 1(b).

[4] Because the System routes the lesser of the disseminated size of the away markets or the order size, it is possible for a portion of an order to be routed rather than the entire order. Respecting the part of an order that is routed, that order can either be executed in full, in part or not at all on the destination exchange.

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 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.

public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2011–088 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2011–088. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2011–088 and should be submitted on or before August 2, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011–17394 Filed 7–11–11; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–64823; File No. SR–NYSEArca–2011–42]**

## Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Correcting the Numbering of a Recently Adopted NYSE Arca Equities Rule

July 6, 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 30, 2011, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The 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 correct the numbering of a recently adopted NYSE Arca Equities Rule. The text of the proposed rule change is available at the Exchange, at *http://www.nyse.com,* at the Commission's Public Reference Room, and at the Commission's Web site at *http://www.sec.gov.*

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to correct the numbering of a recently adopted NYSE Arca Equities Rule. Specifically, the Exchange recently codified outbound and inbound routing functions performed by its affiliate broker-dealer, Archipelago Securities LLC (''Arca Securities''), in Section 4 of Rule 7. The Exchange inadvertently mis-numbered the new NYSE Arca Equities Rule as 7.41 when it should have been 7.45.

NYSE Arca Equities Rule 7.41—pertaining to clearance and settlement—already appears in Section 3 of Rule 7.[3] The Exchange hereby proposes to correct the inadvertent mis-numbering to reflect the new routing broker function rule as NYSE Arca Equities Rule 7.45.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[4] of the Act, in general, and furthers the objectives of Section 6(b)(5),[5] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule change, which would correct the inadvertent mis-numbering of a new Exchange Rule, would avoid confusion that could result from having two separate rules numbered as Rule 7.41 and instead reflect the Exchange's intention to adopt the routing broker function rule as NYSE Arca Equities Rule 7.45.

*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.

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange, through SR–NYSEArca–2011–38, did not intend or propose to change the meaning, interpretation or enforcement of Rule 7.41 (Clearing and Settlement) within Section 3 of Rule 7.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the proposed rule change: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[6] and Rule 19b–4(f)(6) thereunder.[7]

A proposed rule change filed under 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[8] However, Rule 19b–4(f)(6)(iii)[9] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay. The Exchange believes that waiver of the 30-day operative delay would provide more clarity and transparency in its rule text concerning all of the functions that Arca Securities performs on behalf of the Exchange without undue delay. For these reason, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, and designates the proposed rule change to be operative upon filing with the Commission.[10]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**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–NYSEArca–2011–42 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2011–42. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2011–42 and should be submitted on or before August 2, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011–17429 Filed 7–11–11; 8:45 am]

**BILLING CODE 8011–01–P**

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(6).

[8] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires that a self-regulatory organization submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[9] *Id.*

[10] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[11] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–64820; File No. SR–NYSEArca–2011–41]**

## Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services To Introduce Two New Pricing Tiers, Step-Up Tier 1 and Step-Up Tier 2

July 6, 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 30, 2011, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to amend the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services (the ''Schedule'') to introduce two new pricing tiers, Step-Up Tier 1 and Step-Up Tier 2. The text of the proposed rule change is available at the Exchange, at *http://www.nyse.com,* at the Commission's Public Reference Room, and at the Commission's Web site at *http://www.sec.gov.*

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

Effective July 1, 2011, NYSE Arca proposes to introduce two new pricing tier levels, Step-Up Tier 1 and Step-Up Tier 2.

Step-Up Tier 1 will allow members to earn a credit of $0.00295 per share for executed orders that provide liquidity to the Book for Tape A and Tape C securities and a credit of $0.0023 per share for executed orders that provide liquidity to the Book for Tape B securities. Additionally, such members will be charged a fee of $0.0028 per share for orders that take liquidity from the Book for Tape B securities and a fee of $0.0029 per share for orders routed outside the Book to any away market centers for Tape B securities. Finally, such members also will be charged a fee of $0.0023 per share for orders routed outside the Book to the NYSE for Tape A securities. Step-Up Tier 2 will allow members to earn a credit of $0.0029 per share for executed orders that provide liquidity to the Book for Tape A and Tape C securities. Additionally, such members will be charged a fee of $0.0028 per share for orders that take liquidity from the Book for Tape B securities and a fee of $0.0029 per share for orders routed outside the Book to any away market centers for Tape B securities. Finally, such members also will be charged a fee of $0.0023 per share for orders routed outside the Book to the NYSE for Tape A securities. All other fees and credits will be at the existing tiered and basic rates based on the members' qualifying levels.

In order to qualify for the Step-Up Tier 1, a member on a daily basis, measured monthly, must directly execute providing volume on NYSE Arca in an amount that is an increase of no less than 0.15% of US average daily consolidated share volume in Tape A, Tape B, Tape C securities (''US ADV'') for that month over the member's average daily providing volume in June 2011 (the ''Baseline Month''), subject to a minimum increase of 15 million average daily providing shares. In order to qualify for the Step-Up Tier 2, a member on a daily basis, measured monthly, must directly execute providing volume on NYSE Arca in an amount that is an increase of no less than 0.10% of US ADV for that month over the member's average daily providing volume in the Baseline Month, subject to a minimum increase of 10 million average daily providing shares.

By way of example, if a member provided an average daily volume of 5 million shares in the Baseline Month, then to qualify for Step-Up Tier 2 in a month where US ADV is 11 billion shares, that member would need to increase its average daily provide by at least 11 million shares, or 0.10% of that month's US ADV, for a total daily providing average of at least 16 million shares. If that same member in that same month increased its average daily provide by at least 16.5 million shares, or 0.15% of that month's US ADV, for a total daily providing average of at least 21.5 million shares, then that member would then qualify for Step-Up Tier 1.

In addition, for both Step-Up Tier 1 and Step-Up Tier 2, those members that did not directly provide volume to NYSE Arca in the Baseline Month will be treated as having an Arca average daily providing volume of zero for the Baseline Month. With respect to the increased percentage of US ADV, the volume requirements to reach the Step-Up Tiers pricing levels will adjust each calendar month based on the US ADV for that given month. For purposes of clarification, US ADV is equal to the volume reported by all exchanges and trade reporting facilities to the Consolidated Tape Association (''CTA'') Plan for Tapes A, B and C securities, however, US ADV does not include trades on days when the market closes early.

Transactions that are not reported to the Consolidated Tape, such as odd-lots and Crossing Session 2 transactions, are not included in US ADV. The Exchange currently makes this data publicly available on a T + 1 basis from a link at *http://www.nyxdata.com/US-and-European-Volumes.*

The Exchange notes that members may be able to qualify for more than one Tier in a given month, in such case, the most favorable rates would apply. For example, if a member directly provided 8 million average daily shares in the Baseline Month, and then increases the average daily providing volume by 12 million shares to 20 million shares in a subsequent month (where US ADV is 8 billion shares) and such provided liquidity meets all the requirements of Investor Tier 2 as well as Step-up Tier 2, then such member would receive Investor Tier 2 credits of $.0030 per share for providing liquidity, and would be charged Step-Up Tier 2 fees for taking liquidity and routing.

The goal of the Step-Up Tiers is to incentivize members to increase the orders sent directly to NYSE Arca and therefore provide liquidity that supports the quality of price discovery and promotes market transparency. These Tiers would be expected to benefit members whose increased order flow provides added levels of liquidity, but may not be eligible for Tier 1, 2 and 3, or Investor Tier 1 and 2, thereby contributing to the depth and market quality of the Book. Additionally, a previous month baseline approach for rebates and fees has also been adopted by NASDAQ Stock Market LLC and EDGX for liquidity providers.[3]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Securities Exchange Act of 1934 (the ''Act''),[4] in general, and Section 6(b)(4) of the Act,[5] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The Exchange believes that the proposal does not constitute an inequitable allocation of fees, as all similarly situated member organizations and other market participants will be charged the same amount and access to the Exchange's market is offered on fair and non-discriminatory terms.

NYSE Arca believes that the Step-Up Tiers are equitable because they are open to all members on an equal basis and provide credits that are reasonably related to the value to an exchange's market quality associated with higher volumes. As stated above, the Exchange believes that the Step-Up Tiers may incentivize members to increase the orders sent directly to NYSE Arca and therefore provide liquidity that supports the quality of price discovery and promotes market transparency. Moreover, the addition of such Tiers would benefit members whose increased order flow provides meaningful added levels of liquidity, but may not be eligible for the current Tiers, thereby contributing to the depth and market quality of the Book. In addition, by offering two Step-Up Tiers the Exchange believes more members may provide increased order flow and

[3] *See* Securities Exchange Act Release No. 63628 (January 3, 2011), 76 FR 1201 (January 7, 2011); and Securities Exchange Act Release No. 64632 (June 8, 2011), 76 FR 34792 (June 14, 2011). *See* EDGX Exchange Fee Schedule, n. 1 at *http://www.directedge.com/Membership/FeeSchedule/EDGXFeeSchedule.aspx.*

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4).

more members will be eligible to receive the credits for such orders. NYSE Arca also believes that the higher rebates would incent liquidity, and such increased volume increases potential revenue to the Exchange, allowing the Exchange to pass on the savings to members in the form of a higher rebate. Similar to the Baseline Month approach, NASDAQ and EDGX have established credits and fees which are based on increased volumes from a previous month baseline.[6]

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. The Exchange believes that the proposed rule change reflects this competitive environment because it will broaden the conditions under which members may qualify for higher liquidity provider credits.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[7] of the Act and subparagraph (f)(2) of Rule 19b–4[8] thereunder, because it establishes a due, fee, or other charge imposed by the NYSE Arca.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2011–41 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2011–41. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2011–41 and should be submitted on or before August 2, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011–17427 Filed 7–11–11; 8:45 am]

**BILLING CODE 8011–01–P**

[6] *See* n.4 above.

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(2).

[9] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–64822; File No. SR–Phlx-2011–91]**

## Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX PHLX LLC Relating to Routing Priority

July 6, 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 27, 2011, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to correct Rule 1080(m) to reflect the priority of routed orders that are not executed on the destination exchange, as described further below.

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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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 more accurately reflect the priority of routed orders in Rule 1080. Currently, Rule 1080(m) governs the routing of orders on the Exchange and describes when orders are routed. Specifically, it provides that the System will route only customer FIND and SRCH Orders with no other contingencies, that IOC Orders will be cancelled immediately if not executed and will not be routed and that eligible orders can be designated as either available for routing or not available for routing. Customer FIND and SRCH Orders, as defined in Rule 1080(m)(iv), designated as available for routing will first be checked by the System for available contracts for potential execution. After checking the System for available contracts, orders are sent to other available market centers for potential execution. When checking the book, the System will seek to execute at the price at which it would send the order to a destination market center.

In situations where the Exchange's disseminated bid or offer is inferior to the NBBO price, the System will contemporaneously: (i) Route an order marked as an ISO to each away market disseminating prices better than the Exchange's price, for the lesser of: (a) The disseminated size of such away markets, or (b) the order size and, (ii) if order size remains after such routing, trade at the Exchange's disseminated bid or offer up to its disseminated size. If contracts still remain unexecuted after routing, they are posted on the book. Once on the book, should the order subsequently be locked or crossed by another market center, the System will not route the order to the locking or crossing market center, except as specified in Rule 1080(m).

Because the System routes the lesser of the disseminated size of the away markets or the order size, it is possible for part of an order to be routed, with a portion of the order remaining on the Exchange. Respecting the part of an order that is routed (''routed order''), that order can either be executed in full, in part or not at all on the destination exchange.

Currently, Rule 1080(m)(i) describes the priority of routed orders as follows: orders sent to other markets do not retain time priority with respect to other orders in the System and the System shall continue to execute other orders while routed orders are away at another market center. It further provides that once routed by the System, an order becomes subject to the rules and procedures of the destination market including, but not limited to, order cancellation. If a routed order is subsequently returned, in whole or in part, that order, or its remainder, shall receive a new time stamp reflecting the time of its return to the System.

However, there is a situation where the order does not receive a new time stamp. Specifically, as described above, a routed order can be for less than the original incoming order's size with a portion of the order remaining on the Exchange. If a routed order is subsequently returned, in whole or in part, that routed order, or its remainder, will not receive a new time stamp reflecting the time of its return to the System if any portion of the original order remains on the System when the routed order returns to the System, in which case the routed order shall retain its timestamp and its priority; specifically, the routed order, when returned, retains the timestamp and priority of the order which remains on the Exchange. The Exchange proposes to codify this in Rule 1080(m)(i).

Where the original incoming order resides on the book when the routed order returns unexecuted or executed in part, the Exchange's System does not treat the routed order as a new order but rather resumes treating it as part of the original incoming order, thereby retaining its original timestamp and priority, as though the unsuccessful routing had never occurred. The Exchange does not believe that this result is problematic or raises regulatory issues. In fact, in situations where a portion of an order remains on the Exchange and a portion is routed, the Exchange routes such order so as to execute it and comply with the regulatory requirements to avoid trade-throughs and locked and crossed markets. Various market conditions determine the destination(s) to which an order is routed, the portion of the order that should be routed, and whether or not the routed order results in an execution. Accordingly, the Exchange believes that its processes to route and timestamp routed orders, which are spelled out in its rules, are intended to make clear to market participants the various outcomes that result, depending on various market conditions.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act [3] in general, and furthers the objectives of Section 6(b)(5) of the Act [4] in particular, in that it is 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. By more accurately reflecting the priority of routed orders, the rules will be clearer; at the same time, the Exchange also believes that retaining the original timestamp on a partially routed order is designed to promote just and equitable principles of trade and protect investors and the public interest, because maintaining the original order as a single order is the simplest method of handling the order, which should help entering firms manage their order flow. Respecting routable orders, market conditions, not the entering firm, determine whether the order is routed, and ultimately whether it is executed on the destination market, such that the Exchange believes that it is simpler and more logical to treat the unexecuted portion of a routed order together with the original order. In addition, retaining the original timestamp on a partially routed order does not disadvantage other orders on the book, because the partially routed order had time priority and is merely returning, in effect, to its original place in time priority on the book. The portion of the order that was not routed and remained on the book is available for execution; if it is executed in full before the routed portion returns to the Exchange, the returned, routed portion receives a new timestamp book.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others*

No written comments were either solicited or received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the foregoing proposed rule change does not: (i) Significantly affect

[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 78f(b)(5).

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[5] and Rule 19b–4(f)(6)[6] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Phlx-2011–91 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx-2011–91. 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–Phlx-2011–91, and should be submitted on or before August 2, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011–17428 Filed 7–11–11; 8:45 am]

**BILLING CODE 8011–01–P**

[5] 15 U.S.C. 78s(b)(3)(A).

[6] 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.

[7] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–64818; File No. SR–CBOE–2011–060]**

## Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Fees Schedule Relating to the Marketing Fee

July 6, 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 29, 2011, the Chicago Board Options Exchange, Incorporated (the ''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as one establishing or changing a due, fee, or other charge imposed by CBOE under 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.

[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).

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

CBOE proposes to amend its Marketing Fee Program to extend for an additional three months a pilot program it implemented on December 1, 2010,[5] and extended on April 1, 2011,[6] relating to the assessment of the marketing fee in the SPY option class. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary and at the Commission.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

CBOE proposes to amend its Marketing Fee Program to extend for an additional three months a pilot program it implemented on December 1, 2010,[7] and extended on April 1, 2011,[8] relating to the assessment of the marketing fee in the SPY option class. Specifically, CBOE previously determined not to assess the marketing fee on electronic transactions in SPY options, except that it would continue to assess the marketing fee on electronic transactions resulting from its Automated Improvement Mechanism (''AIM'') pursuant to CBOE Rule 6.74A and

[5] *See* Securities Exchange Act Release No. 63470 (December 8, 2010), 75 FR 78284 (December 15, 2010) (SR–CBOE–2010–108).

[6] *See* Securities Exchange Act Release No. 64212 (April 6, 2011), 76 FR 20411 (April 12, 2011) (SR–CBOE–2011–033).

[7] *See* Note 5.

[8] *See* Note 6.

transactions in open outcry. This pilot program is scheduled to terminate on June 30, 2011, and CBOE now proposes to extend it until September 30, 2011.

As CBOE stated in its rule filing establishing this three month pilot program, this proposed change is intended to attract more customer volume to the Exchange in this option class and to allow CBOE market-makers to better compete for order flow. CBOE noted that the SPY option class is unique in the manner in which it trades and is one of the most active option classes. CBOE also noted that DPMs and Preferred Market-Makers can utilize the marketing fee funds to attract orders from payment accepting firms that are executed in AIM and in open outcry. Finally, CBOE noted that it believes that the marketing fee funds received by payment accepting firms may be used to offset transaction and other costs related to the execution of an order in AIM and in open outcry, including in the SPY option class.

For the reasons noted above, CBOE believes that it would make sense to extend the pilot program until September 30, 2011. CBOE believes that it is beneficial to continue to assess the fee on the limited bases as proposed and will continue to enable CBOE to compete for order flow in the SPY option class. However, because the SPY option class is unique in the manner in which it trades and is one of the most active option classes, CBOE would like to continue to evaluate for an additional three months the effect of not assessing the fee on all electronic transactions in the SPY option class, except for transactions resulting from AIM and in open outcry.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Section 6(b)(4) of the Act,[10] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among Trading Permit Holders in that it is intended to attract more customer volume on the Exchange in SPY options. The SPY option class is one of the most active and liquid classes and trades with a significant electronic trading volume. Because of its current trading profile, CBOE believes it might be better able to attract electronic liquidity by not assessing the marketing fee on electronic SPY transactions and therefore proposes to extend the current waiver. However, CBOE believes that continuing to collect the marketing fee on open outcry transactions, as well as electronic orders submitted to AIM for price improvement, from market makers that trade with customer orders from payment accepting firms would continue to attract liquidity in SPY to the floor and AIM mechanism, respectively. Accordingly, CBOE believes continuing the waiver is equitable because it reflects the trading profile of SPY and is designed and intended to attract additional order flow in SPY to the Exchange, which would benefit all trading permit holders.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The proposed rule change is designated by the Exchange as establishing or changing a due, fee, or other charge, thereby qualifying for effectiveness on filing pursuant to Section 19(b)(3)(A) of the Act[11] and subparagraph (f)(2) of Rule 19b–4[12] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2011–060 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–CBOE–2011–060. 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 office of CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2011–060 and should be submitted on or before August 2, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011–17426 Filed 7–11–11; 8:45 am]

**BILLING CODE 8011–01–P**

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(2).

[13] 17 CFR 200.30–3(a)(12).

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

**[Docket No FMCSA–2011–0097]**

### Pilot Program on NAFTA Long-Haul Trucking Provisions

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of Availability; request for comment.

**SUMMARY:** FMCSA announces the availability of a Draft Environmental Assessment (DEA) that evaluates the potential environmental impacts resulting from the implementation of its United States-Mexico cross-border long-haul trucking pilot program. This pilot program is part of FMCSA's implementation of the North American Free Trade Agreement (NAFTA) cross-border long-haul trucking provisions. This pilot program would allow Mexico-domiciled motor carriers to operate throughout the United States for up to 3 years. U.S.-domiciled motor carriers would be granted reciprocal rights to operate in Mexico for the same period. Participating Mexican carriers and drivers would be required to comply with all applicable U.S. laws and regulations, including those concerned with motor carrier safety, customs, immigration, vehicle registration and taxation, and fuel taxation.

**DATES:** Comments are due by August 11, 2011.

**ADDRESSES:** You may submit comments identified by Federal Docket Management System Number FMCSA–2011–0097 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.*
- *Fax:* 202–493–2251.
- *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001, between 9 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

*Instructions:* To view the DEA, go to the online docket (*Regulations.gov*) at *http://www.regulations.gov/* and enter in the docket number (FMCSA–2011–0097) and search for the Draft Environmental Assessment. All submissions must include the Agency name and docket number (FMCSA–2011–0097) for this rulemaking. To avoid duplication, please use only one of these four methods. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please refer to the Privacy Act heading for further information.

Comments received after the comment closing date will be included in the docket and we will consider late comments only to the extent practicable. FMCSA may issue a Final Environmental Assessment (FEA) at any time after the close of the comment period.

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* at any time or to West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays.

*Privacy Act:* Anyone is able to search the electronic form for all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review the U.S. Department of Transportation's (DOT) complete Privacy Act Statement in the **Federal Register** published on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8–785.pdf.*

**FOR FURTHER INFORMATION CONTACT:** Michael M. Johnsen, Environmental Protection Specialist, Analysis Division, Federal Motor Carrier Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590, (202) 366–4111.

**SUPPLEMENTARY INFORMATION:**

### Draft Environmental Assessment

In accordance with the National Environmental Policy Act of 1969 (NEPA) (section 102(2)(c)), as implemented by the Council on Environment Quality regulations (40 CFR parts 1500–1508), FMCSA's Order 5610.1, issued March 1, 2004 (69 FR 9680), and other applicable guidance and requirements, FMCSA prepared a DEA for the U.S.-Mexican cross-border long-haul trucking program. FMCSA analyzed the potential impacts to the environment that may result from implementing the pilot project. FMCSA evaluated environmental issues such as emissions from vehicles, fuel types, air quality impacts, and other pertinent issues in the DEA and is requesting comments.

### Background on the Pilot Project on the U.S.-Mexico Cross-Border Long-Haul Trucking Program

The pilot program is part of FMCSA's implementation of the North American Free Trade Agreement (NAFTA) cross-border long-haul trucking provisions. This pilot program would allow Mexico-domiciled motor carriers to operate throughout the United States for up to 3 years. U.S.-domiciled motor carriers would be granted reciprocal rights to operate in Mexico for the same period. Participating Mexican carriers and drivers would be required to comply with all applicable U.S. laws and regulations, including those concerned with motor carrier safety, customs, immigration, vehicle registration and taxation, and fuel taxation. The safety of the participating carriers would be tracked closely by FMCSA with input from the Motor Carrier Safety Advisory Committee, a Federal advisory committee. For further information regarding this pilot program, please see Federal Register notice of the Pilot Program on NAFTA Long Haul Trucking Provisions in docket FMCSA–2011–0097. The docket contains background information for this action, including comments.

On April 13, 2011, FMSCA issued a notice and request for public comments on the proposed U.S.-Mexico cross-border long-haul trucking pilot program (76 FR 20807 Docket Number FMCSA–2011–0097). There were several comments on the notice regarding environmental impacts, and these comments are addressed in this DEA.

We are requesting your comments on environmental concerns that you may have related to the DEA. This includes suggesting analysis and methodologies for use in the FEA or possible sources of data or information not included in the DEA. Your comments will be considered in preparing a Finding of No Significant Impact, an FEA, or determining if preparation of an Environmental Impact Statement is warranted.

Issued on: June 30, 2011.

**Kelly Leone,**

*Associate Administrator, Office of Research and Information Technology, FMCSA.*

[FR Doc. 2011–17492 Filed 7–11–11; 8:45 am]

**BILLING CODE 4910–EX–P**

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

### Agency Information Collection Activities: Proposed Collection; Comment Request; Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

**AGENCY:** Maritime Administration, (MARAD), Department of Transportation.

**ACTION:** 30-Day notice of submission of information collection approval from the Office of Management and Budget and request for comments.

**SUMMARY:** As part of a Federal Government-wide effort to streamline the process to seek feedback from the public on service delivery, the Maritime Administration is submitting a Generic Information Collection Request (Generic ICR): ''Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery '' to OMB for approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*).

**DATES:** Comments must be submitted August 11, 2011.

**ADDRESSES:** Send comments regarding these information collections to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 Seventeenth Street, NW., Washington, DC, 20503, *Attention:* MARAD Desk Officer. Alternatively, comments may be sent via e-mail to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, at the following address: *oira.submissions@omb.eop.gov.*

**FOR FURTHER INFORMATION CONTACT:** To request additional information, please contact Ms. Barbara Jackson, *Telephone:* (202) 366–0615 or Ms. Bonnie McLendon, Telephone: (202) 366–5485, Maritime Administration, Office of Management and Administrative Services, Division of Management, 1200 New Jersey Avenue, SE., Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:**

*Title:* Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

*Abstract:* 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.

Feedback collected under this generic clearance will provide useful information, but it will not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: The target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior to fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

On December 22, 2010, OMB, on behalf of DOT/MARAD and other listed Executive Agencies, published a 60-day notice (75 FR 80542) in the **Federal Register** soliciting comment on ICRs for which the agency was seeking OMB approval. No comments were received in response to this notice.[1]

Below we provide the Maritime Administration's projected average estimates for the next three years:

*Current Actions:* New collection of information.

*Type of Review:* New Collection.

*Affected Public:* Individuals and Households, Businesses and Organizations, State, Local or Tribal Government.

*Average Expected Annual Number of activities:* 6.

*Respondents:* 26,088.

*Annual Responses:* 8,696.

*Frequency of Response:* Once per request.

*Average Minutes per Response:* 10 minutes.

*Burden Hours:* 4,348 (1,449 annually).

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.

*Comments are invited on:* 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; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

**Authority:** 49 CFR 1.66.

By the Order of the Maritime Administrator.

Dated: June 30, 2011.

**Christine Gurland,**

*Secretary, Maritime Administration.*

[FR Doc. 2011–17505 Filed 7–11–11; 8:45 am]

**BILLING CODE 4910–81–P**

[1] The 60-day notice included the following estimate of the aggregate burden hours for this generic clearance federal-wide:

*Average Expected Annual Number of activities:* 25,000.

*Average number of Respondents per Activity:* 200.

*Annual responses:* 5,000,000.

*Frequency of Response:* Once per request.

*Average minutes per response:* 30.

*Burden hours:* 2,500,000.

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

**[Docket No. MARAD–2011 0090]**

### Requested Administrative Waiver of the Coastwise Trade Laws

**AGENCY:** Maritime Administration, Department of Transportation.

**ACTION:** Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel TRILOGY.

**SUMMARY:** As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime

Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2011–0090 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388 (68 FR 23084, April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

**DATES:** Submit comments on or before August 11, 2011.

**ADDRESSES:** Comments should refer to docket number MARAD–2011–0090. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979, Email *Joann.Spittle@dot.gov.*

**SUPPLEMENTARY INFORMATION:** As described by the applicant the intended service of the vessel TRILOGY is:

*Intended Commercial Use of Vessel:* ''bareboat charters, sailing classes.''

*Geographic Region:* ''WA.''

**Privacy Act**

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator
Date: July 5, 2011.

**Christine Gurland,**

*Secretary, Maritime Secretary.*

[FR Doc. 2011–17507 Filed 7–11–11; 8:45 am]

**BILLING CODE 4910–81–P**

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

**[Docket No. MARAD–2011 0092]**

### Requested Administrative Waiver of the Coastwise Trade Laws

**AGENCY:** Maritime Administration, Department of Transportation.

**ACTION:** Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel DANDY.

**SUMMARY:** As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2011–0092 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388 (68 FR 23084, April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

**DATES:** Submit comments on or before August 11, 2011.

**ADDRESSES:** Comments should refer to docket number MARAD–2011–0092. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979, E-mail *Joann.Spittle@dot.gov.*

**SUPPLEMENTARY INFORMATION:** As described by the applicant the intended service of the vessel DANDY is:

*Intended Commercial Use of Vessel:* ''Day outings, harbor cruises & sightseeing cruises for no more than 6 passengers with at least 1 licensed captain on a seasonal basis.''

*Geographic Region:* ''Rhode Island, Connecticut, New York coastwise trade.''

**Privacy Act**

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.
Dated: July 5, 2011.

**Christine Gurland,**

*Secretary, Maritime Administration.*

[FR Doc. 2011–17509 Filed 7–11–11; 8:45 am]

**BILLING CODE 4910–81–P**

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

**[Docket No. MARAD–2011–0089]**

### Requested Administrative Waiver of the Coastwise Trade Laws

**AGENCY:** Maritime Administration, Department of Transportation.

**ACTION:** Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel BRUT.

**SUMMARY:** As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2011–0089 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388 (68 FR 23084, April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

**DATES:** Submit comments on or before August 11, 2011.

**ADDRESSES:** Comments should refer to docket number MARAD–2011–0089. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979, E-mail *Joann.Spittle@dot.gov.*

**SUPPLEMENTARY INFORMATION:** As described by the applicant the intended service of the vessel BRUT is:

*Intended Commercial Use of Vessel:* ''As a training vessel for our trawler school.''

*Geographic Region:* ''California.''

#### Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: July 5, 2011.

**Christine Gurland,**

*Secretary, Maritime Administrator.*

[FR Doc. 2011–17510 Filed 7–11–11; 8:45 am]

**BILLING CODE 4910–81–P**

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

**[Docket No. MARAD–2011 0091]**

### Requested Administrative Waiver of the Coastwise Trade Laws

**AGENCY:** Maritime Administration, Department of Transportation.

**ACTION:** Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel TANTO AMOR.

**SUMMARY:** As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2011–0091 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388 (68 FR 23084, April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

**DATES:** Submit comments on or before August 11, 2011.

**ADDRESSES:** Comments should refer to docket number MARAD–2011–0091. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979, Email *Joann.Spittle@dot.gov.*

**SUPPLEMENTARY INFORMATION:** As described by the applicant the intended service of the vessel TANTO AMOR is:

*Intended Commercial Use Of Vessel:* ''Private sailing charters for six or less guests at a time.''

*Geographic Region:* ''Puerto Rico.''

#### Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register**

published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: July 5, 2011.

**Christine Gurland,**

*Secretary, Maritime Administration.*

[FR Doc. 2011–17508 Filed 7–11–11; 8:45 am]

**BILLING CODE 4910–81–P**

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

**[Docket No. MARAD–2011 0088]**

### Requested Administrative Waiver of the Coastwise Trade Laws

**AGENCY:** Maritime Administration, Department of Transportation.

**ACTION:** Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel JUANITA.

**SUMMARY:** As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2011–0088 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388 (68 FR 23084, April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

**DATES:** Submit comments on or before August 11, 2011.

**ADDRESSES:** Comments should refer to docket number MARAD–2011–0088. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979, E-mail *Joann.Spittle@dot.gov.*

**SUPPLEMENTARY INFORMATION:** As described by the applicant the intended service of the vessel JUANITA is:

*Intended Commercial Use of Vessel:* ''commercial passenger vessel.''

*Geographic Region:* ''California.''

### Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: July 5, 2011.

**Christine Gurland,**

*Secretary, Maritime Administrator.*

[FR Doc. 2011–17501 Filed 7–11–11; 8:45 am]

**BILLING CODE 4910–81–P**

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

**[Docket No. MARAD–2011 0093]**

### Requested Administrative Waiver of the Coastwise Trade Laws

**AGENCY:** Maritime Administration, Department of Transportation.

**ACTION:** Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel SOMEDAY IS NOW.

**SUMMARY:** As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2011–0093 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388 (68 FR 23084, April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

**DATES:** Submit comments on or before August 11, 2011.

**ADDRESSES:** Comments should refer to docket number MARAD–2011–0093. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979, E-mail *Joann.Spittle@dot.gov.*

**SUPPLEMENTARY INFORMATION:** As described by the applicant the intended service of the vessel SOMEDAY IS NOW is:

*Intended Commercial Use of Vessel:* ''I intend to operate my Small Uninspected Passenger Vessel (private motor yacht) to carry six or fewer

passengers for hire on partial-day cruises. All cruising will be in the San Diego area, with pick-up and drop-off at piers within San Diego Bay. The following cruise services will be offered: Luxury Cruises within San Diego Harbor and along the Point Loma shoreline. Afternoon or evening excursions will be catered with fine hors doeuvres and beverages matching the quality of a 4–Star restaurant. Holiday Events will be highlighted by city fireworks displays. Dolphin and Whale Watching Cruises in nearby coastal waters, with high-quality catering provided. As a professional oceanographer I will be sharing my knowledge of oceanographic processes and marine biology with passengers. A Progressive Waterfront Restaurant Tour with stops at fine establishments along the shorefront of San Diego Bay. Mission Bay Nautical Excursions, with high-quality catering. Up-close fireworks displays will be seen on weekend evenings when SeaWorld is presenting pyrotechnics. Wedding Services for small private parties, with a Marriage Certificate generated at sea. Dignified Services for Burial at Sea with a Navigation Certificate generated to document the exact location where cremation remains were dispersed. Our specialty for all excursions will be the small, intimate setting aboard a classic teak-interior yacht, plus excellent hors doeuvres and wine.''

*Geographic Region:* ''California.''

**Privacy Act**

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: July 5, 2011.

**Christine Gurland,**

*Secretary, Maritime Administration.*

[FR Doc. 2011–17503 Filed 7–11–11; 8:45 am]

**BILLING CODE 4910–81–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Proposed Collection; Comment Request for Revenue Procedure 2005–24; Notice 2006–15

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). The IRS is soliciting comments concerning information collection requirements related to waiver of spousal election and notice 2006–15, extension of June 28, 2005, safe harbor date.

**DATES:** Written comments should be received on or before September 12, 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 revenue procedure should be directed to Evelyn J. Mack at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–7381, or through the Internet at *Evelyn.J.Mack@irs.gov*.

*Title:* Waiver of Spousal Election.

*OMB Number:* 1545–1936.

*Revenue Procedure Number:* Revenue Procedure 2005–24.

*Abstract:* Revenue Procedure 2005–24 provides notice to a husband or wife who has an interest in a Charitable Remainder Annuity Trust (CRAT) under section 664(d)(1) of the Internal Revenue Code or Charitable Remainder Unitrust (CRUT) under section 664(d)(2) that was created by his or her spouse where, under applicable state law, such spouse has a right to receive an elective share that could be satisfied with assets of the CRAT or CRUT. In cases where such a CRAT or CRUT is established after the date that is ninety days after the date this revenue procedure is published in the IRB, the husband or wife must waive the right to receive the elective share in order for the CRAT or CRUT to continue to qualify under section 664(d)(1)(b) or (d)(2)(B). Notice 2006–15 (2006–8 I.R.B. 501) extends the June 28, 2005, grandfather date in Rev. Proc. 2005–24 (2005–16, I.R.B. 909), until further guidance is issued by the Internal Revenue Service.

*Current Actions:* There are no changes being made to the revenue procedure at this time.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit organizations, not-for-profit institutions, and state, local or tribal governments.

*Estimated Number of Respondents:* 100,000.

*Estimated Time per Respondent:* 1 hour 30 minutes.

*Estimated Total Annual Burden Hours:* 150,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Request for Comments:* Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

*Comments are invited on:* (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: June 28, 2011.

**Yvette B. Lawrence,**

*IRS Reports Clearance Officer.*

[FR Doc. 2011–17382 Filed 7–11–11; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Proposed Collection; Comment Request for Regulation Project

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). The IRS is soliciting comments concerning existing final regulation dual consolidated loss recapture events.

**DATES:** Written comments should be received on or before September 12, 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 regulations should be directed to Evelyn J. Mack at Internal Revenue Service, Room 6231, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202)622–7381, or through the Internet at *Evelyn.J.Mack@irs.gov.*

**SUPPLEMENTARY INFORMATION:**

*Title:* Dual Consolidated Loss Recapture Events.

*OMB Number:* 1545–1796.

*Regulation Project Number:* REG–106879–00 (Final).

*Abstract:* This document contains final regulations under section 1503(d) regarding the events that require the recapture of dual consolidated losses. These regulations are issued to facilitate compliance by taxpayers with the dual consolidated loss provisions. The regulations generally provide that certain events will not trigger recapture of a dual consolidated loss or payment of the associated interest charge. The regulations provide for the filing of certain agreements in such cases. This document also makes clarifying and conforming changes to the current regulations.

*Current Actions:* There are no changes being made to this existing regulation.

*Type of Review:* Extension of currently approved collection.

*Affected Public:* Business or other for-profit organizations.

*Estimated Number of Respondents:* 30.

*Estimated Time per Respondent:* 2 hours.

*Estimated Total Annual Burden Hours:* 60.

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 29, 2011.

**Yvette B. Lawrence,**

*IRS Reports Clearance Officer.*

[FR Doc. 2011–17385 Filed 7–11–11; 8:45 am]

**BILLING CODE 4830–01–P**


# FEDERAL REGISTER

Vol. 76 Tuesday,
No. 133 July 12, 2011

Part II

## Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Parts 409, 424, 440, et al.
Medicare Program; Home Health Prospective Payment System Rate Update for Calendar Year 2012; Face-to-Face Requirements for Home Health Services; Policy Changes and Clarifications Related to Home Health; Proposed Rules

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Centers for Medicare & Medicaid Services**

**42 CFR Parts 409, 424, and 484**

**[CMS–1353–P]**

**RIN 0938–AQ30**

# Medicare Program; Home Health Prospective Payment System Rate Update for Calendar Year 2012

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would update the Home Health Prospective Payment System (HH PPS) rates, including: The national standardized 60-day episode rates, the national per-visit rates, the low utilization payment amount (LUPA), and outlier payments under the Medicare prospective payment system for home health agencies effective January 1, 2012.

**DATES:** To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on September 6, 2011.

**ADDRESSES:** In commenting, please refer to file code CMS–1353–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the instructions under the ''More Search Options'' tab.

2. *By regular mail.* You may mail written comments to the following address only: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1353–P, P.O. Box 8016, Baltimore, MD 21244–8016.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address only: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1353–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments before the close of the comment period to either of the following addresses:

a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.).

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, please call (410) 786–7195 in advance to schedule your arrival with one of our staff members.

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

**FOR FURTHER INFORMATION CONTACT:**

Elizabeth Goldstein, (410) 786–6665, for CAHPS issues.

Mary Pratt, (410) 786–6867, for quality issues.

Randy Throndset, (410)786–0131 (overall HH PPS).

**SUPPLEMENTARY INFORMATION:**

*Inspection of Public Comments:* All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://www.regulations.gov.* Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. EST. To schedule an appointment to view public comments, phone 1–800–743–3951.

**Table of Contents**



**Acronyms**

In addition, because of the many terms to which we refer by abbreviation in this proposed rule, we are listing these abbreviations and their

corresponding terms in alphabetical order below:

ACH LOS Acute Care Hospital Length of Stay
ADL Activities of Daily Living
APU Annual Payment Update
BBA Balanced Budget Act of 1997, Public Law 105–33
BBRA Medicare, Medicaid, and SCHIP Balanced Budget Refinement Act of 1999, Public Law 106–113
CAD Coronary Artery Disease
CAH Critical Access Hospital
CBSA Core-Based Statistical Area
CHF Congestive Heart Failure
CMI Case-Mix Index
CMS Centers for Medicare and Medicaid Services
CoPs Conditions of Participation
COPD Chronic Obstructive Pulmonary Disease
CVD Cardiovascular Disease
DM Diabetes Mellitus
DRA Deficit Reduction Act of 2005, Public Law 109–171, enacted February 8, 2006
FDL Fixed Dollar Loss
FI Fiscal Intermediaries
FR **Federal Register**
FY Fiscal Year
HCC Hierarchical Condition Categories
HCIS Health Care Information System
HHCAHPS Home Health Care Consumer Assessment of Healthcare Providers and Systems Survey
HH PPS Home Health Prospective Payment System
HHAs Home Health Agencies
HHRG Home Health Resource Group
HIPPS Health Insurance Prospective Payment System
IH Inpatient Hospitalization
IRF Inpatient Rehabilitation Facility
LTCH Long-Term Care Hospital
LUPA Low Utilization Payment Amount
MEPS Medical Expenditures Panel Survey
MMA Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Public Law 108–173, enacted December 8, 2003
MSA Metropolitan Statistical Areas
MSS Medical Social Services
NRS Non-Routine Supplies
OBRA Omnibus Reconciliation Act of 1981, Public Law 97–35, enacted August 13, 1981
OCESAA Omnibus Consolidated and Emergency Supplemental Appropriations Act, Public Law 105–277, enacted October 21, 1998
OES Occupational Employment Statistics
OIG Office of Inspector General
OT Occupational Therapy
OMB Office of Management and Budget
PAC–PRD Post-Acute Care Payment Reform Demonstration
PEP Partial Episode Payment Adjustment
PT Physical Therapy
QAP Quality Assurance Plan
PRRB Provider Reimbursement Review Board
RAP Request for Anticipated Payment
RF Renal Failure
RFA Regulatory Flexibility Act, Public Law 96–354
RHHIs Regional Home Health Intermediaries
RIA Regulatory Impact Analysis
SLP Speech Language Pathology Therapy
SNF Skilled Nursing Facility
UMRA Unfunded Mandates Reform Act of 1995

## I. Background

### *A. Statutory Background*

The Balanced Budget Act of 1997 (BBA) (Pub. L. 105–33, enacted August 5, 1997), significantly changed the way Medicare pays for Medicare home health (HH) services. Section 4603 of the BBA mandated the development of the home health prospective payment system (HH PPS). Until the implementation of a HH PPS on October 1, 2000, home health agencies (HHAs) received payment under a retrospective reimbursement system.

Section 4603(a) of the BBA mandated the development of a HH PPS for all Medicare-covered HH services provided under a plan of care (POC) that were paid on a reasonable cost basis by adding section 1895 of the Social Security Act (the Act), entitled ''Prospective Payment For Home Health Services''. Section 1895(b)(1) of the Act requires the Secretary to establish a HH PPS for all costs of HH services paid under Medicare.

Section 1895(b)(3)(A) of the Act requires the following: (1) The computation of a standard prospective payment amount include all costs for HH services covered and paid for on a reasonable cost basis and that such amounts be initially based on the most recent audited cost report data available to the Secretary; and (2) the standardized prospective payment amount be adjusted to account for the effects of case-mix and wage levels among HHAs.

Section 1895(b)(3)(B) of the Act addresses the annual update to the standard prospective payment amounts by the HH applicable percentage increase. Section 1895(b)(4) of the Act governs the payment computation. Sections 1895(b)(4)(A)(i) and (b)(4)(A)(ii) of the Act require the standard prospective payment amount to be adjusted for case-mix and geographic differences in wage levels. Section 1895(b)(4)(B) of the Act requires the establishment of an appropriate case-mix change adjustment factor for significant variation in costs among different units of services.

Similarly, section 1895(b)(4)(C) of the Act requires the establishment of wage adjustment factors that reflect the relative level of wages, and wage-related costs applicable to HH services furnished in a geographic area compared to the applicable national average level. Under section 1895(b)(4)(c) of the Act, the wage-adjustment factors used by the Secretary may be the factors used under section 1886(d)(3)(E) of the Act.

Section 1895(b)(5) of the Act gives the Secretary the option to make additions or adjustments to the payment amount otherwise paid in the case of outliers because of unusual variations in the type or amount of medically necessary care. Section 3131(b) of the Patient Protection and Affordable Care Act of 2010 (the Affordable Care Act) (Pub. L. 111–148, enacted March 23, 2010) revised section 1895(b)(5) of the Act so that total outlier payments in a given fiscal year (FY) or year may not exceed 2.5 percent of total payments projected or estimated. The provision also makes permanent a 10 percent agency level outlier payment cap.

In accordance with the statute, as amended by the BBA, we published a final rule in the July 3, 2000 **Federal Register** (65 FR 41128) to implement the HH PPS legislation. The July 2000 final rule established requirements for the new HH PPS for HH services as required by section 4603 of the BBA, as subsequently amended by section 5101 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act (OCESAA) for Fiscal Year 1999, (Pub. L. 105–277, enacted October 21, 1998); and by sections 302, 305, and 306 of the Medicare, Medicaid, and SCHIP Balanced Budget Refinement Act (BBRA) of 1999, (Pub. L. 106–113, enacted November 29, 1999). The requirements include the implementation of a HH PPS for HH services, consolidated billing requirements, and a number of other related changes. The HH PPS described in that rule replaced the retrospective reasonable cost-based system that was used by Medicare for the payment of HH services under Part A and Part B. For a complete and full description of the HH PPS as required by the BBA, see the July 2000 HH PPS final rule (65 FR 41128 through 41214).

Section 5201(c) of the Deficit Reduction Act of 2005 (DRA) (Pub. L. 109–171, enacted February 8, 2006) added new section 1895(b)(3)(B)(v) to the Act, requiring HHAs to submit data for purposes of measuring health care quality, and links the quality data submission to the annual applicable percentage increase. This data submission requirement is applicable for CY 2007 and each subsequent year. If an HHA does not submit quality data, the HH market basket percentage increase is reduced 2 percentage points. In the November 9, 2006 **Federal Register** (71 FR 65884, 65935), we published a final rule to implement the

pay-for-reporting requirement of the DRA, which was codified at § 484.225(h) and (i) in accordance with the statute.

Section 421(a) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108–173, enacted December 8, 2003) provides an increase of 3 percent of the payment amount otherwise made under section 1886(d)(2)(D) of the Act for HH services furnished in a rural area with respect to episodes and visits ending on or after April 1, 2010, and before January 1, 2016.

*B. System for Payment of Home Health Services*

Generally, Medicare makes payment under the HH PPS on the basis of a national standardized 60-day episode payment rate that is adjusted for the applicable case-mix and wage index. The national standardized 60-day episode rate includes the six HH disciplines (skilled nursing, HH aide, physical therapy, speech-language pathology, occupational therapy, and medical social services). Payment for non-routine medical supplies (NRS), is no longer part of the national standardized 60-day episode rate and is computed by multiplying the relative weight for a particular NRS severity level by the NRS conversion factor (See section II.D.4.e). Payment for durable medical equipment covered under the HH benefit is made outside the HH PPS payment system. To adjust for case-mix, the HH PPS uses a 153-category case-mix classification to assign patients to a home health resource group (HHRG). The clinical severity level, functional severity level, and service utilization are computed from responses to selected data elements in the OASIS assessment instrument and are used to place the patient in a particular HHRG. Each HHRG has an associated case-mix weight which is used in calculating the payment for an episode.

For episodes with four or fewer visits, Medicare pays based on a national per-visit rate, adjusted by the discipline(s) providing the services; an episode consisting of four or fewer visits within a 60-day period receives what is referred to as a low utilization payment adjustment (LUPA). Medicare also adjusts the national standardized 60-day episode payment rate for certain intervening events that are subject to a partial episode payment adjustment (PEP adjustment). For certain cases that exceed a specific cost threshold, an outlier adjustment may also be available.

*C. Updates to the HH PPS*

As required by section 1895(b)(3)(B) of the Act, we have historically updated the HH PPS rates annually in the **Federal Register**. The August 29, 2007 final rule with comment period set forth an update to the 60-day national episode rates and the national per-visit rates under the Medicare prospective payment system for HHAs for CY 2008. The CY 2008 rule included an analysis performed on CY 2005 HH claims data, which indicated a 12.78 percent increase in the observed case-mix since 2000. The case-mix represented the variations in conditions of the patient population served by the HHAs. Subsequently, a more detailed analysis was performed on the 12.78 percent increase in case-mix to evaluate if any portion of the increase was associated with a change in the actual clinical condition of HH patients. We examined data on demographics, family severity, and non-HH Part A Medicare expenditures to predict the average case-mix weight for 2005. We identified 8.03 percent of the total case-mix change as real and decreased the 12.78 percent of total case-mix change by 8.03 percent to get a final nominal case-mix increase measure of 11.75 percent ($0.1278 * (1 - 0.0803) = 0.1175$).

To account for the changes in case-mix that were not related to an underlying change in patient health status, we implemented a reduction over 4 years in the national standardized 60-day episode payment rates and the NRS conversion factor. That reduction was to be 2.75 percent per year for 3 years beginning in CY 2008 and 2.71 percent for the fourth year in CY 2011.

For CY 2011, we published the November 17, 2010 final rule (75 FR 70372) (hereinafter referred to as the CY 2011 HH PPS final rule) that set forth the update to the 60-day national episode rates and the national per-visit rates under the Medicare prospective payment system for HH services.

As discussed in the CY 2011 rule, our analysis indicated that there was a 19.40 percent increase in overall case-mix from 2000 to 2008 and that only 10.07 percent of that overall observed case-mix percentage increase was due to real case-mix change. As a result of our analysis, we identified a 17.45 percent nominal increase in case-mix. To fully account for the 17.45 percent nominal case-mix growth which was identified from 2000 to 2008, we proposed 3.79 percent payment reductions in both CY 2011 and CY 2012. However, we deferred finalizing a payment reduction for CY 2012 until a further study of the case-mix data was completed. Independent review of the case-mix model has been conducted and the results are discussed in section II.A. of this proposed rule.

## II. Provisions of the Proposed Rule

*A. Case-Mix Measurement*

Every year, since the HH PPS CY 2008 proposed rule, we have stated in HH PPS rulemaking that we would continue to monitor case-mix changes in the HH PPS and to update our analysis to measure change in case-mix, both real changes in case-mix and changes which are unrelated to changes in patient acuity (nominal). We have continued to monitor case-mix changes, and our latest analysis continues to support the need to make payment adjustments to account for nominal case-mix growth.

Before measuring nominal case-mix growth, we examined the total case-mix growth every year from 2000 to 2009. Our latest analysis indicates that there was a large 1-year increase, 2.6 percent, in the average case-mix weight from 2008 to 2009. Specifically, the 2008 average case-mix was 1.3095 and the 2009 average case-mix was 1.3435. It should be noted that the average case-mix for 2008 is slightly different than the average case-mix for 2008 that was reported in the CY 2011 HH PPS final rule. The difference in case-mix is due to the increased availability of data and inclusion of more episodes in the 2008 sample. As we did last year, we sought to describe how much of the 1-year change was due to a change in the distribution of episodes according to the number of therapy visits and how much was due to a change in the average case-mix weight at each level of therapy visits.

The method we used first holds the average case-mix weight constant (at the 2008 values) at each level of therapy visits, and measures the effect of the shift to the new distribution of therapy visits. The method then holds the distribution of therapy visits constant (at the 2008 distribution) and measures the effect of the change in average case-mix weight at each level of therapy visits. The results were that 0.0254 or about 75 percent (0.0254/0.0340 = 0.75) of the total change in average case-mix weights from 2008 to 2009 was due to the shift in the distribution of therapy visits per episode. The remaining 0.0086 or about 25 percent (0.0086/0.0340 = 0.25) in overall average case-mix weight from 2008 to 2009 was due to an increase in the average case-mix weight at each level of therapy visits per episode.

The decomposition suggests that agencies in 2009 were still responding to the 2008 refinements in terms of both coding practices and the definition of therapy treatment plans for patients. This analysis by itself, however, does not isolate real case-mix change within total case-mix change. We discuss our latest analysis of real and nominal case-mix change in the remainder of this section.

Section 1895(b)(3)(B)(iv) of the Act gives CMS the authority to implement payment reductions for nominal case-mix growth, changes in case-mix that are not related to actual changes in patient characteristics over time. Nominal case-mix growth was assessed and reported in CY 2008 and CY 2011 rulemaking, and payment reductions to the base rate were implemented to account for the nominal case-mix growth observed.

In CY 2008 rulemaking, to assess nominal case-mix growth, we first estimated real case-mix growth, changes in case-mix which are related to changes in patient characteristics, using a regression-based, predictive model of individual case-mix weights. The predictive model contained measures of patients' demographic characteristics, clinical status, inpatient history, and Part A Medicare costs in the time period leading up to their home health episodes. The regression coefficients for the predictive model were developed using 2000 as a base year and were applied to episodes from 2005, allowing estimation of the change in real case-mix. We then determined the nominal case-mix growth from 2000 to 2005 using the regression model-predicted real case-mix change and the total case-mix change for the time period of interest.

In 2000, the average case-mix was 1.0960 and in 2005, the average case-mix was 1.2361. As such, the total measure of case-mix change from 2000 to 2005 was 12.78 percent ((1.2361 − 1.0960)/1.0960 = 0.1278). Using the regression-based predictive model, we identified 8.03 percent of the total case-mix change as real case-mix change from 2000 to 2005, and we adjusted the 12.78 percent of total change in case-mix, downward, by 8.03 percent to get a final nominal case-mix change measure of 11.75 percent (0.1278 * (1 − 0.0803) = 0.1175). To account for the 11.75 percent increase in nominal case-mix, we implemented a payment reduction of 2.75 percent each year for 3 years, beginning in 2008, and we planned to implement a payment reduction of 2.71 in CY 2011.

Since the HH PPS CY 2008 proposed rule, we have continued to monitor case-mix changes in the HH PPS, and in CY 2011 rulemaking we updated our analysis to measure change in real and nominal case-mix. In CY 2011 rulemaking, we developed two regression-based models to assess nominal case-mix growth from 2000 to 2008. One model was developed using 2000 as a base year and the 80 grouper case-mix system. The regression coefficients in the model were applied to 2007 data to determine the change in real case-mix from 2000 to 2007. The second model was developed using 2008 as a base year and the 153 grouper case-mix system. The regression coefficients in the model were applied to 2007 data to determine the change in real case-mix from 2007 to 2008. The data from both of the models were then used to calculate the overall real and nominal case-mix change from 2000 to 2008. Our analysis indicated that there was a 19.40 percent increase in overall case-mix from 2000 to 2008 and 10.07 percent of that overall observed case-mix change was identified as real case-mix change. Consequently, as a result of our analysis, we identified a 17.45 percent nominal increase in case-mix (0.1940 * (1 − 0.1007) = 0.1745) from 2000 to 2008. In other words, there was a growth in case-mix of 17.45 percent that was unrelated to differences in patient characteristics and reflects changes in coding procedures and documentation rather than the treatment of more resource-intensive patients. This 17.45 percent increase was larger than expected. Previously, there was about 1 percent annual case-mix growth from 2000 to 2007. Between 2007 and 2008, we observed a 4 percent overall case-mix growth. As a result of our analysis, in CY 2011, we proposed an increase to the planned 2.71 percent payment reduction in 2011 to a 3.79 percent payment reduction and we proposed another 3.79 percent payment reduction in 2012 to fully account for the 17.45 percent nominal case-mix growth which was identified from 2000 to 2008.

We received many comments on our CY 2011 HH PPS proposed rule that criticized our methodology for assessing real case-mix change. The criticisms from commenters centered on the idea that we underestimated the percentage of case-mix growth that was real. Multiple commenters stated that our model for assessing real case-mix change relies too heavily on hospital discharge data. Commenters stated that we should include more variables which capture the severity of patients entering home health from the community since more than half of Medicare home health patients are admitted to home health from a setting other than a hospital. Also, commenters suggested that the acute care hospital APR–DRG and other prior use variables in our models may not be relevant for patients with more than one home health episode. Another criticism was that our model should consider that there are shorter hospital stays, and therefore, the patients who are discharged from the hospital into home health may have a higher level of severity of illness than the model recognizes. Moreover, commenters stated that all of the HHAs were being penalized for the actions of a few HHAs and that the nominal case-mix change reductions should be limited to certain types of agencies (such as by region or for-profit/non-profit status or by case-mix index [CMI]). Furthermore, one commenter stated that a recent study by Dr. Partha Deb of Hunter College used data from a nationally representative survey (the Medical Expenditures Panel Survey—MEPS) and found that the health status of Medicare beneficiaries worsened, suggesting a possible increase in real case-mix in the Medicare population from 2000 through 2007 (the study by Partha Deb can be found at *http://www.aha.org/aha/content/2010/pdf/100715-CMItrends.pdf*). Commenters inferred that the change in real case-mix was larger than the change we measured for the home health population, and therefore, commenters doubted whether our model accounted for the entire real case-mix change in the home health population. The study by Dr. Deb constructed a case-mix measure from medical expenditures and diagnosis-related data and compared results for 2000 and 2007.

In the CY 2011 HH PPS final rule, we implemented the proposed payment reduction of 3.79 percent to the national standardized episode rate in CY 2011. However, due to the extensive comments we received, we deferred finalizing a payment reduction for CY 2012 until further study of the case-mix data and methodology was completed.

1. Independent Review of the Models To Assess Nominal Case-Mix Growth

To assess the validity of the criticisms we received about our models to measure real and nominal case-mix change, we procured an independent review of our methodology by a team at Harvard University led by Dr. David Grabowski. The review included an examination of the predictive regression models and data used in CY 2011 rulemaking, and further analysis consisting of extensions of the model to allow a closer look at nominal case-mix

growth by categorizing the growth according to provider types and subgroups of patients. The extensions showed a similar rate of nominal case-mix growth from 2000 to 2008 (Table 1A) for the various categories and subgroups. Below, we discuss these results in terms of the criticisms we received.

TABLE 1A—MODELS FOR ASSESSING REAL CASE-MIX CHANGE

| Model | Nominal case-mix percent increase from 2000 to 2008 |
|---|---|
| (ALL) Total Nominal growth using Full Data Set (Replication) | 17.45 |
| (ALL) Full Data Set using MEDIAN ACH LOS (Replication) | 17.38 |
| (ALL) Full Data Set using Q3 ACH LOS (Replication) | 17.47 |
| (1a) Pre-HHA: With IH in prior 14 days | 21.16 |
| (1b) Pre-HHA: With IH in prior 15–120 days | 16.81 |
| (2a) Pre-HHA: Without IH in prior 14 days | 15.85 |
| (2b) Pre-HHA: Without IH in prior 15–120 days | 18.19 |
| (3a) Pre-HHA: With IRF/SNF/LTCH in prior 14 days | 13.90 |
| (3b) Pre-HHA: With IRF/SNF/LTCH in prior 15–120 days | 14.11 |
| (4a) Pre-HHA: Without IRF/SNF/LTCH in prior 14 days | 18.51 |
| (4b) Pre-HHA: Without IRF/SNF/LTCH in prior 15–120 days | 18.33 |
| (5a) Pre-HHA: With IH/IRF/SNF/LTCH in prior 14 days | 18.97 |
| (5b) Pre-HHA: With IH/IRF/SNF/LTCH in prior 15–120 days | 16.74 |
| (6a) Pre-HHA: Without IH/IRF/SNF/LTCH in prior 14 days | 16.95 |
| (6b) Pre-HHA: Without IH/IRF/SNF/LTCH in prior 15–120 days | 18.29 |
| (7a) AGENCY-LEVEL: Owner: Non-Profit | 14.49 |
| (7b) AGENCY-LEVEL: Owner: For-Profit | 18.63 |
| (7c) AGENCY-LEVEL: Owner: Government | 15.22 |
| (8a) AGENCY-LEVEL: Facility-Based HHA | 14.17 |
| (8b) AGENCY-LEVEL: Free-Standing HHA | 17.86 |
| (9a) AGENCY-LEVEL: West Region | 17.51 |
| (9b) AGENCY-LEVEL: Midwest Region | 16.76 |
| (9c) AGENCY-LEVEL: South Region | 18.01 |
| (9d) AGENCY-LEVEL: Northeast Region | 14.81 |
| (10a) AGENCY-LEVEL: Large Agency | 17.21 |
| (10b) AGENCY-LEVEL: Small Agency | 17.53 |
| (11a) AGENCY-LEVEL: Urban HHA | 17.75 |
| (11b) AGENCY-LEVEL: Rural HHA | 15.36 |
| (12a) AGENCY-LEVEL: Treats predominantly post-acute patients | 16.67 |
| (12b) AGENCY-LEVEL: Treats predominantly community patients | 18.87 |
| (13) First Episode Only | 19.06 |

HHA = home health agency; IH = Inpatient hospitalization; IRF = inpatient rehabilitation facility; SNF = skilled nursing facility; LTCH = long-term care hospital, ACH LOS = acute care hospital length of stay.

To address the concern about our current models' robustness when there is no prior inpatient or post-acute care setting (when patients are admitted from the community), the Harvard team re-ran our models for separate subgroups; in most cases, subgroups were defined by the prior hospital and post-acute care use measures present on the data file. Specifically, they defined prior inpatient/post-acute care use in six different ways (shown in lines 1a through 6b of Table 1A): Any hospital use over the past 14 days (yes/no); any post-acute use over the prior 14 days (yes/no); any hospital use over the past 15–120 days (yes/no); any post-acute care use over the past 15–120 days (yes/no); any hospital or post-acute care use in the preceding 14 days (yes/no); and any hospital or post-acute care use in the preceding 15–120 days (yes/no). As another test, the team separated agencies according to whether they treated predominantly post-acute patients or not. To calculate this measure, the Harvard team split agencies above/below the median based on their percentage of home health episodes in 2007 with an inpatient hospital stay in the preceding 14 days.

Across all models, there was evidence of significant and similar nominal case-mix growth, suggesting that high rates of nominal case-mix growth exist regardless of whether there was a preceding inpatient or post-acute stay. Agencies classified as serving predominantly community patients had a slightly higher nominal case-mix percentage increase compared to agencies classified as serving predominately post-acute patients (as shown in lines 12a and 12b in Table 1A). (For a full description of the Harvard team's analysis and results, please see the L&M final report located at *http://www.cms.gov/center/hha.asp*).

Also, to evaluate the validity of the comment that the acute care hospital APR–DRG and other prior use variables in our model may not be relevant for patients with more than one home health episode, the Harvard team re-ran our current predictive models using only the first home health episode for each patient (shown in line 13 of Table 1A). Once again, results based on this first episode were similar to the overall results of our current model, suggesting that the model is relatively stable across home health episodes. The results show that the inclusion of the later episodes does not dramatically alter the primary finding of significant nominal case-mix growth.

To evaluate the comment that our models should take into account the fact that there are shorter hospital stays and therefore, the patients who are discharged from the hospital into home health may have a higher level of severity of illness than the model recognizes, our predictions were calculated assuming there was a different average length of stay than the actual average length of stay found for the LOS predictor variables in the 2007 and 2008 follow-up years. Harvard developed predictions of real and nominal case-mix growth using the

median acute care hospitalization length of stay, instead of the mean length of stay which is used in our current model. The median is lower than the mean acute care hospitalization length of stay. Harvard also developed predictions of real and nominal case-mix growth using the third quartile acute care hospitalization length of stay, which is longer than the mean. The results were very similar to the overall nominal case-mix percentage increase and therefore, the analysis suggests that our methodology is not particularly limited in capturing length of stay effects, because acute care hospitalization length of stay does not play a big role in determining average patient severity.

To evaluate the suggestion that we should limit nominal case-mix change reductions to certain types of agencies (such as by region or for-profit/non-profit status or by CMI), the Harvard team re-ran our model based on ownership type (non-profit, government, for-profit), agency type (facility-based, freestanding), region of the country (Northeast, South, Midwest, West), urban vs. rural status, and agency size (large vs. small; based on the number of initial episodes), shown in lines 7a through 11b in Table 1A. As noted earlier, the team also examined case-mix growth by whether the agency had a particular focus on post-acute vs. community patients. Across all these different categories (ownership, agency type, region, urban vs. rural status, agency size, agency focus), nominal case-mix growth was present. As expected, nominal case-mix growth was larger for some sub-groups. For example, nominal case-mix growth was higher for for-profit agencies (18.63 percent) than non-profit (14.49 percent) and government agencies (15.22 percent); however, these latter ownership types still exhibited high rates of nominal case-mix growth. As such, the Harvard team asserted that similar high rates of nominal case-mix growth exist for all types of HHAs.

To address the comment that a study which used MEPS data showed a higher rate of real case-mix growth in the entire Medicare population than our model estimated for Medicare home health patients, a more detailed analysis of the MEPS data was performed. The trends in health status of four different populations from 2000 to 2008 were analyzed. The data for the analysis were obtained from the MEPS 2000 and 2008 Full Year Consolidated Data files. The four populations that were analyzed were: (1) The full MEPS sample; (2) all Medicare beneficiaries, defined as all respondents ever having Medicare in a given year; (3) all home health patients, defined as having at least one home health provider day in a given year; and (4) all home health Medicare beneficiaries, defined as all respondents with any Medicare home health charges. Two measures of self-reported health status and one measure derived from patient information that screened for activities of daily living (ADL) limitations were used to determine the trends in health status. These types of measures have been shown to be highly correlated with actual health (Ware and Sherbourne, 1992; McHorney, Ware, and Raczek, 1993). The three measures which were analyzed for each of the populations were: (1) Whether the respondent indicated perceived health status of ''poor'' or ''fair'' as opposed to those indicating health status as ''good'', ''very good'', or ''excellent''; (2) whether the respondent indicated if pain limited normal work (including work in the home) in the past 4 weeks ''extremely'' or ''quite a bit'' as opposed to those indicating pain limited work ''moderately'', ''a little bit'', or ''not at all''; and (3) whether respondents had a positive screen for needing assistance with ADL. In all cases, responses such as ''refused'', ''don't know'', or ''not ascertained'' were omitted from the analysis. The Medicare analysis samples consisted of 3,371 and 4,144 beneficiaries in 2000 and 2008, respectively. The Medicare home health subsamples consisted of 174 and 289 beneficiaries in 2000 and 2008, respectively. The survey responses were then weighted using pre-constructed MEPS survey weights to estimate nationally representative changes in the three health status variables.

All three measures indicated a slight increase in the overall health status of the Medicare home health population. Two of these results were not statistically significant, but the percent of home health Medicare beneficiaries experiencing ''extreme'' or ''quite a bit'' of work-limiting pain decreased substantially, from 56.6 percent in 2000 to 45.4 percent in 2008 ($p = 0.039$). Unlike Dr. Deb's original study, the new MEPS analysis focuses specifically on Medicare home health users (as opposed to the entire Medicare population), and it is not reliant on expenditure data. A limitation of the Debs case-mix measure, which relies on expenditure data, is that it could reflect large increases in expenditures, such as drug expenditures, but any relationship to actual increases in impairments and other reasons for using home health resources is unclear. A possible limitation of the new MEPS analysis is that the sample of Medicare home health respondents is relatively small, notwithstanding that the result of one of the three measures was statistically significant. Also, the ADL screening item may not capture a change in the frequency of very severe ADL limitations since the measure may be insensitive to changes at high levels of disability. However, the Harvard team asserted that the methods of the new MEPS analysis are more appropriate for assessing whether there are increases in the severity of illness burden that would specifically indicate a need for more resources in the Medicare home health population. Based on the two kinds of evidence, and a recognition of the limitations of both, we conclude that the MEPS data provide no evidence of an increase in patient severity from 2000 to 2008.

Based on the findings from the extensions of the current model that were tested, including the finding that the two nominal case-mix percentage increases for the post-acute and community patients are similar (Table 1A), and the results of the MEPS analysis which do not provide evidence to suggest that the Medicare home health population has experienced a decrease in their health status over time, the Harvard team concluded that the current model adequately measures real case-mix growth for home health patients, including patients admitted to home health from the community.

When reviewing the model, the Harvard team found that overall, our models are robust. However, one area of potential refinement to our models that the Harvard team suggested was to incorporate variables derived from Hierarchical Condition Categories (HCC) data, which is used by CMS to risk-adjust payments to managed care organizations in the Medicare program. Currently, the HCC model includes 70 HCCs, each of which is defined based on the presence of particular ICD–9–CM codes identified from Medicare claims data (inpatient and outpatient hospital claims and Part B Physician Claims). Some of the HCCs reflect hierarchies among related conditions, but, for unrelated diseases, each HCC is separately defined. The HCC model also includes demographic items related to gender, age, Medicaid enrollment, and whether Medicare eligibility was originally based on disabled status. We have augmented our modeling data with HCC information, as described in the next section.

2. Revised Version of Our Models To Assess Nominal Case-Mix Growth

In the past, we have considered using HCC data to assess real and nominal

case-mix change; however, we have yet to implement a change to our models which would incorporate the HCC data. Based on Dr. Grabowski and his team's recommendation and our previous consideration to incorporate HCC data in our models to assess real case-mix change, we explored the effects of adding the managed care data to our models. To incorporate HCC data into our models, we augmented our analytic files used to measure real case-mix change. We obtained HCC data on all home health users for 2004–2009. There were several different types of HCC variables that could be added to our models to assess real case-mix. Some of the variables we considered are the HCC risk score, binary variables for each of the HCCs, demographic variables, and disease indicators.

In the HCC model used for managed care risk adjustment, each HCC has an associated regression coefficient. Regression coefficients for each beneficiary's HCCs, along with the regression coefficients for their demographic and enrollment characteristics, are summed to calculate predicted expenditures. A risk score for each record can then be calculated based on expected expenditures for the patient divided by the mean expenditures for all patients. The HCC data include several risk score measures, including the HCC community risk score, the institutional risk score, and the risk score for new Medicare enrollees. Because home health patients live in the community, the community risk score seemed more appropriate than the institutional risk score. An alternative to using the HCC risk score was to include binary variables for each of the 70 HCCs, which may better capture a patient's severity. Along with the HCC risk score and the individual HCCs, we considered other elements of the HCC data such as the demographic variables, whether disability was the original reason for Medicare entitlement, and an indicator for whether the individual is a Medicaid beneficiary. Furthermore, we examined interactions involving a number of disease conditions that are included with the HCC data, such as congestive heart failure (CHF), diabetes mellitus (DM), chronic obstructive pulmonary disease (COPD), cardiovascular disease (CVD), renal failure (RF), and coronary artery disease (CAD).

To test the usefulness of these different HCC variables, we developed several models to examine real case-mix and which contained different types of HCC data. We examined models in which we added the HCC community score to our CY 2005 data so that the HCC score was included with the APR–DRG variables in an equation explaining 2005 case-mix weights. We also examined models which incorporated individual HCCs, instead of the HCC risk score. Furthermore, we examined models in which either the HCC risk score or individual HCCs were added to our model along with demographic and disease indicator variables. Moreover, we examined models which did not include APR–DRGs, but rather the HCC risk score or individual HCCs replaced the APR–DRGs in the model. When we replaced the APR–DRGs in the models with the HCC risk score, there was a low R-squared value, lower than any of the other models we examined. When we replaced the APR–DRG variables in our models with the individual HCC indicators, we observed a negative change in real case-mix. This negative change in real case-mix would indicate that the health status of the Medicare home health population has improved over time and that all of the change in case-mix from 2000–2009 would be nominal case-mix change. As a result of the findings from the various models, we decided to augment our current model with the HCC variables rather than replace our APR–DRG variables with HCC variables.

It should be noted that in addition to examining which HCC variables we should include in our models, we also examined which year of HCC data we should use in our models. There is a 1 year look-back period with HCC data in that the HCC data are based on the previous calendar year's claims history for an individual. Therefore, when developing our models, we assessed whether we should use HCC data from the previous year or HCC data in the same year as when the home health episode occurred (the home health episode is the unit of observation in our models). Our concern was that if we used HCC data in the same year as the episode, the HCC data may partially reflect diseases and conditions identified after a home health episode. However, we decided to use HCC data in the same year as the episode since we thought it best reflected the health status of the patients in that year.

For this year's analysis, we used a similar approach to our previous methods. The basic method is to estimate a prediction model and use coefficients from that model along with predictor variables from a different year to predict the average case-mix for that year. It should be noted that we chose to enhance our models with HCC data starting in 2005 due to the availability of HCC data in our analytic files. Therefore, we analyzed real case-mix change for three different periods, from 2000 to 2005, from 2005 to 2007, and from 2007 to 2009. The real case-mix change in the period from 2005 to 2007 and the period from 2007 to 2009 were assessed using enhanced models, which included HCC data. The real case-mix change from 2000 to 2005 was assessed using the same variables used in the model described in last year's regulation (75 FR 43238), a variable list consisting of measures of patients' demographic characteristics, clinical status, inpatient history, and Part A Medicare costs in the time period leading up to their home health episodes. The regression coefficients from the model without HCC variables were applied to episodes from 2005, allowing us to estimate how much of the change in observed case-mix was attributable to changes in patient characteristics between the IPS period and 2005.

We added HCC variables for the 2005 to 2007 period, estimating the model using data from 2005. The enhanced model includes HCC community scores, HCC demographic variables, and disease indicator variables for 2005 and later. We chose this version of the HCC-enhanced case-mix change model largely based on its ability to predict higher real case-mix change relative to the other HCC enhanced models. We applied the regression coefficients to means from 2007, allowing estimation of real case-mix change between 2005 and 2007.

For the 2007 to 2009 period, we used the 153 HHRG case-mix weights and data from 2009 to estimate the same set of models as we did for 2005. Using the backwards prediction method that we used in CY 2011 rulemaking, the coefficients from this model were developed using 2009 data and were applied to episodes from 2007. This procedure allows us to estimate how much of the 2007 through 2009 change (based on the HHRG153 case-mix for both periods) was associated with changes in patient characteristics between 2007 and 2009.

From 2000 to 2009, we identified a total change in case-mix of 0.2476 ($1.3435 - 1.0959 = 0.2476$), which results in a case-mix growth of 22.59 percent ($(1.3435 - 1.0959)/1.0959 = 0.2259$). We then estimated the real and nominal change in case-mix for each of the three periods. The change in real case-mix from 2000 to 2005 was 0.0207 case-mix units. The change in real case-mix from 2005 to 2007 was 0.0061 case-mix units. The change in real case-mix from 2007 to 2009 was 0.0122 case-mix units. After adding together the estimated real case-mix change in case-mix units for the three periods, the total

estimated change in real case-mix from 2000 to 2009 was 0.0390 (0.0207 + 0.0061 + 0.0122 = 0.0390). Therefore, we estimate that 15.76 percent of the total percentage change in the national average case-mix weight since the IPS baseline through 2009 is due to change in real case-mix (0.0390/0.2476 = ~0.1576). It should be noted that due to rounding, there is a 0.01 percentage point difference between the calculated and actual value. When taking into account the total measure of case-mix change (22.59 percent) and the 15.76 percent of total case-mix change estimated as real from 2000 to 2009, we obtained a final nominal case-mix change measure of 19.03 percent from 2000 to 2009 (0.2259 * (1 − 0.1576) = 0.1903). Please see Table 1B for additional information about the calculations used to make the real and nominal case-mix change estimates from 2000 to 2009.

Our estimates of real and nominal case-mix change are consistent with past results. Most of the case-mix change has been due to improved coding, coding practice changes, and other behavioral responses to the prospective payment system, such as increased use of high therapy treatment plans.

TABLE 1B—SUMMARY OF REAL AND NOMINAL CASE-MIX CHANGE ESTIMATES: 2000–2009

| Measure | Model |
|---|---|
| Actual case-mix: 2000 | 1.0959 |
| Actual case-mix: 2009 | 1.3435 |
| Total change in case-mix | 0.2476 |
| Total percentage change | 22.59% |
| Estimated real change in case-mix | 0.0390 |
| Percent of total change estimated as real | 15.76% |
| Percent of total change estimated as nominal (creep) | 84.24% |
| Real case-mix percent increase | 3.56% |
| Nominal case-mix percent increase | 19.03% |

As we described earlier in this proposed rule, our CY 2008 HH PPS final rule finalized a reduction over 4 years in the national standardized 60-day episode payment rates to account for a large increase in case-mix from 2000 to 2005 which we determined was not related to treatment of more intense patients. We implemented a 2.75 percent reduction each year for 2008, 2009, and 2010 and planned to reduce payments by 2.71 percent in 2011. In CY 2011 rulemaking, we updated our analysis of nominal case-mix growth through 2008 and determined that there was 17.45 percent nominal case-mix growth from 2000 to 2008. Therefore, we proposed and finalized an increase in the planned 2.71 percent reduction to 3.79 percent for CY 2011. Also, in the CY 2011 proposed rule, we stated that if we were to identify further increases in nominal case-mix as more current data becomes available, it would be our intent to account fully for those increases when they are identified, rather than continuing to phase in the reductions over more than 1 year. For the CY 2012 proposed rule, after updating our models to incorporate HCC data, we have determined that there was a 19.03 percent nominal case-mix change from 2000 to 2009. To account for the remainder of the 19.03 percent residual increase in nominal case-mix beyond that which has been accounted for in previous payment reductions, we estimate that the percentage reduction to the national standardized 60-day episode rates for nominal case-mix change for CY 2012 will be 5.06 percent. Therefore, for CY 2012, we propose to implement a 5.06 percent payment reduction to the national standardized 60-day episode rates to fully account for growth in nominal case-mix from the inception of HH PPS through 2009.

*B. Case-Mix Revision to the Case-Mix Weights*

1. Hypertension Diagnosis Coding Under the HH PPS

In CY 2011 rulemaking, we proposed to remove ICD–9–CM code 401.1, Benign Essential Hypertension, and ICD–9–CM code 401.9, Unspecified Essential Hypertension, from the HH PPS case-mix model's hypertension group. Beginning with the HH PPS refinements in 2008, hypertension was included in the HH PPS system because data suggested it was associated with elevated resource use. As a result, the diagnoses Unspecified Essential Hypertension and Benign Essential Hypertension were associated with additional points from the four-equation model and subsequently, potentially higher case-mix weights in the HH PPS case-mix system. When examining the trends in reporting of hypertension codes from 2000 to 2008, our analysis showed a large increase in the reporting of codes 401.1 and 401.9 in 2008. However, when looking at 2008 claims data, the average number of visits for claims with code 401.9 was slightly lower than the average for claims not reporting these hypertension codes. In last year's proposed rule, we proposed to remove codes 401.1 and 401.9 from our case-mix model based on preliminary analysis of the trends in coding and resource use of patients with these codes. We suspected that the 2008 refinements, which newly awarded points for the diagnosis codes 401.1 and 401.9, led to an increase in reporting of these codes and that this reporting was a key driver of the high 2008 growth in nominal case-mix. In response to this proposed policy change, we received numerous comments, many of which stated that additional analysis was needed to substantiate the rationale for removing hypertension codes 401.1 and 401.9. In the CY 2011 HH PPS final rule, we withdrew our proposal to eliminate 401.1 and 401.9 from our model and described our plans to do a more comprehensive analysis of the resource use of patients with these two hypertension codes. We have since completed a more thorough analysis. Based on the results of our latest analyses, we propose to remove codes 401.1 and 401.9 from the HH PPS case-mix system.

We performed several analyses of the resource use and prevalence of patients with Benign Essential Hypertension and Unspecified Essential Hypertension (codes 401.1 and 401.9) to assess the appropriateness of these codes in our case-mix model. We looked at the HH PPS episode data using two samples to more accurately assess the trends in hypertension prevalence over time. In one sample, we excluded episodes from providers in areas exhibiting suspect billing practices. For the other sample, we excluded outlier episodes. In all of the analyses that follow, we report the results from the sample that excludes outliers because results from the alternate analysis were highly similar. Also, the sample that excludes outliers is more appropriate than one that includes outliers because our case-mix research has been conducted on samples without outliers.

One of our analyses looked at the prevalence of various hypertension codes over time. We compared the change in prevalence of 401.1 and 401.9 diagnoses to the prevalence of other diagnoses in the hypertension group—401.0 (malignant essential hypertension), 402 (hypertensive heart disease), 403 (hypertensive chronic kidney disease), 404 (hypertensive heart and chronic kidney disease), and 405 (secondary hypertension)—from 2005 to 2009 (Table 2). Our analysis shows that the prevalence of episodes with a 401.9 diagnosis continued to increase in 2009, from 50.58 percent of episodes in 2008 to 55.52 percent in 2009, and more than doubled between 2005 and 2009. The prevalence of episodes with a 401.1 diagnosis decreased from 2008 to 2009 but the prevalence remained slightly higher than the prevalence in 2005.

TABLE 2—PREVALENCE OF HYPERTENSION—2005–2009

[In percent]

| Diagnosis | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|
| Any hypertension | 33.32 | 40.22 | 46.26 | 60.37 | 65.65 |
| 401.0 Malignant essential hypertension | 0.56 | 0.54 | 0.53 | 0.56 | 0.47 |
| 401.1 Benign essential hypertension | 2.89 | 3.36 | 3.44 | 3.79 | 2.95 |
| 401.9 Essential hypertension, unspecified | 27.23 | 33.22 | 38.74 | 50.58 | 55.52 |
| 402 Hypertensive heart disease | 2.19 | 2.38 | 2.49 | 2.99 | 2.76 |
| 403 Hypertensive renal disease | 0.31 | 0.56 | 0.92 | 2.24 | 3.66 |
| 404 Hypertensive heart and renal disease | 0.14 | 0.17 | 0.20 | 0.31 | 0.39 |
| 405 Secondary hypertension | 0.04 | 0.04 | 0.03 | 0.03 | 0.04 |

Outlier episodes are excluded.
Source: Abt Associates analysis of 20 percent sample of Home Health Datalink file for 2005–2009.

We also examined the prevalence of hypertension coding by various agency characteristics, such as agency type, region, and provider size, in 2005 versus 2009 (Tables 3 and 4). We compared the 2005 data (Table 3) to more current data (Table 4) because the 2005 data were used to simulate the 2008 refinements for the CY 2008 HH PPS final rule implementing the 153-group case-mix system (72 FR 49762 through 49945). Based on our analysis, except for government-owned agencies and agencies in a few regions, agencies (regardless of type) had a similar prevalence of episodes with a 401.9 diagnosis across the board in 2009 (Table 4). Also, agencies had a relatively similar prevalence of episodes with a 401.1 diagnosis across the board in 2009, except for West South Central, which had a high prevalence of 6.68 percent (Table 4)—about 9 times the region's prevalence in 2005. In addition, small facilities with less than 19 home health episodes in a year in the 20 percent sample of the Home Health Datalink file had a high prevalence of diagnosis 401.1; 8.30 percent of their episodes had a 401.1 diagnosis. All categories of agencies appear to have a significant increase in the reporting of a 401.9 diagnosis when comparing 2005 HH PPS claims and OASIS data to 2009 HH PPS claims and OASIS data. The reporting of a 401.9 diagnosis in 2009 was typically 1.8 to 2.1 times the reporting of a 401.9 diagnosis in 2005, with the exception of the East North and the West North Central regions which had an increase of around 1.7 and 1.5 fold respectively. Also, it should be noted that the Mid-Atlantic region had around a 2.4 fold increase in the reporting of a 401.9 diagnosis between 2005 and 2009 and the West South Central region had almost a threefold increase in the reporting of a 401.9 diagnosis between 2005 and 2009. Furthermore, many categories had an increase in the reporting of a 401.1 diagnosis when comparing 2005 data to 2009.

TABLE 3—PREVALENCE OF HYPERTENSION BY VARIOUS AGENCY CHARACTERISTICS—2005

[In percent]

| | Any | 401.0 | 401.1 | 401.9 | 402 | 403 | 404 | 405 |
|---|---|---|---|---|---|---|---|---|
| All Agencies | 33.59 | 0.56 | 2.96 | 27.34 | 2.26 | 0.32 | 0.15 | 0.04 |
| **Type of Facility** | | | | | | | | |
| Free-Standing/Other Vol/NP | 27.50 | 0.21 | 0.63 | 25.49 | 0.83 | 0.30 | 0.06 | 0.01 |
| Free-Standing/Other Prop | 39.35 | 0.86 | 4.86 | 29.63 | 3.48 | 0.30 | 0.19 | 0.06 |
| Free-Standing/Other Govt | 29.01 | 0.41 | 1.35 | 25.36 | 1.51 | 0.22 | 0.17 | 0.04 |
| Hospital-Based Vol/NP | 25.11 | 0.17 | 0.68 | 23.33 | 0.51 | 0.35 | 0.09 | 0.01 |
| Hospital-Based Prop | 29.79 | 0.30 | 0.68 | 27.50 | 0.83 | 0.37 | 0.16 | 0.01 |
| Agency-Based Govt | 30.94 | 0.80 | 3.04 | 24.46 | 1.92 | 0.53 | 0.23 | 0.02 |
| **Facility Location** | | | | | | | | |
| New England | 39.36 | 1.06 | 5.25 | 27.83 | 4.63 | 0.37 | 0.30 | 0.01 |
| Mid Atlantic | 26.09 | 0.22 | 0.81 | 23.79 | 0.65 | 0.24 | 0.09 | 0.01 |
| South Atlantic | 36.87 | 0.81 | 5.93 | 27.41 | 2.21 | 0.30 | 0.14 | 0.09 |
| East South Central | 31.97 | 0.42 | 0.90 | 29.15 | 1.26 | 0.24 | 0.07 | 0.01 |
| West South Central | 21.15 | 0.25 | 0.74 | 19.57 | 0.32 | 0.19 | 0.09 | 0.01 |
| East North Central | 36.54 | 0.20 | 0.62 | 34.59 | 0.47 | 0.62 | 0.06 | 0.02 |
| West North Central | 37.81 | 0.56 | 1.46 | 32.10 | 3.17 | 0.35 | 0.21 | 0.01 |
| Mountain | 29.95 | 0.45 | 1.58 | 24.74 | 2.70 | 0.35 | 0.16 | 0.03 |
| Pacific | 25.33 | 0.32 | 1.81 | 22.17 | 0.76 | 0.21 | 0.07 | 0.02 |
| Other | 36.33 | 0.46 | 2.46 | 28.89 | 4.30 | 0.16 | 0.12 | 0.01 |
| **Facility Size** | | | | | | | | |
| < 19 episodes | 36.71 | 0.79 | 3.86 | 28.75 | 2.53 | 0.52 | 0.19 | 0.10 |
| 20 to 49 | 36.11 | 0.74 | 4.42 | 27.39 | 2.98 | 0.38 | 0.17 | 0.04 |
| 50 to 99 | 35.98 | 0.80 | 4.06 | 27.97 | 2.73 | 0.31 | 0.11 | 0.02 |
| 100 to 199 | 36.78 | 0.73 | 4.11 | 28.60 | 2.81 | 0.33 | 0.16 | 0.07 |

TABLE 3—PREVALENCE OF HYPERTENSION BY VARIOUS AGENCY CHARACTERISTICS—2005—Continued

[In percent]

| | Any | 401.0 | 401.1 | 401.9 | 402 | 403 | 404 | 405 |
|---|---|---|---|---|---|---|---|---|
| 200+ | 32.86 | 0.53 | 2.72 | 27.06 | 2.09 | 0.31 | 0.14 | 0.03 |

Outlier episodes are excluded.
Source: Abt Associates analysis of 20 percent sample of Home Health Datalink file.

TABLE 4—PREVALENCE OF HYPERTENSION BY VARIOUS AGENCY CHARACTERISTICS—2009

[In percent]

| | Any | 401.0 | 401.1 | 401.9 | 402 | 403 | 404 | 405 |
|---|---|---|---|---|---|---|---|---|
| All Agencies | 65.95 | 0.48 | 3.17 | 55.36 | 3.00 | 3.64 | 0.40 | 0.04 |
| **Type of Facility** | | | | | | | | |
| Free-Standing/Other Vol/NP | 60.11 | 0.17 | 0.94 | 53.06 | 0.71 | 5.05 | 0.24 | 0.01 |
| Free-Standing/Other Prop | 69.42 | 0.62 | 3.86 | 57.81 | 3.74 | 3.07 | 0.44 | 0.05 |
| Free-Standing/Other Govt | 54.60 | 0.45 | 3.13 | 44.98 | 2.00 | 3.41 | 0.72 | 0.02 |
| Hospital-Based Vol/NP | 56.82 | 0.16 | 1.22 | 49.49 | 0.78 | 4.93 | 0.32 | 0.02 |
| Hospital-Based Prop | 61.41 | 0.21 | 1.45 | 54.61 | 1.83 | 3.31 | 0.16 | 0.01 |
| Agency-Based Govt | 54.89 | 0.48 | 2.29 | 46.53 | 1.68 | 3.57 | 0.48 | 0.03 |
| **Facility Location** | | | | | | | | |
| New England | 58.71 | 0.10 | 0.54 | 53.96 | 0.43 | 3.50 | 0.23 | 0.02 |
| Mid Atlantic | 62.45 | 0.12 | 0.65 | 56.04 | 0.58 | 4.98 | 0.16 | 0.01 |
| South Atlantic | 64.09 | 0.28 | 1.74 | 56.80 | 1.49 | 3.46 | 0.31 | 0.08 |
| East South Central | 69.52 | 0.22 | 2.13 | 59.69 | 3.27 | 3.73 | 0.61 | 0.01 |
| West South Central | 73.22 | 0.92 | 6.68 | 57.28 | 4.47 | 3.53 | 0.50 | 0.05 |
| East North Central | 67.01 | 0.52 | 2.16 | 57.42 | 3.04 | 3.68 | 0.34 | 0.02 |
| West North Central | 55.97 | 0.46 | 1.84 | 48.00 | 1.12 | 4.15 | 0.46 | 0.06 |
| Mountain | 56.02 | 0.52 | 2.21 | 49.13 | 1.29 | 2.51 | 0.32 | 0.10 |
| Pacific | 57.42 | 0.52 | 3.00 | 45.06 | 5.50 | 3.02 | 0.51 | 0.03 |
| Other | 63.20 | 0.33 | 1.58 | 55.53 | 1.52 | 4.00 | 0.35 | 0.00 |
| **Facility Size** | | | | | | | | |
| < 19 episodes | 71.19 | 1.77 | 8.30 | 51.27 | 7.35 | 2.01 | 0.71 | 0.08 |
| 20 to 49 | 68.39 | 1.35 | 6.13 | 53.07 | 5.63 | 2.04 | 0.44 | 0.04 |
| 50 to 99 | 67.67 | 0.66 | 4.27 | 54.27 | 5.26 | 2.82 | 0.52 | 0.07 |
| 100 to 199 | 65.99 | 0.52 | 4.03 | 54.90 | 3.12 | 3.07 | 0.41 | 0.08 |
| 200+ | 64.37 | 0.21 | 1.52 | 56.61 | 1.38 | 4.38 | 0.33 | 0.02 |

Outlier episodes are excluded.
Source: Abt Associates analysis of 20 percent sample of Home Health Datalink file.

In last year's final regulation, we received a comment stating that a multivariate analysis of the costliness of hypertension is advisable to strengthen the evidence for the proposal to eliminate the 401.1 and 401.9 diagnoses from the case-mix model. In response to this comment, we estimated a set of multivariate regression models to examine the resources associated with the 401.1 and 401.9 diagnoses while adjusting for other factors in the case-mix system (Tables 5 and 6). The multivariate regression models used 2008 HH PPS claims and OASIS data which excluded PEP, LUPA, and outlier episodes. Model 1 included variables for the number of therapy visits, the clinical score, the functional score, and indicators for whether a 401.1 or 401.9 diagnosis was present. In this model, both the 401.1 and 401.9 diagnoses were associated with significantly lower costs ($-19$ and $-18$ resource units, respectively). This model indicates that an episode with a 401.1 or 401.9 code has less resource costs than an episode without a 401.1 or 401.9 code, when the amount of therapy, clinical score, and functional score are held constant. Model 2 included variables for the payment weight and the 401.1 and 401.9 indicators. In this model, both 401.1 and 401.9 were associated with lower costs and these impacts were statistically significant. The diagnosis code 401.1 was associated with significantly lower costs ($-22$ resource units) while the 401.9 indicator was associated with about $-2$ resource units. This model most accurately shows the impact of codes 401.1 and 401.9 on resource use within the payment system, because it directly controls for the payment weight, which represents in a summary variable all the other conditions paid for in the case-mix algorithm. Both models provide strong evidence for removing the 401.1 diagnosis from the case-mix model, since it is associated with significantly lower resource costs. The models also provide strong evidence for removing the 401.9 diagnosis, since they do not indicate that this condition is responsible for additional resource costs beyond what is already accounted for in the case-mix model.

In addition, it should be noted that when we estimated the multivariate regression models when excluding episodes from providers in areas exhibiting suspect billing practices, ICD–9–CM diagnosis code 401.9 was associated with slightly lower costs and ICD–9–CM diagnosis code 401.1 was associated with a slight increase in

resource costs (about +3 resource units). However, we believe that relying on analyses that include outliers, as this sample does, is problematic. In 2008 and 2009, outliers reached a historically high rate per 100 episodes in home health, and the abuse of the PPS outlier policy was subsequently recognized as a significant problem. In a 10 percent random beneficiary sample, there is a strong association between the reporting of code 401.1 and outliers, and this association could be contributing to the higher resource costs for episodes with the 401.1 code in the regression that excludes episodes from suspect areas. Although it is not certain whether the use of this code in outlier cases is related to abusive outlier utilization, we are cautious about relying on data that include outliers. In addition, even absent any concerns about suspect billing practices, the increase in resource costs associated with a 401.1 diagnosis is not large enough to warrant awarding additional points in our case-mix system for the diagnosis.

TABLE 5—REGRESSION RESULTS: RESOURCES ASSOCIATED WITH A 401.1 OR 401.9 DIAGNOSIS: MODEL 1 (2008)

| Variable | Parameter estimate | Standard error | T value | Pr > \|t\| |
|---|---|---|---|---|
| Intercept | 171.1183 | 0.74992 | 228.18 | < .0001 |
| Number of therapy visits | 34.72435 | 0.0371 | 936.03 | < .0001 |
| Clinical score | 8.7105 | 0.03774 | 230.8 | < .0001 |
| Functional score | 8.63246 | 0.08876 | 97.26 | < .0001 |
| ICD9 401.1 present | −18.72875 | 1.38201 | −13.55 | < .0001 |
| ICD9 401.9 present | −18.19412 | 0.53904 | −33.75 | < .0001 |

PEP, LUPA and outlier episodes are excluded.
Source: Abt Associates analysis of 20 percent sample of Home Health Datalink file for 2008.

TABLE 6—REGRESSION RESULTS: RESOURCES ASSOCIATED WITH A 401.1 OR 401.9 DIAGNOSIS: MODEL 2 (2008)

| Variable | Parameter estimate | Standard error | T value | Pr > \|t\| |
|---|---|---|---|---|
| Intercept | −35.5089 | 0.68637 | −51.73 | < .0001 |
| Payment weight | 530.9656 | 0.51853 | 1023.98 | < .0001 |
| ICD9 401.1 present | −21.96335 | 1.43741 | −15.28 | < .0001 |
| ICD9 401.9 present | −1.73284 | 0.55998 | −3.09 | 0.002 |

PEP, LUPA and outlier episodes are excluded.
Source: Abt Associates analysis of 20 percent sample of Home Health Datalink file for 2008.

We also examined whether there were any subsets of patients with a 401.1 or 401.9 diagnosis who had higher resource costs. Potentially such information could lead to adding interaction variables involving the two hypertension diagnoses to the case-mix model. The model currently includes several interactions (for example, gastrointestinal disorders and ostomy). There was speculation that patients who required respiratory treatments may have higher than expected resource costs in the presence of either of the two hypertension codes—for example, patients who are smokers. We therefore examined the resource costs for patients with a 401.1 or a 401.9 diagnosis and different types of respiratory treatments (Tables 7 and 8). The results showed that there was a decrease in resource costs for episodes with patients with a 401.1 diagnosis and who received respiratory treatments (Table 7). In addition, it can be noted that there was a decrease in resource costs for episodes with patients with a 401.1 diagnosis and no respiratory treatment. Table 8 shows that there was a decrease in average cost for episodes with patients with a 401.9 diagnosis and who were on oxygen or receiving continuous positive airway treatment. There was also an increase in resource costs for episodes with 401.9 compared to those without 401.9 for patients on ventilators. However, this increase in resource costs associated with the presence of a 401.9 diagnosis is not statistically significant. Overall, the results from Tables 7 and 8 show that there is little support for keeping 401.1 and 401.9 codes for patients receiving respiratory treatments.

TABLE 7—RESOURCE COSTS FOR PATIENTS WITH A 401.1 DIAGNOSIS AND RESPIRATORY TREATMENT (2008)

| | 401.1 Present | | Difference | % Difference |
|---|---|---|---|---|
| | No | Yes | | |
| Oxygen | $575.79 | $567.52 | ($8.27) | −1.44 |
| Ventilator | 662.71 | 612.24 | (50.47) | −7.62 |
| Continuous positive airway pressure | 587.05 | 530.93 | (56.12) | −9.56 |
| None | 567.88 | 554.61 | (13.27) | −2.34 |

Outliers are excluded.
Source: Abt Associates analysis of 20 percent sample of Home Health Datalink file for 2008.

TABLE 8—RESOURCE COSTS FOR PATIENTS WITH A 401.9 DIAGNOSIS AND RESPIRATORY TREATMENT (2008)

| | 401.9 Present | | Difference | % Difference |
|---|---|---|---|---|
| | No | Yes | | |
| Oxygen | $581.66 | $568.46 | (13.20) | −2.27 |
| Ventilator | 648.94 | 683.77 | 34.83 | 5.37 |
| Continuous positive airway pressure | 599.69 | 572.08 | (27.61) | −4.60 |
| None | 568.42 | 566.75 | (1.67) | −0.29 |

Outliers are excluded.
Source: Abt Associates analysis of 20 percent sample of Home Health Datalink file for 2008.

We also looked at the average resource cost of episodes for patients categorized by primary diagnosis, with and without a 401.9 diagnosis code, to determine whether there are other sub-categories of patients diagnosed with 401.9 who are more resource intensive (Table 9). Many primary diagnoses had a lower average cost when code 401.9 was present. Heart disease was among the primary diagnoses in which the average resource cost for episodes with a 401.9 diagnosis was less than the average cost without a 401.9 diagnosis. For six primary diagnoses, there was an increase in resource cost when a 401.9 diagnosis was present. However, the increases in resource costs for four of the six diagnoses were not statistically significant. It should be noted that while there was a large increase in resource costs for patients with blindness/low vision when a 401.9 diagnosis was present, the results were not statistically significant. There are few patients with a primary diagnosis of blindness/low vision. The two diagnoses which resulted in a significant increase in resource cost when a 401.9 diagnosis was present were stroke and gait abnormality (Table 9).

When further examining the data, we questioned the hypertension coding for the episodes with stroke as a primary diagnosis. For the 28,923 episodes with a primary diagnosis of stroke, only 18,063 episodes had a 401.9 diagnosis present. Furthermore, of those 28,923 episodes, only 71 percent of the episodes had a hypertension diagnosis. Because stroke is so strongly associated with hypertension, we would expect more episodes with a primary diagnosis of stroke to also have a hypertension diagnosis. Therefore, we believe that the data in the table corresponding to the episodes with stroke as a primary diagnosis is affected by incomplete coding. Also, if stroke almost always should be listed followed by hypertension, there would be no reason for an interaction term in the model involving stroke and hypertension. An interaction in the model—identifying a subset of patients with a condition who have another condition that changes the patient's resource cost utilization—cannot apply in this case.

TABLE 9—TOTAL RESOURCE COSTS BY PRIMARY DIAGNOSIS AND WHETHER 401.9 IS PRESENT (2008)

| Primary diagnosis | N | N with 401.9 present | 401.9 not present | 401.9 present | Difference | % Difference |
|---|---|---|---|---|---|---|
| Blindness/low vision | 392 | 213 | $392.95 | $415.11 | $22.16 | 5.64 |
| Stroke | 28,923 | 18,063 | 742.54 | 768.66 | 26.12 | 3.52 |
| Gait Abnormality | 22,946 | 11,567 | 641.28 | 656.97 | 15.69 | 2.45 |
| Hypertension | 13,446 | 202 | 406.91 | 414.20 | 7.29 | 1.79 |
| Neurological | 14,869 | 6,583 | 622.88 | 628.27 | 5.39 | 0.86 |
| Blood disorders | 14,985 | 7,264 | 367.44 | 369.81 | 2.37 | 0.65 |
| Orthopedic | 33,468 | 17,757 | 529.46 | 529.46 | 0.00 | 0.00 |
| Cystostomy Care | 2,469 | 915 | 436.92 | 433.80 | (3.12) | −0.71 |
| Cancer | 20,885 | 9,298 | 459.59 | 452.73 | (6.86) | −1.49 |
| Diabetes | 96,018 | 54,461 | 462.55 | 450.32 | (12.23) | −2.64 |
| Gastrointestinal | 14,496 | 7,170 | 457.55 | 445.29 | (12.26) | −2.68 |
| Traumatic wounds | 27,855 | 13,849 | 554.73 | 539.44 | (15.29) | −2.76 |
| Heart disease | 68,297 | 36,040 | 484.49 | 469.11 | (15.37) | −3.17 |
| MS | 4,206 | 1,329 | 651.37 | 620.30 | (31.07) | −4.77 |
| Dysphagia | 1,430 | 595 | 651.95 | 598.26 | (53.69) | −8.24 |
| Tracheostomy | 414 | 176 | 598.77 | 508.91 | (89.86) | −15.01 |

Outlier episodes are excluded.
Source: Abt Associates analysis of 20% sample of Home Health Datalink file for 2008.

To further investigate the increase in average resource cost when 401.9 was present in patients with gait abnormality, we looked at average resources and average visits for joint replacement patients, which are patient groups strongly associated with a diagnosis of gait abnormality. We chose to look at patients with joint, hip, and knee replacements since they would be the sorts of patients in home health that would have a skilled need as a result of gait abnormality and they would typically have high therapy and resource costs. We also examined the subgroups of these patients who were reported on the OASIS to have a diagnosis of gait abnormality (Table 10). For patients with joint, hip, and knee replacements that had a 401.9 diagnosis, resource costs and visits differed little compared to such patients who did not have the 401.9 diagnosis. None of the differences were statistically significant. In addition, we saw that for the episodes with gait abnormality as a primary diagnosis, there were no statistically significant differences between the resource costs or number of visits for joint, hip, and knee replacement patients when a 401.9 diagnosis was present. These results indicate that there is no significant difference in resource

cost for patients with joint replacements when a 401.9 diagnosis is present.

It should also be noted that when examining the increase in average resources for episodes with patients with a primary diagnosis of stroke or gait abnormality when a 401.9 diagnosis is present, we could not determine whether the increase in resource cost was due to the 401.9 diagnosis or due to a third confounding variable. As described earlier, we estimated a set of multivariate regression models to determine the relationship between a 401.9 diagnosis and resource cost, when controlling for other variables in the case-mix model.

TABLE 10—TOTAL RESOURCE COSTS AND VISITS BY TYPE OF JOINT REPLACEMENT AND WHETHER 401.9 IS PRESENT FOR ALL PATIENTS WITH JOINT REPLACEMENTS AND THE SUBSET OF PATIENTS WITH GAIT ABNORMALITY (2008)

| Diagnosis | N | Costs | | | | Visits | | | |
|---|---|---|---|---|---|---|---|---|---|
| | | 401.9 not present | 401.9 present | Difference | % Difference | 401.9 not present | 401.9 present | Difference | % Difference |
| Joint replacement | 45,689 | $566.41 | $559.88 | ($6.53) | −1.15% | 15.71 | 15.86 | 0.15 | 0.95 |
| Hip replacement | 13,658 | 563.95 | 564.50 | 0.55 | 0.10 | 16.37 | 16.43 | 0.06 | 0.37 |
| Knee replacement | 21,580 | 542.12 | 539.63 | (2.49) | −0.46 | 14.9 | 15.04 | 0.14 | 0.94 |
| **Episodes with gait abnormality as primary diagnosis** | | | | | | | | | |
| Joint replacement | 632 | 553.68 | 562.41 | 8.73 | 1.58 | 15.58 | 16.23 | 0.65 | 4.17 |
| Hip replacement | 315 | 587.44 | 609.34 | 21.90 | 3.73 | 16.83 | 17.99 | 1.16 | 6.89 |
| Knee replacement | 382 | 554.78 | 529.23 | (25.55) | −4.61 | 14.98 | 14.57 | (0.41) | −2.74 |

Outlier episodes are excluded.
Source: Abt Associates' analysis of 20 percent sample of Home Health Datalink file for 2008.

Some of our analysis was performed to further investigate issues raised in comments we received on last year's proposed rule. In response to last year's rule, one commenter stated that we should keep the diagnosis code 401.9 in the case-mix system, stating that very often clinically complex patients, such as hypertensive heart disease patients, will be diagnosed with this code while waiting for proper documentation that is required by ICD–9–CM to report a more specific diagnosis code. To investigate the extent to which a 401.9 diagnosis might be coded on an initial assessment while waiting for necessary documentation for other hypertension codes, we looked at the hypertension prevalence for start-of-care episodes (defined as those with segment number equal to one) and recertification episodes (defined as those with segment number greater than one) for various subgroups of related episodes (Table 11). Related episodes are episodes without a gap of more than 60 days in between them. In past rulemaking, we have referred to these as episodes as part of a sequence of adjacent episodes. In those rules, we defined episodes as adjacent if they were separated by no more than a 60-day period between episodes. Some of the subgroups we examined in our analysis were ones in which: (1) The initial episode had a 401.9 code; (2) the 2nd episode in a sequence of adjacent episodes had a 402, 403, 404, or 405 code; (3) codes 402, 403, 404, and 405 were not present on the initial episode, but were present on the second episode in the sequence of adjacent episodes. Table 11 shows that, of the sequence of adjacent episodes where a 401.9 code is reported on the initial episode, very few subsequent episodes had a diagnosis of 402, 403, 404, or 405, and most subsequent episodes continued to have a 401.9 diagnosis. Also, for those sequences of adjacent episodes where a 402, 403, 404, or 405 code exists on the second episode, many (over 60 percent) had the same code reported for the initial episode. For patients that had a 402, 403, 404, or 405 diagnosis on their second episode but not their initial episode, many had a 401.9 diagnosis on their initial episode. However, there were only a small number of episodes with this pattern and it is not clear if this pattern is related to the comment about coding 401.9 while waiting for documentation or if this occurs due to the random fluctuation in hypertension coding patterns. In summary, the results of this analysis do not provide support for keeping 401.9 as a diagnosis in the case-mix model based on the reason that it is used as a placeholder while waiting for documentation to support another ICD–9–CM hypertension code.

TABLE 11—HYPERTENSION PREVALENCE BY SEGMENT AND TYPE OF HYPERTENSION REPORTED ON SEGMENT 1 OR SEGMENT 2 (2009)

| Diagnosis | N | 401.9 (%) | 401.1 (%) | 402 (%) | 403 (%) | 404 (%) | 405 (%) |
|---|---|---|---|---|---|---|---|
| **401.1 Benign Essential hypertension, unspecified (segment 1)** | | | | | | | |
| Segment 1 | 10,859 | 0.04 | 100.00 | 0.19 | 0.12 | 0.06 | 0.00 |
| Segment 2 | 3,463 | 12.21 | 75.69 | 1.70 | 0.78 | 0.20 | 0.03 |
| Segment 3 | 1,734 | 17.42 | 68.86 | 2.42 | 0.69 | 0.23 | 0.06 |
| Segment 4 | 997 | 19.76 | 64.79 | 3.21 | 0.80 | 0.30 | 0.10 |
| **401.9 Essential hypertension, unspecified (segment 1)** | | | | | | | |
| Segment 1 | 305,530 | 100.00 | 0.00 | 0.08 | 0.06 | 0.01 | 0.00 |
| Segment 2 | 70,493 | 87.63 | 0.44 | 0.74 | 1.41 | 0.11 | 0.00 |
| Segment 3 | 29,235 | 84.76 | 0.73 | 1.14 | 1.82 | 0.15 | 0.01 |
| Segment 4 | 14,255 | 82.94 | 0.98 | 1.35 | 2.13 | 0.18 | 0.01 |

TABLE 11—HYPERTENSION PREVALENCE BY SEGMENT AND TYPE OF HYPERTENSION REPORTED ON SEGMENT 1 OR SEGMENT 2 (2009)—Continued

| Diagnosis | N | 401.9 (%) | 401.1 (%) | 402 (%) | 403 (%) | 404 (%) | 405 (%) |
|---|---|---|---|---|---|---|---|
| **402 Hypertensive heart disease (segment 1)** | | | | | | | |
| Segment 1 | 8,777 | 2.83 | 0.24 | 100.00 | 0.24 | 0.09 | 0.01 |
| Segment 2 | 3,165 | 14.00 | 1.07 | 79.05 | 1.23 | 0.73 | 0.00 |
| Segment 3 | 1,563 | 20.47 | 1.66 | 70.12 | 1.15 | 1.02 | 0.06 |
| Segment 4 | 859 | 23.40 | 1.40 | 65.19 | 0.70 | 1.28 | 0.00 |
| **403 Hypertensive renal disease (segment 1)** | | | | | | | |
| Segment 1 | 18,740 | 1.02 | 0.07 | 0.11 | 100.00 | 0.03 | 0.01 |
| Segment 2 | 4,497 | 9.12 | 0.18 | 0.51 | 79.25 | 0.78 | 0.04 |
| Segment 3 | 1,806 | 11.46 | 0.39 | 0.44 | 73.75 | 1.33 | 0.06 |
| Segment 4 | 843 | 12.81 | 0.47 | 0.59 | 72.00 | 1.66 | 0.00 |
| **404 Hypertensive heart and renal disease (segment 1)** | | | | | | | |
| Segment 1 | 1,331 | 2.93 | 0.45 | 0.60 | 0.38 | 100.00 | 0.00 |
| Segment 2 | 404 | 8.66 | 1.98 | 2.23 | 6.44 | 73.51 | 0.00 |
| Segment 3 | 191 | 12.57 | 1.57 | 2.62 | 7.33 | 67.54 | 0.00 |
| Segment 4 | 101 | 12.87 | 1.98 | 0.99 | 10.89 | 67.33 | 0.00 |
| **405 Secondary hypertension (segment 1)** | | | | | | | |
| Segment 1 | 192 | 1.04 | 0.00 | 0.52 | 0.52 | 0.00 | 100.00 |
| Segment 2 | 56 | 8.93 | 0.00 | 0.00 | 1.79 | 1.79 | 75.00 |
| Segment 3 | 29 | 6.90 | 0.00 | 0.00 | 6.90 | 0.00 | 58.62 |
| Segment 4 | 13 | 23.08 | 0.00 | 0.00 | 0.00 | 0.00 | 61.54 |
| **401.1 Secondary hypertension (segment 2)** | | | | | | | |
| Segment 1 | 3,269 | 9.51 | 80.18 | 1.04 | 0.24 | 0.24 | 0.00 |
| Segment 2 | 3,269 | 0.06 | 100.00 | 0.28 | 0.12 | 0.15 | 0.00 |
| Segment 3 | 1,548 | 9.95 | 80.68 | 1.68 | 0.32 | 0.06 | 0.00 |
| Segment 4 | 987 | 15.40 | 72.10 | 3.00 | 0.20 | 0.20 | 0.00 |
| **401.9 Essential hypertension, unspecified (segment 2)** | | | | | | | |
| Segment 1 | 70,616 | 87.48 | 0.60 | 0.63 | 0.58 | 0.05 | 0.01 |
| Segment 2 | 70,616 | 100.00 | 0.00 | 0.12 | 0.08 | 0.02 | 0.00 |
| Segment 3 | 27,347 | 89.83 | 0.41 | 0.74 | 1.02 | 0.10 | 0.01 |
| Segment 4 | 13,622 | 86.46 | 0.70 | 0.99 | 1.50 | 0.10 | 0.01 |
| **402 Hypertensive heart disease (segment 2)** | | | | | | | |
| Segment 1 | 3,298 | 15.92 | 1.79 | 75.86 | 0.70 | 0.27 | 0.00 |
| Segment 2 | 3,298 | 2.67 | 0.27 | 100.00 | 0.27 | 0.06 | 0.00 |
| Segment 3 | 1,478 | 13.94 | 0.88 | 81.33 | 0.68 | 0.74 | 0.00 |
| Segment 4 | 788 | 17.51 | 1.02 | 74.62 | 0.51 | 1.27 | 0.00 |
| **403 Hypertensive renal disease (segment 2)** | | | | | | | |
| Segment 1 | 5,192 | 19.11 | 0.52 | 0.75 | 68.64 | 0.50 | 0.00 |
| Segment 2 | 5,192 | 1.02 | 0.08 | 0.17 | 100.00 | 0.00 | 0.00 |
| Segment 3 | 1,861 | 6.45 | 0.27 | 0.21 | 84.09 | 0.59 | 0.00 |
| Segment 4 | 837 | 7.89 | 0.36 | 0.36 | 81.84 | 0.96 | 0.00 |
| **404 Hypertensive heart and renal disease (segment 2)** | | | | | | | |
| Segment 1 | 478 | 15.69 | 1.46 | 4.81 | 7.32 | 62.13 | 0.21 |
| Segment 2 | 478 | 3.14 | 1.05 | 0.42 | 0.00 | 100.00 | 0.00 |
| Segment 3 | 201 | 7.46 | 1.99 | 1.49 | 5.47 | 78.61 | 0.00 |
| Segment 4 | 106 | 8.49 | 0.94 | 0.94 | 10.38 | 72.64 | 0.00 |
| **405 Secondary hypertension (on segment 2)** | | | | | | | |
| Segment 1 | 51 | 5.88 | 1.96 | 0.00 | 3.92 | 0.00 | 82.35 |
| Segment 2 | 51 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | 100.00 |
| Segment 3 | 21 | 0.00 | 0.00 | 0.00 | 4.76 | 0.00 | 95.24 |
| Segment 4 | 11 | 18.18 | 0.00 | 0.00 | 0.00 | 0.00 | 81.82 |

TABLE 11—HYPERTENSION PREVALENCE BY SEGMENT AND TYPE OF HYPERTENSION REPORTED ON SEGMENT 1 OR SEGMENT 2 (2009)—Continued

| Diagnosis | N | 401.9 (%) | 401.1 (%) | 402 (%) | 403 (%) | 404 (%) | 405 (%) |
|---|---|---|---|---|---|---|---|
| **402 Hypertensive heart disease (not present on segment 1 but present on segment 2)** | | | | | | | |
| Segment 1 | 796 | 58.67 | 6.53 | 0.00 | 72.01 | 0.88 | 0.00 |
| Segment 2 | 796 | 3.27 | 0.25 | 100.00 | 64.58 | 0.00 | 0.00 |
| Segment 3 | 318 | 18.55 | 1.89 | 72.01 | 2.14 | 0.94 | 0.00 |
| Segment 4 | 144 | 22.22 | 1.39 | 64.58 | 0.38 | 2.08 | 0.00 |
| **403 Hypertensive renal disease (not present on segment 1 but present on segment 2)** | | | | | | | |
| Segment 1 | 1,628 | 59.28 | 1.41 | 1.97 | 0.00 | 1.54 | 0.06 |
| Segment 2 | 1,628 | 1.47 | 0.00 | 0.12 | 100.00 | 0.00 | 0.00 |
| Segment 3 | 552 | 9.42 | 0.18 | 0.36 | 76.27 | 0.72 | 0.00 |
| Segment 4 | 231 | 11.69 | 0.43 | 0.43 | 72.73 | 1.30 | 0.00 |
| **404 Hypertensive heart disease (not present on segment 1 but present on segment 2)** | | | | | | | |
| Segment 1 | 181 | 39.23 | 2.21 | 10.50 | 19.34 | 0.00 | 0.55 |
| Segment 2 | 181 | 4.97 | 0.55 | 0.55 | 0.00 | 100.00 | 0.00 |
| Segment 3 | 66 | 10.61 | 3.03 | 1.52 | 9.09 | 68.18 | 0.00 |
| Segment 4 | 36 | 13.89 | 0.00 | 0.00 | 8.33 | 63.89 | 0.00 |
| **405 Secondary Hypertension (not present on segment 1 but present on segment 2)** | | | | | | | |
| Segment 1 | 9 | 33.33 | 11.11 | 0.00 | 22.22 | 0.00 | 0.00 |
| Segment 2 | 9 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | 100.00 |
| Segment 3 | 4 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | 100.00 |
| Segment 4 | 2 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | 100.00 |

Outlier episodes are excluded.
Source: Abt Associates' analysis of 20 percent sample of Home Health Datalink file for 2009.

To further investigate the issue whether 401.9 is used as a placeholder while waiting for documentation to support coding of other more complex hypertension codes, we looked at the average resource cost for the initial episode, categorized by hypertension diagnosis, for all of the episodes with a hypertension diagnosis of 402, 403, or 404 in their second episode (Table 12). We compared the average cost of an initial episode when there was a 401.9 diagnosis to the average cost of an initial episode when both the initial and second episode had the same diagnosis (both the initial and second episode had either a 402, 403, or 404 code). For example, for all 2nd episodes, in a sequence of adjacent episodes, with a 402 diagnosis, we compared the average cost of an initial episode when there was a 401.9 diagnosis to the average cost of an initial episode when there was a 402 diagnosis. Considering the comment that a 401.9 is coded while waiting for documentation for a more complex diagnosis like 402 (hypertensive heart disease), one would expect the average resource cost for an initial episode with a 401.9 code to be the same as an initial episode with a 402 code when looking at all of the sequences which have a 402 diagnosis in the second episode. Based on our analysis, the average resource cost for initial episodes with a 401.9 diagnosis is lower than the average resource cost for initial episodes with a 402, 403, and 404 diagnosis, given that a 402, 403, or 404 diagnosis exists on the second episode respectively. It should be noted that the average resource cost for initial episodes with a 401.9 diagnosis is only slightly lower than the average resource cost for initial episodes with a 404 diagnosis, given a 404 diagnosis on the second episode. However, the samples for this comparison are small (N=69 and N=293). In general, the overall pattern of results of this analysis does not support keeping 401.9 as a diagnosis in the case-mix model based on the reason that 401.9 is coded while waiting for documentation for another ICD–9 code.

TABLE 12—RESOURCE COSTS FOR SEGMENT 1 BY HYPERTENSION DIAGNOSES ON SEGMENT 1 GIVEN A HYPERTENSION DIAGNOSIS REPORTED ON SEGMENT 2 (2009)

| Hypertension diagnosis (segment 1) | Hypertension diagnosis (segment 2) | | | | | |
|---|---|---|---|---|---|---|
| | 402 | | 403 | | 404 | |
| | N | Mean resource cost for initial episode | N | Mean resource cost for initial episode | N | Mean resource cost for initial episode |
| None | 254 | $765.28 | 585 | $725.84 | 54 | $798.17 |
| 401.9 | 467 | 651.24 | 962 | 660.99 | 69 | 683.99 |
| 402 | 2502 | 692.79 | 39 | 565.74 | 23 | 624.20 |
| 403 | 17 | 769.40 | 3557 | 741.52 | 34 | 650.24 |

TABLE 12—RESOURCE COSTS FOR SEGMENT 1 BY HYPERTENSION DIAGNOSES ON SEGMENT 1 GIVEN A HYPERTENSION DIAGNOSIS REPORTED ON SEGMENT 2 (2009)—Continued

| Hypertension diagnosis (segment 1) | Hypertension diagnosis (segment 2) | | | | | |
|---|---|---|---|---|---|---|
| | 402 | | 403 | | 404 | |
| | N | Mean resource cost for initial episode | N | Mean resource cost for initial episode | N | Mean resource cost for initial episode |
| 404 | 7 | 756.36 | 25 | 619.69 | 293 | 689.01 |

Outlier episodes are excluded.
Source: Abt Associates' analysis of 20 percent sample of Home Health Datalink file for 2009.

In summary, we propose to remove ICD–9–CM code 401.1, Benign Essential Hypertension, and ICD–9–CM code 401.9, Unspecified Essential Hypertension, from the HH PPS case-mix model's hypertension group. Based on our analysis, there continues to be an increase in the prevalence of ICD–9–CM code 401.9 from 2008 to 2009. In addition, agencies (regardless of type) typically had a twofold or higher increase in the prevalence of a 401.9 diagnosis from 2005 to 2009, with the exception of the East North and the West North Central regions which had an increase of about 1.7 and 1.5 fold respectively. Furthermore, many categories had an increase in the reporting of a 401.1 diagnosis when comparing 2005 data to 2009. Most compelling, current data indicates that these diagnoses are not predictors of higher home health patient resource costs. Rather, current data indicates a lower cost associated with home health patients when these codes are reported. The results from the two regression models provide strong support for removing the 401.1 and 401.9 diagnoses from the case-mix system, showing that the presence of these diagnoses is associated with lower costs, when controlling for other case-mix related factors. Therefore, we propose to remove codes 401.1 and 401.9 to more accurately align payment with resource use.

In the CY 2011 HH PPS final rule, in response to comments, we described that if we were to finalize removing these codes from our case-mix system, we would do so in such a way that we would revise our case-mix weights to ensure that the removal of the codes would result in the same projected aggregate expenditures. Therefore, we also propose to revise the HH PPS case-mix weights as we describe in detail in the following section. The revisions of the case-mix weights would redistribute HH PPS payments among the case-mix groups such that removal of these hypertension codes would not result in lower aggregate payments. Rather, the change would be effectuated in a budget neutral way.

2. Proposal for Revision of Case-Mix Weights

As we described in section II.B.1 of this preamble, we propose to revise our HH PPS case-mix weights to remove two hypertension codes from our case-mix system while maintaining budget neutrality. We also believe that additional revisions to the case-mix weights are needed.

Our review of HH PPS utilization data shows a shift to an increased share of episodes with very high numbers of therapy visits. This shift was first observed in 2008 and it continued in 2009. Table 13 shows the percentage distribution of episodes according to number of therapy visits for 2001 through 2009.

TABLE 13—DISTRIBUTION OF HOME HEALTH EPISODES ACCORDING TO NUMBER OF THERAPY VISITS (2001–2009)

[In percent]

| Number of therapy visits | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|---|---|---|---|
| None | 54 | 52 | 51 | 50 | 50 | 50 | 50 | 49 | 48 |
| 1 to 5 | 14 | 15 | 15 | 15 | 15 | 15 | 14 | 14 | 14 |
| 6 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 |
| 7 to 9 | 6 | 6 | 6 | 6 | 6 | 6 | 6 | 9 | 9 |
| 10 to 13 | 10 | 11 | 13 | 14 | 14 | 15 | 15 | 10 | 10 |
| 14+ | 12 | 12 | 12 | 12 | 12 | 12 | 12 | 15 | 16 |

**Note:** Based on a 10 percent random beneficiary sample.

The 2009 distribution of episodes by number of therapy visits resembles the 2008 distribution with some important differences. In last year's regulation, we described an increase of 25 percent in the share of episodes with 14 or more therapy visits. In the 2009 sample, the share with 14 or more therapy visits continued to increase while the share of episodes with no therapy visits continued to decrease. The frequencies also indicate that the share of episodes with 20 or more therapy visits was 6 percent in 2009 (data not shown). This is a 50 percent increase from the share of episodes of 2007, when episodes with at least 20 therapy visits accounted for only 4 percent of episodes.

In their 2010 and 2011 Reports to Congress, MedPAC suggests that the HH PPS contains incentives which likely result in agencies providing more therapy than is needed to maximize their Medicare payments. In their March 2010 Report to the Congress, MedPAC stated that ''therapy episodes appear to be overpaid relative to others and that the amount of therapy changed significantly in response to the 2008 revisions to the payment system.'' In support of this statement, MedPAC showed that there was a quick episode volume shift to the new therapy thresholds, which suggests inappropriate therapy utilization. In their March 2011 Report to the

Congress, MedPAC stated, ''The volume data for 2009 indicate that the shifts that occurred in 2008 are continuing * * * Episodes with 14 or more therapy visits increased by more than 20 percent, and those with 20 or more therapy visits increased by 30 percent.''

Also, in their March 2011 Report to Congress, MedPAC suggested that the current HH PPS may ''overvalue therapy services and undervalue nontherapy services.'' In this report, MedPAC describes that HHA margins average 17.7 percent, with 20 percent of agencies achieving margins of 37 percent. MedPAC further states that their analysis of high-margin and low-margin agencies suggests that the HH PPS overpays for episodes with high case-mix values and underpays for episodes with low-case-mix values. Furthermore, MedPAC reports that home health agencies with high margins had high case-mix values which were attributable to the agencies providing more therapy episodes (MedPAC, March 2011 Report to Congress). MedPAC went on to assert that ''unless the case-mix system is revised, agencies will continue to have significant incentives to favor therapy patients, avoid high-cost nontherapy patients, and base the number of therapy visits on payment incentives instead of patient characteristics.''

We concur that the therapy utilization shifts and the correlation between high agency margins and high volumes of therapy episodes strongly suggest that the costs which the HH PPS assigns to therapy services when deriving the relative payment weights are higher than actual costs incurred by agencies for therapy services. We believe that one factor which contributes to this overpayment for therapy services is the growing use of therapy assistants, instead of qualified therapists, to provide home health therapy services. Current data suggest that the percentage of therapy assistants which is reflected in the therapy-wage weighted minutes used in the calculations of HH PPS relative resource costs is too low. For our 2008 refinements, to construct the relative resource costs for episodes, we used the labor mix percentages reported in the Occupational Employment Statistics (OES) data by the Bureau of Labor Statistics. In 2005, which is the year of data that was used to develop the HH PPS refinements, the OES data showed that 15 percent of physical therapy was provided by therapy assistants and that 11 percent of occupational therapy was provided by therapy assistants. This data was then used to develop the resource costs for episodes which were used to develop the current HH PPS payment weights. In 2008, the OES data showed that 19 percent of physical therapy was provided by therapy assistants and that 13 percent of occupational therapy was provided by therapy assistants. In addition, by 2010, OES data has shown that the percentage of physical therapy provided by therapy assistants was 20 percent and the percentage of occupational therapy provided by therapy assistants was 14 percent. We note that these statistics reflect the mix for all home health providers. Also, preliminary analysis of resource use data collected during Medicare's Post-Acute Care Demonstration (PAC-PRD) shows a somewhat higher prevalence of assistants providing therapy for patients receiving Medicare's home health benefit than the OES data. We note that in CY 2011, we began collecting data on HH PPS claims which will enable us to quantify the percentage of therapy assistants who are providing therapy and to assess how the percentages vary relative to the quantity of therapy provided and the type of provider.

We believe that MedPAC has provided strong evidence that our reimbursement for episodes with high therapy is too high. Also, based on MedPAC's analysis and our own findings, we believe that the resource costs reflected in our current case-mix weights for therapy episodes, in particular for those episodes with high amounts of therapy, are higher than current actual resource costs and that an adjustment to the HH PPS therapy case-mix weights is warranted. We note that fully addressing MedPAC's concerns with the way the HH PPS factors therapy visits into the case-mix system will be a complex process which will require more comprehensive structural changes to the HH PPS. While we plan to address their concerns in a more comprehensive way in future years, for CY 2012 we propose to revise the current case-mix weights by lowering the relative weights for episodes with high therapy and increasing the weights for episodes with little or no therapy. It should be noted that we propose to revise the case-mix weights in a budget neutral way. In other words, this proposal would redistribute some HH PPS dollars from high therapy payment groups to other HH PPS case-mix groups, such as the groups with little or no therapy. We believe this proposed revision to the payment weights would result in more accurate HH PPS payments for targeted case-mix groups while addressing MedPAC concerns that our reimbursement for therapy episodes is too high and our reimbursement for non-therapy episodes is too low. Also, we believe our proposed revision of the payment weights will discourage the provision of unnecessary therapy services and will slow the growth of nominal case-mix. Our detailed approach, analysis, and case-mix revision methodology which support this proposal are described below.

During the 2008 HH PPS refinements, in addition to implementing a change from an 80 group case-mix system to a 153 group case-mix system, we developed new payment weights for the HH PPS case-mix system. To derive these payment weights, we developed a four-equation model which estimated an equation explaining an episode's resource use, as measured in units corresponding to wage-weighted minutes (the dependent variable), in terms of therapy visits and clinical and functional variables (the independent, or explanatory, variables). Each equation was created from a different subset of episodes (for example, early episodes with 13 or fewer therapy visits). The results from the four-equation model were then used to develop the severity levels for the clinical and functional dimensions. Specifically, the coefficients of the four-equation model were divided by 10 and rounded to the nearest integer to create points which correspond to the impact of the variable on the total resource cost of the episode. These points are reported in Table 2a of the CY 2008 HH PPS final rule. For each episode in the sample, the sum of clinical variable points and the sum of functional variable points were calculated. Within each of the four equations, the clinical or functional severity levels were then defined in terms of intervals of the total clinical or functional points in such a way as to create a relatively even distribution of episodes amongst the severity levels. Also, the single 10-therapy visit threshold was changed to three therapy thresholds at 6, 14, and 20 visits to promote appropriate therapy utilization. Graduated steps between each of the three thresholds were also defined to provide an equitable increase in payment that would not otherwise occur between the three threshold levels. After defining the severity levels and thresholds and graduated steps between thresholds, we estimated a payment regression. The payment regression quantifies the relationship between an episode's resource use as measured in dollars corresponding to wage weighted minutes (the dependent variable) and the episode's clinical severity indicator variables (low, medium, or high), functional severity

indicator variables (low, medium, or high), four-equation indicator variables (which indicate whether an episode is early/late and has low/high therapy), and therapy visit indicator variables. The therapy visit indicator variables were defined based on the graduated steps between the therapy thresholds. The raw payment weights for the 153 case-mix groups were then derived from the payment regression model coefficients. Note that in the process of developing the weights for episodes with therapy, we decelerated the increase in payment within each grouping of additional therapy visits (that is, we decelerated the increase in payment for each graduated therapy step). Finally, the weights were altered to achieve budget neutrality to 2005.

Initially, for this proposed rule, during the process of revising the case-mix weights, we re-estimated the payment regression model on 2008 data using the same dependent and independent variables we defined for the payment regression model which we used for the HH PPS refinements. We then compared the results to the current payment regression, which was based on 2005 data. We saw that the coefficients for the clinical and functional severity indicators were typically smaller in 2008 compared to 2005. This finding implies that if we were to use 2008 data to revise our payment weights, the clinical and functional severity levels would be associated with lower relative resource costs compared to our current payment regression model, and would result in lower raw payment weights for episodes with little or no therapy when compared to our current case-mix weights. These results would not achieve our intended goals as we describe in more detail below.

As a result of our re-estimation of the payment regression using 2008 data, we decided not to use data from 2008 or later to develop the revised case-mix weights. Instead, we propose to use pre-2008 data, which is before the implementation of the HH PPS refinements and the behavioral and coding changes we described in our discussion of the 2008 therapy utilization and case-mix data in last year's proposed and final regulations (75 FR 43238 through 43244 and 75 FR 70384). In last year's proposed and final rules we presented several analyses that described indications of a large change in coding practices between 2007 and 2008, the first year of the 153-group, refined system. Our initial analysis indicated that if we were to use the 2008 data in our payment regression to develop the revised weights, the regression would assign a higher relative resource cost to high therapy episodes and would assign a lower relative resource cost to episodes with little or no therapy than was assigned when deriving the current weights. As we described earlier in this section, we believe the data strongly suggest that our current weights over-value high therapy episodes and under-value non-therapy episodes and has strongly influenced the utilization shifts to more episodes in the 14 and 20 therapy groups and fewer non-therapy episodes beginning in 2008. Therefore, we believe that using 2008 or later data in our payment regression to revise the case-mix weights would be inadvisable. The evidence strongly suggests that the utilization shifts are influenced by agencies' attempts to maximize Medicare payments. As such, we propose to use pre-2008 data in the payment regression to revise our case-mix weights. We believe this data is more reflective of costs associated with patients' actual clinical needs than the 2008 and later data. We note that using pre-2008 data to derive relative resource costs and to revise our case-mix weights does not hinder our ability to achieve budget neutrality. We will describe our approach to ensure budget neutrality later in this section.

We explored numerous methods for revising our case-mix weights which were similar to the method we previously used for the 2008 refinements. We note that when developing the case-mix weights for the 2008 refinements, we were concerned that since there was an increase in payment weight as additional therapy visits were provided, there may be incentives to provide more therapy than clinically needed. To discourage this, when developing our current weights, we incrementally decreased the marginal payment for each grouping of therapy visits as the number of therapy visits grew. When exploring ways to revise our current case-mix weights, we initially applied a more aggressive deceleration to the weights for each of the incremental therapy visit steps similar to the approach we took for the current weights. We saw that when we applied more deceleration for each incremental therapy visit step, the payment weight for episodes with high numbers of therapy visits, when taking into account the clinical and functional score, was often the same as or larger than the current weight. Also, we saw inversions in the payment weights. For example, we saw that the payment weight for an episode with a clinical severity level of 1, functional severity level of 1, and 14 therapy visits had a smaller weight than for an episode with a clinical severity level of 1, a functional severity level of 1, and 13 therapy visits. Because of these observations, we decided against using the same type of approach we originally used when developing our current case-mix therapy weights. Instead, we developed a different approach to revise the case-mix payment weights.

Before we can describe this new approach, we must first explain the changes we made to the four-equation model to remove the hypertension diagnoses ICD–9–CM code 401.1, Benign Essential Hypertension, and ICD–9–CM code 401.9, Unspecified Essential Hypertension from our case-mix system, as we have proposed to do. As we indicated in the CY 2011 HH PPS final rule, our intention would be to revise the system in a manner that redistributes all the resources in the system after removing the two hypertension codes from our case-mix system. Our method of redistributing the resources starts with changes to the four-equation model, which is the foundation for the subsequent revised payment regression and creation of revised case-mix weights. The changes to the four-equation model are described below.

To examine the effects of removing the two hypertension codes 401.1 and 401.9 from the case-mix system and determine whether the thresholds for the clinical severity indicators need to be changed if 401.1 and 401.9 are removed from the case-mix system, we estimated the four-equation model with and without codes 401.1 and 401.9 in the hypertension group. We used 2005 data for this estimation. We note that the adjusted R-squared value for the four-equation model without codes 401.1 and 401.9 derived from 2005 data was 0.4621. We also note that we used 2005 data to develop an accurate comparison of the current four-equation model with the revised four-equation model without the two hypertension codes because our current four-equation model was built using 2005 data. In addition, we estimated the coefficients for the variables in the four-equation model using 2005 data to maintain the same variables we developed for our current four-equation model and minimize changes to our current model. We then used the coefficients from the four-equation model without codes 401.1 and 401.9 to determine the points which would be associated with all the clinical and functional variables found in our current four-equation model, as described on Table 2a of the CY 2008 HH PPS final rule (Table 14A).

When comparing the four-equation model with the two hypertension diagnoses (which is equivalent to our current model) to the four-equation model without the two hypertension diagnoses, there were some differences in the points assigned to variables. Specifically, there was a different number of points for 58 of the 224 variables in the four-equation model. However, the difference between the two models was at most 1 point. Also, of the 58 variables which had a different number of points, 33 were clinical and functional variables. (The remaining variables were therapy-visit and early/later episode indicator variables used in the four-equation model estimation procedure.) For 13 of the 33 clinical and functional variables, there was an extra point assigned when the two hypertension codes are excluded, and for 20 of the 33 clinical and functional variables, there was one less point assigned compared to the current model (Table 14B).

TABLE 14A—POINTS ASSOCIATED WITH THE UPDATED 4-EQUATION MODEL WITHOUT HYPERTENSION CODES 401.1 AND 401.9

**Case-Mix Adjustment Variables and Scores**

(Note: 4—Equation Model was Estimated on Episodes from 2005 where 401.1 and 401.9 were not counted in the Hypertension Diagnosis Group)

| | Episode number within sequence of adjacent episodes | 1 or 2 | 1 or 2 | 3+ | 3+ |
|---|---|---|---|---|---|
| | Therapy visits | 0–13 | 14+ | 0–13 | 14+ |
| | EQUATION: | *1* | *2* | *3* | *4* |
| | **CLINICAL DIMENSION** | | | | |
| 1 | Primary or Other Diagnosis = Blindness/Low Vision | 3 | 3 | 3 | 3 |
| 2 | Primary or Other Diagnosis = Blood disorders | 2 | 5 | ..... | ..... |
| 3 | Primary or Other Diagnosis = Cancer, selected benign neoplasms | 3 | 8 | 3 | 10 |
| 4 | Primary Diagnosis = Diabetes | 5 | 13 | 1 | 8 |
| 5 | Other Diagnosis = Diabetes | 3 | 5 | 1 | 5 |
| 6 | Primary or Other Diagnosis = Dysphagia and Primary or Other Diagnosis = Neuro 3—Stroke | 2 | 6 | ..... | 6 |
| 7 | Primary or Other Diagnosis = Dysphagia and M0250 (Therapy at home) = 3 (Enteral) | ..... | 6 | ..... | ..... |
| 8 | Primary or Other Diagnosis = Gastrointestinal disorders | 2 | 6 | 1 | 5 |
| 9 | Primary or Other Diagnosis = Gastrointestinal disorders and M0550 (ostomy) = 1 or 2 | 2 | ..... | ..... | ..... |
| 10 | Primary or Other Diagnosis = Gastrointestinal disorders and Primary or Other Diagnosis = Neuro 1—Brain disorders and paralysis, or Neuro 2—Peripheral neurological disorders, or Neuro 3—Stroke, or Neuro 4—Multiple Sclerosis | ..... | ..... | 2 | ..... |
| 11 | Primary or Other Diagnosis = Heart Disease or Hypertension | 3 | 6 | 1 | 7 |
| 12 | Primary Diagnosis = Neuro 1—Brain disorders and paralysis | 3 | 8 | 5 | 8 |
| 13 | Primary or Other Diagnosis = Neuro 1—Brain disorders and paralysis and M0680 (Toileting) = 2 or more | 3 | 10 | 3 | 10 |
| 14 | Primary or Other Diagnosis = Neuro 1—Brain disorders and paralysis or Neuro 2—Peripheral neurological disorders and M0650 or M0660 (Dressing upper or lower body) = 1, 2, or 3 | 1 | 4 | 1 | 2 |
| 15 | Primary or Other Diagnosis = Neuro 3—Stroke | ..... | 2 | ..... | ..... |
| 16 | Primary or Other Diagnosis = Neuro 3—Stroke and M0650 or M0660 (Dressing upper or lower body) = 1, 2, or 3 | 1 | 3 | 2 | 8 |
| 17 | Primary or Other Diagnosis = Neuro 3—Stroke and M0700 (Ambulation) = 3 or more | 1 | 5 | ..... | ..... |
| 18 | Primary or Other Diagnosis = Neuro 4—Multiple Sclerosis and at least one of the following: M0670 (bathing) = 2 or more or M0680 (Toileting) = 2 or more or M0690 (Transferring) = 2 or more or M0700 (Ambulation) = 3 or more | 3 | 3 | 12 | 18 |
| 19 | Primary or Other Diagnosis = Ortho 1—Leg Disorders or Gait Disorders and M0460 (most problematic pressure ulcer stage) = 1, 2, 3 or 4 | 2 | ..... | ..... | ..... |
| 20 | Primary or Other Diagnosis = Ortho 1—Leg or Ortho 2—Other orthopedic disorders and M0250 (Therapy at home) = 1 (IV/Infusion) or 2 (Parenteral) | 5 | 5 | ..... | ..... |
| 21 | Primary or Other Diagnosis = Psych 1—Affective and other psychoses, depression | 4 | 6 | 2 | 6 |
| 22 | Primary or Other Diagnosis = Psych 2—Degenerative and other organic psychiatric disorders | 1 | 3 | ..... | 3 |
| 23 | Primary or Other Diagnosis = Pulmonary disorders | 1 | 5 | 1 | 5 |
| 24 | Primary or Other Diagnosis = Pulmonary disorders and M0700 (Ambulation) = 1 or more | 1 | | | |
| 25 | Primary Diagnosis = Skin 1—Traumatic wounds, burns, and post-operative complications | 10 | 20 | 8 | 20 |
| 26 | Other Diagnosis = Skin 1—Traumatic wounds, burns, post-operative complications | 6 | 6 | 4 | 4 |
| 27 | Primary or Other Diagnosis = Skin 1—Traumatic wounds, burns, and post-operative complications or Skin 2—Ulcers and other skin conditions and M0250 (Therapy at home) = 1 (IV/Infusion) or 2 (Parenteral) | 2 | ..... | 2 | ..... |
| 28 | Primary or Other Diagnosis = Skin 2—Ulcers and other skin conditions | 6 | 12 | 5 | 12 |
| 29 | Primary or Other Diagnosis = Tracheostomy | 4 | 4 | 4 | ..... |
| 30 | Primary or Other Diagnosis = Urostomy/Cystostomy | 6 | 22 | 4 | 22 |
| 31 | M0250 (Therapy at home) = 1 (IV/Infusion) or 2 (Parenteral) | 8 | 15 | 5 | 11 |
| 32 | M0250 (Therapy at home) = 3 (Enteral) | 4 | 11 | ..... | 11 |
| 33 | M0390 (Vision) = 1 or more | 1 | ..... | ..... | 2 |
| 34 | M0420 (Pain) = 2 or 3 | 1 | ..... | ..... | ..... |
| 35 | M0450 = Two or more pressure ulcers at stage 3 or 4 | 3 | 3 | 5 | 5 |
| 36 | M0460 (Most problematic pressure ulcer stage) = 1 or 2 | 5 | 11 | 5 | 11 |
| 37 | M0460 (Most problematic pressure ulcer stage) = 3 or 4 | 16 | 26 | 12 | 22 |
| 38 | M0476 (Stasis ulcer status) = 2 | 7 | 7 | 7 | 7 |
| 39 | M0476 (Stasis ulcer status) = 3 | 11 | 11 | 11 | 11 |
| 40 | M0488 (Surgical wound status) = 2 | ..... | 2 | 3 | ..... |
| 41 | M0488 (Surgical wound status) = 3 | 4 | 4 | 4 | 4 |
| 42 | M0490 (Dyspnea) = 2, 3, or 4 | 2 | 2 | ..... | ..... |

TABLE 14A—POINTS ASSOCIATED WITH THE UPDATED 4-EQUATION MODEL WITHOUT HYPERTENSION CODES 401.1 AND 401.9—Continued

**Case-Mix Adjustment Variables and Scores**

(Note: 4—Equation Model was Estimated on Episodes from 2005 where 401.1 and 401.9 were not counted in the Hypertension Diagnosis Group)

| | Episode number within sequence of adjacent episodes | 1 or 2 | 1 or 2 | 3+ | 3+ |
|---|---|---|---|---|---|
| 43 | M0540 (Bowel Incontinence) = 2 to 5 | 1 | 2 | 1 | ..... |
| 44 | M0550 (Ostomy) = 1 or 2 | 5 | 9 | 3 | 9 |
| 45 | M0800 (Injectable Drug Use) = 0, 1, or 2 | 0 | 1 | 2 | 3 |
| | **FUNCTIONAL DIMENSION** | | | | |
| 46 | M0650 or M0660 (Dressing upper or lower body) = 1, 2, or 3 | 2 | 4 | 2 | 2 |
| 47 | M0670 (Bathing) = 2 or more | 3 | 3 | 6 | 6 |
| 48 | M0680 (Toileting) = 2 or more | 2 | 3 | 2 | ..... |
| 49 | M0690 (Transferring) = 2 or more | ..... | 1 | ..... | ..... |
| 50 | M0700 (Ambulation) = 1 or 2 | 1 | ..... | 1 | ..... |
| 51 | M0700 (Ambulation) = 3 or more | 3 | 3 | 4 | 5 |

**Notes:** The data for the regression equations come from a 20 percent random sample of episodes from CY 2005. The sample excludes LUPA episodes, outlier episodes, and episodes with SCIC or PEP adjustments.

Points are additive, however, points may not be given for the same line item in the table more than once.

Please see Medicare Home Health Diagnosis Coding guidance at *http://www.cms.hhs.gov/HomeHealthPPS/03_coding&billing.asp* for definitions of primary and secondary diagnoses.

TABLE 14B—THE DIFFERENCE IN POINTS BETWEEN THE CURRENT AND PROPOSED CASE-MIX ADJUSTMENT SCORES

| | Episode number within sequence of adjacent episodes | 1 or 2 | 1 or 2 | 3+ | 3+ |
|---|---|---|---|---|---|
| | Therapy visits | 0–13 | 14+ | 0–13 | 14+ |
| | EQUATION: | *1* | *2* | *3* | *4* |
| | **CLINICAL DIMENSION** | | | | |
| 1 | Primary or Other Diagnosis = Blindness/Low Vision | 0 | 0 | 0 | 0 |
| 2 | Primary or Other Diagnosis = Blood disorders | 0 | 0 | ..... | ..... |
| 3 | Primary or Other Diagnosis = Cancer, selected benign neoplasms | −1 | 1 | 0 | 0 |
| 4 | Primary Diagnosis = Diabetes | 0 | 1 | 0 | 0 |
| 5 | Other Diagnosis = Diabetes | 1 | 1 | 0 | 1 |
| 6 | Primary or Other Diagnosis = Dysphagia and Primary or Other Diagnosis = Neuro 3—Stroke | 0 | 0 | ..... | 0 |
| 7 | Primary or Other Diagnosis = Dysphagia and M0250 (Therapy at home) = 3 (Enteral) | ..... | 0 | ..... | ..... |
| 8 | Primary or Other Diagnosis = Gastrointestinal disorders | 0 | 0 | 0 | 1 |
| 9 | Primary or Other Diagnosis = Gastrointestinal disorders and M0550 (ostomy) = 1 or 2 | −1 | ..... | ..... | ..... |
| 10 | Primary or Other Diagnosis = Gastrointestinal disorders and Primary or Other Diagnosis = Neuro 1—Brain disorders and paralysis, or Neuro 2—Peripheral neurological disorders, or Neuro 3—Stroke, or Neuro 4—Multiple Sclerosis | ..... | ..... | 0 | ..... |
| 11 | Primary or Other Diagnosis = Heart Disease or Hypertension | 0 | −1 | 0 | −1 |
| 12 | Primary Diagnosis = Neuro 1—Brain disorders and paralysis | 0 | 0 | 0 | 0 |
| 13 | Primary or Other Diagnosis = Neuro 1—Brain disorders and paralysis and M0680 (Toileting) = 2 or more | 0 | 0 | 0 | 0 |
| 14 | Primary or Other Diagnosis = Neuro 1—Brain disorders and paralysis or Neuro 2—Peripheral neurological disorders and M0650 or M0660 (Dressing upper or lower body) = 1, 2, or 3 | −1 | 0 | −1 | 0 |
| 15 | Primary or Other Diagnosis = Neuro 3—Stroke | ..... | 1 | ..... | ..... |
| 16 | Primary or Other Diagnosis = Neuro 3—Stroke and M0650 or M0660 (Dressing upper or lower body) = 1, 2, or 3 | 0 | 0 | 0 | 0 |
| 17 | Primary or Other Diagnosis = Neuro 3—Stroke and M0700 (Ambulation) = 3 or more | 0 | 0 | ..... | ..... |
| 18 | Primary or Other Diagnosis = Neuro 4—Multiple Sclerosis and at least one of the following: M0670 (bathing) = 2 or more or M0680 (Toileting) = 2 or more or M0690 (Transferring) = 2 or more or M0700 (Ambulation) = 3 or more | 0 | 0 | 0 | 0 |
| 19 | Primary or Other Diagnosis = Ortho 1—Leg Disorders or Gait Disorders and M0460 (most problematic pressure ulcer stage) = 1, 2, 3 or 4 | 0 | ..... | ..... | ..... |
| 20 | Primary or Other Diagnosis = Ortho 1—Leg or Ortho 2—Other orthopedic disorders and M0250 (Therapy at home) = 1 (IV/Infusion) or 2 (Parenteral) | 0 | 0 | ..... | ..... |
| 21 | Primary or Other Diagnosis = Psych 1—Affective and other psychoses, depression | 1 | 1 | 0 | 1 |
| 22 | Primary or Other Diagnosis = Psych 2—Degenerative and other organic psychiatric disorders | 0 | 1 | ..... | 1 |
| 23 | Primary or Other Diagnosis = Pulmonary disorders | 0 | 0 | 0 | 0 |
| 24 | Primary or Other Diagnosis = Pulmonary disorders and M0700 (Ambulation) = 1 or more | 0 | ..... | ..... | ..... |
| 25 | Primary Diagnosis = Skin 1—Traumatic wounds, burns, and post-operative complications | 0 | 0 | 0 | 0 |
| 26 | Other Diagnosis = Skin 1—Traumatic wounds, burns, post-operative complications | 0 | 0 | 0 | 0 |
| 27 | Primary or Other Diagnosis = Skin 1—Traumatic wounds, burns, and post-operative complications or Skin 2—Ulcers and other skin conditions and M0250 (Therapy at home) = 1 (IV/Infusion) or 2 (Parenteral) | 0 | ..... | 0 | ..... |
| 28 | Primary or Other Diagnosis = Skin 2—Ulcers and other skin conditions | 0 | 0 | 0 | 0 |
| 29 | Primary or Other Diagnosis = Tracheostomy | 0 | 0 | 0 | ..... |
| 30 | Primary or Other Diagnosis = Urostomy/Cystostomy | 0 | −1 | 0 | −1 |

TABLE 14B—THE DIFFERENCE IN POINTS BETWEEN THE CURRENT AND PROPOSED CASE-MIX ADJUSTMENT SCORES—Continued

| | Episode number within sequence of adjacent episodes | 1 or 2 | 1 or 2 | 3+ | 3+ |
|---|---|---|---|---|---|
| 31 | M0250 (Therapy at home) = 1 (IV/Infusion) or 2 (Parenteral) | 0 | 0 | 0 | −1 |
| 32 | M0250 (Therapy at home) = 3 (Enteral) | 0 | −1 | ..... | −1 |
| 33 | M0390 (Vision) = 1 or more | 0 | ..... | ..... | 1 |
| 34 | M0420 (Pain) = 2 or 3 | 0 | ..... | ..... | ..... |
| 35 | M0450 = Two or more pressure ulcers at stage 3 or 4 | 0 | 0 | 0 | 0 |
| 36 | M0460 (Most problematic pressure ulcer stage) = 1 or 2 | 0 | 0 | 0 | 0 |
| 37 | M0460 (Most problematic pressure ulcer stage) = 3 or 4 | 0 | 0 | 0 | −1 |
| 38 | M0476 (Stasis ulcer status) = 2 | −1 | −1 | −1 | −1 |
| 39 | M0476 (Stasis ulcer status) = 3 | 0 | 0 | 0 | 0 |
| 40 | M0488 (Surgical wound status) = 2 | ..... | 0 | 0 | ..... |
| 41 | M0488 (Surgical wound status) = 3 | 0 | 0 | 0 | 0 |
| 42 | M0490 (Dyspnea) = 2, 3, or 4 | 0 | 0 | ..... | ..... |
| 43 | M0540 (Bowel Incontinence) = 2 to 5 | 0 | 0 | 0 | ..... |
| 44 | M0550 (Ostomy) = 1 or 2 | 0 | 0 | 0 | 0 |
| 45 | M0800 (Injectable Drug Use) = 0, 1, or 2 | −1 | 0 | 0 | −1 |
| | **FUNCTIONAL DIMENSION** | | | | |
| 46 | M0650 or M0660 (Dressing upper or lower body) = 1, 2, or 3 | 0 | 0 | 0 | 0 |
| 47 | M0670 (Bathing) = 2 or more | 0 | 0 | 0 | 0 |
| 48 | M0680 (Toileting) = 2 or more | 0 | 0 | 0 | ..... |
| 49 | M0690 (Transferring) = 2 or more | ..... | −1 | ..... | ..... |
| 50 | M0700 (Ambulation) = 1 or 2 | 0 | ..... | 0 | ..... |
| 51 | M0700 (Ambulation) = 3 or more | 0 | −1 | 0 | 0 |

**Notes:** The data for the regression equations come from a 20 percent random sample of episodes from CY 2005. The sample excludes LUPA episodes, outlier episodes, and episodes with SCIC or PEP adjustments.

Points are additive, however points may not be given for the same line item in the table more than once.

Please see Medicare Home Health Diagnosis Coding guidance at *http://www.cms.hhs.gov/HomeHealthPPS/03_coding&billing.asp* for definitions of primary and secondary diagnoses.

We also examined how episodes in the sample changed clinical severity groups when going from a four-equation model that includes 401.1 and 401.9 to a four-equation model that does not include 401.1 and 401.9. It should be noted that a small number of episodes also changed functional groups. In our analysis, we looked at the distribution of episodes in each clinical severity level (low, medium, high) by the four-equation model indicators (early/late episodes and low/high therapy episodes). When comparing the distribution of episodes using the four-equation model without the 401.1 and 401.9 hypertension codes to the distribution of episodes using the four-equation model with the hypertension codes (our current four-equation model), there was a similar distribution of episodes between the low, medium and high clinical levels, for each of the four-equation model indicators. We also looked at the distribution of episodes in each functional severity level by the four-equation model indicator. There was also a very similar distribution of episodes for the three functional severity levels using the four-equation model without the two hypertension codes compared to the distribution of episodes using the current four-equation model, for each of the four-equation model indicators. Since the four-equation model without the hypertension codes 401.1 and 401.9 had similar clinical and functional distributions of episodes as the current model, we decided that it was not necessary to change the thresholds for the clinical and functional severity levels.

When developing the new payment regression model, we used scores from the four-equation model without hypertension codes 401.1 and 401.9 to identify the clinical and functional severity levels to be used as payment regression variables. In addition, as we described earlier, we decided to implement a revision of the weights using a new method of decelerating therapy resources with higher numbers of therapy visits. The new method involved the removal of the therapy visit step indicators from the payment regression model. This approach has the advantage of staging the introduction of clinical and functional severity levels into the model as a separate step, to avoid influence on the clinical and functional scores from numerous therapy step variables that would otherwise be simultaneously entered into the regression. In other words, we eliminated the therapy visit step indicators from the payment regression model to ensure that more of the resource use would be captured by clinical and functional variables, rather than therapy variables. Later, we implement a method to account for the resource use for the therapy step variables. The new payment regression model that was developed estimated the relationship between an episode's total resource (as measured in dollars corresponding to wage weighted minutes) and the clinical score indicators, functional score indicators, and four-equation indicators (early/late episodes and low/high therapy services).

It should be noted that for the payment regression model, we used data from 2007, which is the most recent data available before the implementation of the HH PPS refinements. The coefficients for the payment regression model using 2007 data can be found at Table 15. The adjusted R-squared value for the payment regression model using 2007 data is 0.3769.

TABLE 15—PROPOSED PAYMENT REGRESSION MODEL

| Variable name | Variable description | New payment regression coefficients |
|---|---|---|
| clin_grp2_1 | Step 1, Clinical Score 5 to 8 | $6.55 |
| clin_grp3_1 | Step 1, Clinical Score 9 or More | 37.72 |
| func_grp2_1 | Step 1, Functional Score = 6 | 88.99 |
| func_grp3_1 | Step 1, Functional Score 7 or More | 129.81 |
| clin_grp2_21 | Step 2.1, Clinical Score 7 to 14 | 87.49 |
| clin_grp3_21 | Step 2.1, Clinical Score 15 or More | 191.74 |
| func_grp2_21 | Step 2.1, Functional Score = 7 | 43.63 |
| func_grp3_21 | Step 2.1, Functional Score 8 or More | 65.49 |
| clin_grp2_22 | Step 2.2, Clinical Score 9 to 16 | 76.41 |
| clin_grp3_22 | Step 2.2, Clinical Score 17+ | 177.93 |
| func_grp2_22 | Step 2.2, Functional Score = 8 | 36.55 |
| func_grp3_22 | Step 2.2, Functional Score 9 or More | 109.94 |
| clin_grp2_3 | Step 3, Clinical Score 3 to 5 | 28.53 |
| clin_grp3_3 | Step 3, Clinical Score 6 or More | 112.15 |
| func_grp2_3 | Step 3, Functional Score = 9 | 73.68 |
| func_grp3_3 | Step 3, Functional Score 10 or More | 113.33 |
| clin_grp2_4 | Step 4, Clinical Score 8 to 14 | 84.62 |
| clin_grp3_4 | Step 4, Clinical Score 15 or More | 213.78 |
| func_grp2_4 | Step 4, Functional Score = 7 | 73.13 |
| func_grp3_4 | Step 4, Functional Score 8 or More | 133.71 |
| step2_1 | Step 2.1, 1st and 2nd Episodes, 14 to 19 Therapy Visits | 386.71 |
| step2_2 | Step 2.2, 3rd+ Episodes, 14 to 19 Therapy Visits | 413.85 |
| step3 | Step 3, 3rd+ Episodes, 0–13 Therapy Visits | −63.66 |
| step4 | Step 4, All Episodes, 20+ Therapy Visits | 700.20 |
| _cons | Intercept | 348.74 |

**Note:** The data for the payment regression model come from a 20 percent random sample of episodes from CY 2007.

The raw weights for each of the 153 groups were then calculated based on the payment regression model. It should be noted that the raw weights do not change across the graduated therapy steps between the therapy thresholds. In the next step of weight revision, the weights associated with 0 to 5 therapy visits were increased by 7.5 percent. Also, the weights associated with 14–15 therapy visits were decreased by 5 percent and the weights associated with 20+ therapy visits were decreased by 10 percent. These adjustments were made to discourage inappropriate use of therapy while addressing concerns that non-therapy services are undervalued. The larger reduction factor for 20 or more therapy visits (10 percent) compared to the reduction factor for 14 to 15 therapy visits (5 percent) implements a more aggressive deceleration than we used in the current weights. Currently, there is a high payment weight associated with the 20 or more therapy visit threshold to capture the costs associated with providing 20 therapy visits, as well as numbers of therapy visits well beyond 20 therapy visits. As a result, there is a large increase in the payment weight between the 18–19 therapy visit step and the 20 or more therapy visit threshold. This large increase in the payment weight may create incentives for agencies to provide unnecessary therapy visits up to and including 20 visits, and may explain MedPAC's observation that there was a larger increase in the number of episodes in the 20 or more therapy visit group than the 14 or more therapy visit group. By implementing a larger reduction at the 20 or more therapy visits, we will provide a disincentive for agencies to pad episodes just to 20 visits or slightly more, to be able to realize a large margin from that threshold, which was designed to pay for not only episodes involving 20 or just above 20 therapy visits, but also episodes involving considerably more than 20 therapy visits.

After the adjustments were applied to the raw weights, the weights were further adjusted to create an increase in the payment weights for the therapy visit steps between the therapy thresholds. Weights with the same clinical severity level, functional severity level, and early/later episode status were grouped together. Then within those groups, the weights for each therapy step between thresholds were gradually increased. We did this by interpolating between the main thresholds on the model (from 0–5 to 14–15 therapy visits, and from 14–15 to 20+ therapy visits). We used a linear model to implement the interpolation so the payment weight increase for each step between the thresholds (such as the increase between 0–5 therapy visits and 6 therapy visits and the increase between 6 therapy visits and 7–9 therapy visits) was constant. The interpolated weights were then adjusted so that the average case-mix for the weights was equal to 1.

When developing our model, we considered a number of different sets of adjustments. We further explored two sets of adjustments because the adjustments were in line with our goals to address therapy incentives. The two sets of adjustments are shown in Table 16. We looked at the payment to cost ratios for various subgroups, where the payment was defined as the predicted resource use and the cost was defined as the wage weighted minutes in dollars. After looking at the payment to cost ratios, we decided to propose the less aggressive set of adjustments (option 2) to address therapy incentives while maintaining our target payment to cost ratios for groups. Specifically, when examining the payment to cost ratios by number of therapy visits, it appears that currently, episodes with three to five therapy visits are underpaid and episodes with 20 or just over 20 therapy visits are overpaid. When using our proposed payment weights, the episodes with three to five therapy visits have a higher payment to cost ratio and would receive higher payments. Also, episodes with around 20 therapy visits have more reasonable payment to cost ratios when using the proposed weights compared to ratios

with the current weights. (Please see the Abt technical report located at *http://www.cms.gov/center/hha.asp* for the payment to cost ratio tables and more information.)

TABLE 16—ADJUSTMENTS TO THE RAW WEIGHTS

| Therapy step group | Option 1: Most aggressive direct adjustments | Option 2: Less aggressive direct adjustments |
|---|---|---|
| 0 to 5 Therapy Visits | 1.15 | 1.075 |
| 14 to 15 Therapy Visits | 0.9 | 0.95 |
| 20+ Therapy Visits | 0.8 | 0.9 |

After applying the adjustments in Table 16 to the raw weights, applying the interpolation between the therapy thresholds, and adjusting the weights so that the average case-mix for the weights was equal to 1, we applied a budget neutrality factor (1.2847) to the weights to ensure that the final proposed weights result in aggregate expenditures in 2009 approximately equal to expenditures using the current payment weights. It is important to note that our authority allows us to reduce home health payments only as described in section 1895(b)(3)(B)(iv) of the Act. As such, we must revise our payment weights in a budget neutral manner. Therefore, after deriving revised relative case-mix weights, we increased the weights to achieve budget neutrality to the most current, complete data available, which is 2009. We show the final set of new payment weights for the 153 groups that we are proposing in Table 17. The R-squared value when we ran a regression of the episode's total resources (dependent variable) using our proposed weights (independent variable) is 0.5384. It should be noted that we will continue to evaluate and potentially refine the payment weights as new data and analysis becomes available.

It also should be noted that as we described in section A of this proposed rule, we also are proposing to reduce payments under our authority in section 1895(b)(3)(B)(iv) of the Act to reduce the home health base episode payment to account for nominal case-mix growth through 2009.

TABLE 17—FINAL PROPOSED PAYMENT WEIGHTS (2007)

| Payment group | Step (episode and/or therapy visit ranges) | Clinical and functional levels (1 = low; 2 = medium; 3 = high) | Final weights (2007 recalibration) |
|---|---|---|---|
| 10111 | 1st and 2nd Episodes, 0 to 5 Therapy Visits | C1F1 | 0.8468 |
| 10112 | 1st and 2nd Episodes, 6 Therapy Visits | C1F1 | 0.9931 |
| 10113 | 1st and 2nd Episodes, 7 to 9 Therapy Visits | C1F1 | 1.1394 |
| 10114 | 1st and 2nd Episodes, 10 Therapy Visits | C1F1 | 1.2857 |
| 10115 | 1st and 2nd Episodes, 11 to 13 Therapy Visits | C1F1 | 1.4320 |
| 10121 | 1st and 2nd Episodes, 0 to 5 Therapy Visits | C1F2 | 1.0630 |
| 10122 | 1st and 2nd Episodes, 6 Therapy Visits | C1F2 | 1.1847 |
| 10123 | 1st and 2nd Episodes, 7 to 9 Therapy Visits | C1F2 | 1.3065 |
| 10124 | 1st and 2nd Episodes, 10 Therapy Visits | C1F2 | 1.4283 |
| 10125 | 1st and 2nd Episodes, 11 to 13 Therapy Visits | C1F2 | 1.5501 |
| 10131 | 1st and 2nd Episodes, 0 to 5 Therapy Visits | C1F3 | 1.1621 |
| 10132 | 1st and 2nd Episodes, 6 Therapy Visits | C1F3 | 1.2734 |
| 10133 | 1st and 2nd Episodes, 7 to 9 Therapy Visits | C1F3 | 1.3847 |
| 10134 | 1st and 2nd Episodes, 10 Therapy Visits | C1F3 | 1.4961 |
| 10135 | 1st and 2nd Episodes, 11 to 13 Therapy Visits | C1F3 | 1.6074 |
| 10211 | 1st and 2nd Episodes, 0 to 5 Therapy Visits | C2F1 | 0.8627 |
| 10212 | 1st and 2nd Episodes, 6 Therapy Visits | C2F1 | 1.0434 |
| 10213 | 1st and 2nd Episodes, 7 to 9 Therapy Visits | C2F1 | 1.2240 |
| 10214 | 1st and 2nd Episodes, 10 Therapy Visits | C2F1 | 1.4047 |
| 10215 | 1st and 2nd Episodes, 11 to 13 Therapy Visits | C2F1 | 1.5853 |
| 10221 | 1st and 2nd Episodes, 0 to 5 Therapy Visits | C2F2 | 1.0788 |
| 10222 | 1st and 2nd Episodes, 6 Therapy Visits | C2F2 | 1.2350 |
| 10223 | 1st and 2nd Episodes, 7 to 9 Therapy Visits | C2F2 | 1.3912 |
| 10224 | 1st and 2nd Episodes, 10 Therapy Visits | C2F2 | 1.5473 |
| 10225 | 1st and 2nd Episodes, 11 to 13 Therapy Visits | C2F2 | 1.7035 |
| 10231 | 1st and 2nd Episodes, 0 to 5 Therapy Visits | C2F3 | 1.1780 |
| 10232 | 1st and 2nd Episodes, 6 Therapy Visits | C2F3 | 1.3237 |
| 10233 | 1st and 2nd Episodes, 7 to 9 Therapy Visits | C2F3 | 1.4694 |
| 10234 | 1st and 2nd Episodes, 10 Therapy Visits | C2F3 | 1.6151 |
| 10235 | 1st and 2nd Episodes, 11 to 13 Therapy Visits | C2F3 | 1.7608 |
| 10311 | 1st and 2nd Episodes, 0 to 5 Therapy Visits | C3F1 | 0.9384 |
| 10312 | 1st and 2nd Episodes, 6 Therapy Visits | C3F1 | 1.1487 |
| 10313 | 1st and 2nd Episodes, 7 to 9 Therapy Visits | C3F1 | 1.3589 |
| 10314 | 1st and 2nd Episodes, 10 Therapy Visits | C3F1 | 1.5692 |

TABLE 17—FINAL PROPOSED PAYMENT WEIGHTS (2007)—Continued

| Payment group | Step (episode and/or therapy visit ranges) | Clinical and functional levels (1 = low; 2 = medium; 3 = high) | Final weights (2007 recalibration) |
|---|---|---|---|
| 10315 | 1st and 2nd Episodes, 11 to 13 Therapy Visits | C3F1 | 1.7794 |
| 10321 | 1st and 2nd Episodes, 0 to 5 Therapy Visits | C3F2 | 1.1545 |
| 10322 | 1st and 2nd Episodes, 6 Therapy Visits | C3F2 | 1.3403 |
| 10323 | 1st and 2nd Episodes, 7 to 9 Therapy Visits | C3F2 | 1.5261 |
| 10324 | 1st and 2nd Episodes, 10 Therapy Visits | C3F2 | 1.7118 |
| 10325 | 1st and 2nd Episodes, 11 to 13 Therapy Visits | C3F2 | 1.8976 |
| 10331 | 1st and 2nd Episodes, 0 to 5 Therapy Visits | C3F3 | 1.2537 |
| 10332 | 1st and 2nd Episodes, 6 Therapy Visits | C3F3 | 1.4290 |
| 10333 | 1st and 2nd Episodes, 7 to 9 Therapy Visits | C3F3 | 1.6043 |
| 10334 | 1st and 2nd Episodes, 10 Therapy Visits | C3F3 | 1.7796 |
| 10335 | 1st and 2nd Episodes, 11 to 13 Therapy Visits | C3F3 | 1.9549 |
| 21111 | 1st and 2nd Episodes, 14 to 15 Therapy Visits | C1F1 | 1.5782 |
| 21112 | 1st and 2nd Episodes, 16 to 17 Therapy Visits | C1F1 | 1.7630 |
| 21113 | 1st and 2nd Episodes, 18 to 19 Therapy Visits | C1F1 | 1.9478 |
| 21121 | 1st and 2nd Episodes, 14 to 15 Therapy Visits | C1F2 | 1.6719 |
| 21122 | 1st and 2nd Episodes, 16 to 17 Therapy Visits | C1F2 | 1.8750 |
| 21123 | 1st and 2nd Episodes, 18 to 19 Therapy Visits | C1F2 | 2.0781 |
| 21131 | 1st and 2nd Episodes, 14 to 15 Therapy Visits | C1F3 | 1.7188 |
| 21132 | 1st and 2nd Episodes, 16 to 17 Therapy Visits | C1F3 | 1.9473 |
| 21133 | 1st and 2nd Episodes, 18 to 19 Therapy Visits | C1F3 | 2.1758 |
| 21211 | 1st and 2nd Episodes, 14 to 15 Therapy Visits | C2F1 | 1.7660 |
| 21212 | 1st and 2nd Episodes, 16 to 17 Therapy Visits | C2F1 | 1.9455 |
| 21213 | 1st and 2nd Episodes, 18 to 19 Therapy Visits | C2F1 | 2.1250 |
| 21221 | 1st and 2nd Episodes, 14 to 15 Therapy Visits | C2F2 | 1.8596 |
| 21222 | 1st and 2nd Episodes, 16 to 17 Therapy Visits | C2F2 | 2.0575 |
| 21223 | 1st and 2nd Episodes, 18 to 19 Therapy Visits | C2F2 | 2.2553 |
| 21231 | 1st and 2nd Episodes, 14 to 15 Therapy Visits | C2F3 | 1.9065 |
| 21232 | 1st and 2nd Episodes, 16 to 17 Therapy Visits | C2F3 | 2.1298 |
| 21233 | 1st and 2nd Episodes, 18 to 19 Therapy Visits | C2F3 | 2.3531 |
| 21311 | 1st and 2nd Episodes, 14 to 15 Therapy Visits | C3F1 | 1.9897 |
| 21312 | 1st and 2nd Episodes, 16 to 17 Therapy Visits | C3F1 | 2.1822 |
| 21313 | 1st and 2nd Episodes, 18 to 19 Therapy Visits | C3F1 | 2.3747 |
| 21321 | 1st and 2nd Episodes, 14 to 15 Therapy Visits | C3F2 | 2.0833 |
| 21322 | 1st and 2nd Episodes, 16 to 17 Therapy Visits | C3F2 | 2.2941 |
| 21323 | 1st and 2nd Episodes, 18 to 19 Therapy Visits | C3F2 | 2.5050 |
| 21331 | 1st and 2nd Episodes, 14 to 15 Therapy Visits | C3F3 | 2.1302 |
| 21332 | 1st and 2nd Episodes, 16 to 17 Therapy Visits | C3F3 | 2.3665 |
| 21333 | 1st and 2nd Episodes, 18 to 19 Therapy Visits | C3F3 | 2.6027 |
| 22111 | 3rd+ Episodes, 14 to 15 Therapy Visits | C1F1 | 1.6365 |
| 22112 | 3rd+ Episodes, 16 to 17 Therapy Visits | C1F1 | 1.8018 |
| 22113 | 3rd+ Episodes, 18 to 19 Therapy Visits | C1F1 | 1.9672 |
| 22121 | 3rd+ Episodes, 14 to 15 Therapy Visits | C1F2 | 1.7149 |
| 22122 | 3rd+ Episodes, 16 to 17 Therapy Visits | C1F2 | 1.9037 |
| 22123 | 3rd+ Episodes, 18 to 19 Therapy Visits | C1F2 | 2.0924 |
| 22131 | 3rd+ Episodes, 14 to 15 Therapy Visits | C1F3 | 1.8724 |
| 22132 | 3rd+ Episodes, 16 to 17 Therapy Visits | C1F3 | 2.0497 |
| 22133 | 3rd+ Episodes, 18 to 19 Therapy Visits | C1F3 | 2.2270 |
| 22211 | 3rd+ Episodes, 14 to 15 Therapy Visits | C2F1 | 1.8004 |
| 22212 | 3rd+ Episodes, 16 to 17 Therapy Visits | C2F1 | 1.9685 |
| 22213 | 3rd+ Episodes, 18 to 19 Therapy Visits | C2F1 | 2.1365 |
| 22221 | 3rd+ Episodes, 14 to 15 Therapy Visits | C2F2 | 1.8789 |
| 22222 | 3rd+ Episodes, 16 to 17 Therapy Visits | C2F2 | 2.0703 |
| 22223 | 3rd+ Episodes, 18 to 19 Therapy Visits | C2F2 | 2.2618 |
| 22231 | 3rd+ Episodes, 14 to 15 Therapy Visits | C2F3 | 2.0364 |
| 22232 | 3rd+ Episodes, 16 to 17 Therapy Visits | C2F3 | 2.2164 |
| 22233 | 3rd+ Episodes, 18 to 19 Therapy Visits | C2F3 | 2.3964 |
| 22311 | 3rd+ Episodes, 14 to 15 Therapy Visits | C3F1 | 2.0183 |
| 22312 | 3rd+ Episodes, 16 to 17 Therapy Visits | C3F1 | 2.2013 |
| 22313 | 3rd+ Episodes, 18 to 19 Therapy Visits | C3F1 | 2.3842 |
| 22321 | 3rd+ Episodes, 14 to 15 Therapy Visits | C3F2 | 2.0967 |
| 22322 | 3rd+ Episodes, 16 to 17 Therapy Visits | C3F2 | 2.3031 |
| 22323 | 3rd+ Episodes, 18 to 19 Therapy Visits | C3F2 | 2.5094 |
| 22331 | 3rd+ Episodes, 14 to 15 Therapy Visits | C3F3 | 2.2542 |
| 22332 | 3rd+ Episodes, 16 to 17 Therapy Visits | C3F3 | 2.4492 |
| 22333 | 3rd+ Episodes, 18 to 19 Therapy Visits | C3F3 | 2.6441 |
| 30111 | 3rd+ Episodes, 0 to 5 Therapy Visits | C1F1 | 0.6923 |
| 30112 | 3rd+ Episodes, 6 Therapy Visits | C1F1 | 0.8811 |
| 30113 | 3rd+ Episodes, 7 to 9 Therapy Visits | C1F1 | 1.0699 |

TABLE 17—FINAL PROPOSED PAYMENT WEIGHTS (2007)—Continued

| Payment group | Step (episode and/or therapy visit ranges) | Clinical and functional levels (1 = low; 2 = medium; 3 = high) | Final weights (2007 recalibration) |
|---|---|---|---|
| 30114 | 3rd+ Episodes, 10 Therapy Visits | C1F1 | 1.2588 |
| 30115 | 3rd+ Episodes, 11 to 13 Therapy Visits | C1F1 | 1.4476 |
| 30121 | 3rd+ Episodes, 0 to 5 Therapy Visits | C1F2 | 0.8712 |
| 30122 | 3rd+ Episodes, 6 Therapy Visits | C1F2 | 1.0399 |
| 30123 | 3rd+ Episodes, 7 to 9 Therapy Visits | C1F2 | 1.2087 |
| 30124 | 3rd+ Episodes, 10 Therapy Visits | C1F2 | 1.3774 |
| 30125 | 3rd+ Episodes, 11 to 13 Therapy Visits | C1F2 | 1.5462 |
| 30131 | 3rd+ Episodes, 0 to 5 Therapy Visits | C1F3 | 0.9675 |
| 30132 | 3rd+ Episodes, 6 Therapy Visits | C1F3 | 1.1485 |
| 30133 | 3rd+ Episodes, 7 to 9 Therapy Visits | C1F3 | 1.3294 |
| 30134 | 3rd+ Episodes, 10 Therapy Visits | C1F3 | 1.5104 |
| 30135 | 3rd+ Episodes, 11 to 13 Therapy Visits | C1F3 | 1.6914 |
| 30211 | 3rd+ Episodes, 0 to 5 Therapy Visits | C2F1 | 0.7615 |
| 30212 | 3rd+ Episodes, 6 Therapy Visits | C2F1 | 0.9693 |
| 30213 | 3rd+ Episodes, 7 to 9 Therapy Visits | C2F1 | 1.1771 |
| 30214 | 3rd+ Episodes, 10 Therapy Visits | C2F1 | 1.3849 |
| 30215 | 3rd+ Episodes, 11 to 13 Therapy Visits | C2F1 | 1.5927 |
| 30221 | 3rd+ Episodes, 0 to 5 Therapy Visits | C2F2 | 0.9405 |
| 30222 | 3rd+ Episodes, 6 Therapy Visits | C2F2 | 1.1281 |
| 30223 | 3rd+ Episodes, 7 to 9 Therapy Visits | C2F2 | 1.3158 |
| 30224 | 3rd+ Episodes, 10 Therapy Visits | C2F2 | 1.5035 |
| 30225 | 3rd+ Episodes, 11 to 13 Therapy Visits | C2F2 | 1.6912 |
| 30231 | 3rd+ Episodes, 0 to 5 Therapy Visits | C2F3 | 1.0367 |
| 30232 | 3rd+ Episodes, 6 Therapy Visits | C2F3 | 1.2367 |
| 30233 | 3rd+ Episodes, 7 to 9 Therapy Visits | C2F3 | 1.4366 |
| 30234 | 3rd+ Episodes, 10 Therapy Visits | C2F3 | 1.6365 |
| 30235 | 3rd+ Episodes, 11 to 13 Therapy Visits | C2F3 | 1.8364 |
| 30311 | 3rd+ Episodes, 0 to 5 Therapy Visits | C3F1 | 0.9646 |
| 30312 | 3rd+ Episodes, 6 Therapy Visits | C3F1 | 1.1753 |
| 30313 | 3rd+ Episodes, 7 to 9 Therapy Visits | C3F1 | 1.3861 |
| 30314 | 3rd+ Episodes, 10 Therapy Visits | C3F1 | 1.5968 |
| 30315 | 3rd+ Episodes, 11 to 13 Therapy Visits | C3F1 | 1.8076 |
| 30321 | 3rd+ Episodes, 0 to 5 Therapy Visits | C3F2 | 1.1435 |
| 30322 | 3rd+ Episodes, 6 Therapy Visits | C3F2 | 1.3342 |
| 30323 | 3rd+ Episodes, 7 to 9 Therapy Visits | C3F2 | 1.5248 |
| 30324 | 3rd+ Episodes, 10 Therapy Visits | C3F2 | 1.7155 |
| 30325 | 3rd+ Episodes, 11 to 13 Therapy Visits | C3F2 | 1.9061 |
| 30331 | 3rd+ Episodes, 0 to 5 Therapy Visits | C3F3 | 1.2398 |
| 30332 | 3rd+ Episodes, 6 Therapy Visits | C3F3 | 1.4427 |
| 30333 | 3rd+ Episodes, 7 to 9 Therapy Visits | C3F3 | 1.6456 |
| 30334 | 3rd+ Episodes, 10 Therapy Visits | C3F3 | 1.8485 |
| 30335 | 3rd+ Episodes, 11 to 13 Therapy Visits | C3F3 | 2.0514 |
| 40111 | All Episodes, 20+ Therapy Visits | C1F1 | 2.1325 |
| 40121 | All Episodes, 20+ Therapy Visits | C1F2 | 2.2812 |
| 40131 | All Episodes, 20+ Therapy Visits | C1F3 | 2.4043 |
| 40211 | All Episodes, 20+ Therapy Visits | C2F1 | 2.3046 |
| 40221 | All Episodes, 20+ Therapy Visits | C2F2 | 2.4532 |
| 40231 | All Episodes, 20+ Therapy Visits | C2F3 | 2.5764 |
| 40311 | All Episodes, 20+ Therapy Visits | C3F1 | 2.5671 |
| 40321 | All Episodes, 20+ Therapy Visits | C3F2 | 2.7158 |
| 40331 | All Episodes, 20+ Therapy Visits | C3F3 | 2.8390 |

*C. Outlier Policy*

1. Background

Section 1895(b)(5) of the Act allows for the provision of an addition or adjustment to the national standardized 60-day case-mix and wage-adjusted episode payment amounts in the case of episodes that incur unusually high costs due to patient home health (HH) care needs. Prior to the enactment of the Affordable Care Act in March 2010, this section of the Act stipulated that total outlier payments could not exceed 5 percent of total projected or estimated HH payments in a given year. In the July 2000 final rule (65 FR 41188 through 41190), we described the method for determining outlier payments. Under this system, outlier payments are made for episodes whose estimated costs exceed a threshold amount for each Home Health Resource Group (HHRG). The episode's estimated cost is the sum of the national wage-adjusted per-visit payment amounts for all visits delivered during the episode. The outlier threshold for each case-mix group or partial episode payment (PEP) adjustment is defined as the 60-day episode payment or PEP adjustment for that group plus a fixed dollar loss (FDL) amount. The outlier payment is defined to be a proportion of the wage-adjusted estimated cost beyond the wage-adjusted threshold. The threshold

amount is the sum of the wage and case-mix adjusted PPS episode amount and wage-adjusted fixed dollar loss amount. The proportion of additional costs paid as outlier payments is referred to as the loss-sharing ratio.

2. Regulatory Update

In the CY 2010 HH PPS final rule (74 FR 58080 through 58087), we discussed excessive growth in outlier payments, primarily the result of unusually high outlier payments in a few areas of the country. Despite program integrity efforts associated with excessive outlier payments in targeted areas of the country, we discovered that outlier expenditures exceeded the 5 percent statutory limit. Consequently, we assessed the appropriateness of taking action to curb outlier abuse. To mitigate possible billing vulnerabilities associated with excessive outlier payments and adhere to our statutory limit on outlier payments, we adopted an outlier policy that included a 10 percent agency level cap on outlier payments. This cap was done in concert with a reduced fixed dollar loss (FDL) ratio of 0.67. These policies resulted in a projected target outlier pool of approximately 2.5 percent. (The previous outlier pool was 5 percent of total HH expenditures.)

For CY 2010, we first returned 5 percent of these dollars back into the national standardized 60-day episode rates, the national per-visit rates, the low utilization payment adjustment (LUPA) add-on payment amount, and the non-routine supplies (NRS) conversion factor. Then, we reduced the CY 2010 rates by 2.5 percent to account for the new outlier pool of 2.5 percent. This outlier policy was adopted for CY 2010 only.

3. Statutory Update

As outlined in the CY 2011 HH PPS final rule (75 FR 70397 through 70399), sections 3131(b)(1) and 3131(b)(2) of the Affordable Care Act amended sections 1895(b)(3)(C) and 1895(b)(5) of the Act. Specifically, section 3131(b)(2) of the Affordable Care Act amended section 1895(b)(5) of the Act by redesignating the existing language as section 1895(b)(5)(A) of the Act, and revising it to state that the Secretary, ''may provide for an addition or adjustment to the payment amount otherwise made in the case of outliers because of unusual variations in the type or amount of medically necessary care. The total amount of the additional payments or payment adjustments made under this paragraph with respect to a fiscal year or year may not exceed 2.5 percent of the total payments projected or estimated to be made based on the prospective payment system under this subsection in that year.''

The result of these revisions was that, beginning in CY 2011, we reduced payment rates by 5 percent, targeted up to 2.5 percent of estimated total payments to be paid as outlier payments, and applied a 10 percent agency-level outlier cap.

4. Loss-Sharing Ratio and Fixed Dollar Loss (FDL) Ratio

For a given level of outlier payments, there is a trade-off between the values selected for the FDL ratio and the loss-sharing ratio. A high FDL ratio reduces the number of episodes that can receive outlier payments, but makes it possible to select a higher loss-sharing ratio and, therefore, increase outlier payments for outlier episodes. Alternatively, a lower FDL ratio means that more episodes can qualify for outlier payments, but outlier payments per episode must then be lower.

The FDL ratio and the loss-sharing ratio must be selected so that the estimated total outlier payments do not exceed the 2.5 percent aggregate level (as required by section 1895(b)(5)(A) of the Act). In the past, we have used a value of 0.80 for the loss-sharing ratio, which is relatively high, but preserves incentives for agencies to attempt to provide care efficiently for outlier cases. With a loss-sharing ratio of 0.80, Medicare pays 80 percent of the additional costs above the wage-adjusted outlier threshold amount. In the CY 2011 HH PPS final rule (75 FR 70398), in targeting total outlier payments as 2.5 percent of total HH PPS payments, we implemented an FDL ratio of 0.67.

A preliminary look at partial CY 2010 Health Care Information System (HCIS) data indicates that, because the total outlier payments comprise approximately 2 percent of total payments, we would maintain the current FDL ratio of 0.67. However, in the final rule, we will update our estimate of the FDL ratio using the most current and complete year of HH PPS data available.

Table 18 shows outlier payment history as a percentage of total HH PPS payments between calendar years 2004 and 2009. Preliminary data for CY 2010 is also provided; however, this data represents only a portion of the data available and is current only through part of the third quarter.

TABLE 18—OUTLIER PAYMENT HISTORY—CY 2004 THROUGH CY 2010

| Year | Outlier payment | Total HH PPS payment | Outlier payment percentage |
|---|---|---|---|
| 2004 | $309,198,604 | $11,500,462,624 | 2.69 |
| 2005 | 527,096,653 | 12,885,434,951 | 4.09 |
| 2006 | 701,945,386 | 14,041,853,560 | 5.00 |
| 2007 | 996,316,407 | 15,677,329,001 | 6.36 |
| 2008 | 1,127,162,152 | 17,114,906,875 | 6.59 |
| 2009 | 1,204,246,569 | 18,895,476,901 | 6.37 |
| 2010 | 233,274,303 | 13,878,411,396 | *1.68 |

*This CY 2010 outlier payment projection is based only on claims reported through part of the third quarter.

5. Outlier Relationship to the HH Payment Study

As we discuss later in this proposed rule, section 3131(d) of the Affordable Care Act requires CMS to conduct a study and report on developing HH payment revisions that will ensure access to care and payment for HH patients with high severity of illness. Our Report to Congress containing this study's recommendations is due no later than March 1, 2014. Section 3131(d)(1)(A)(iii) of the Affordable Care Act, in particular, states that this study may include analysis of potential revisions to outlier payments to better reflect costs of treating Medicare beneficiaries with high levels of severity of illness.

*D. CY 2012 Rate Update*

1. Home Health Market Basket Update

Section 1895(b)(3)(B) of the Act requires that the standard prospective

payment amounts for CY 2012 be increased by a factor equal to the applicable home health market basket update for those HHAs that submit quality data as required by the Secretary. Section 3401(e) of the Affordable Care Act amended section 1895(b)(3)(B) of the Act by adding a new clause (vi) which states, ''After determining the home health market basket percentage increase * * * the Secretary shall reduce such percentage * * * for each of 2011, 2012, and 2013, by 1 percentage point. The application of this clause may result in the home health market basket percentage increase under clause (iii) being less than 0.0 for a year, and may result in payment rates under the system under this subsection for a year being less than such payment rates for the preceding year.''

The proposed HH PPS market basket update for CY 2012 is 2.5 percent. This is based on Global Insight Inc.'s first quarter 2011 forecast, utilizing historical data through the fourth quarter of 2010. A detailed description of how we derive the HHA market basket is available in the CY 2008 HH PPS proposed rule (72 FR 25356, 25435). Due to the requirement in section 1895(b)(3)(B)(vi) of the Act, the proposed CY 2012 market basket update of 2.5 percent must be reduced by 1 percentage point to 1.5 percent. In effect, the proposed CY 2012 market basket update becomes 1.5 percent.

2. Home Health Care Quality Reporting Program

a. Background and Quality Reporting Requirements

Section 1895(b)(3)(B)(v)(II) of the Act states that ''each home health agency shall submit to the Secretary such data that the Secretary determines are appropriate for the measurement of health care quality. Such data shall be submitted in a form and manner, and at a time, specified by the Secretary for purposes of this clause.'' In addition, section 1895(b)(3)(B)(v)(I) of the Act dictates that ''for 2007 and each subsequent year, in the case of a HHA that does not submit data to the Secretary in accordance with subclause (II) with respect to such a year, the HH market basket percentage increase applicable under such clause for such year shall be reduced by 2 percentage points.'' This requirement has been codified in regulations at § 484.225(i). HHAs that meet the quality data reporting requirements would be eligible for the full home health market basket percentage increase. HHAs that do not meet the reporting requirements would be subject to a 2 percent reduction to the home health market basket increase.

b. OASIS Data

Accordingly, for CY 2012, we propose to continue to use a HHA's submission of OASIS data as one form of quality data to meet the requirement that the HHA submit data appropriate for the measurement of health care quality. We are proposing for CY 2012 to consider OASIS assessments submitted by HHAs to CMS in compliance with HHA Conditions of Participation and Conditions for Payment for episodes beginning on or after July 1, 2010 and before July 1, 2011 as fulfilling one portion of the quality reporting requirement for CY 2012. This time period would allow 12 full months of data collection and would provide us the time necessary to analyze and make any necessary payment adjustments to the payment rates for CY 2012. We propose to reconcile the OASIS submissions with claims data to verify full compliance with the OASIS portion of the quality reporting requirements in CY 2012 and each year thereafter on an annual cycle July 1 through June 30 as described above.

As set forth in the CY 2008 final rule, agencies do not need to submit OASIS data for those patients who are excluded from the OASIS submission requirements under the Home Health Conditions of Participation (CoPs) § 484.1–§ 484.265, as well as those excluded, as described at 70 FR 76202:

- Those patients receiving only nonskilled services;
- Those patients for whom neither Medicare nor Medicaid is paying for home health care (patients receiving care under a Medicare or Medicaid Managed Care Plan are not excluded from the OASIS reporting requirement);
- Those patients receiving pre- or post-partum services; or
- Those patients under the age of 18 years.

As set forth in the CY 2008 HH PPS final rule (72 FR 49863), agencies that become Medicare-certified on or after May 31 of the preceding year (2011 for payments in 2012) are excluded from any payment penalty for quality reporting purposes for the following CY. Therefore, HHAs that are certified on or after May 1, 2011 are excluded from the quality reporting requirement for CY 2012 payments. These exclusions only affect quality reporting requirements and do not affect the HHA's reporting responsibilities under the Conditions of Participation and Conditions of Payment.

(1) OASIS Data and Annual Payment Update

HHAs that submit OASIS data as specified above are considered to have met one portion of the quality data reporting requirements. Additional portions of the quality data reporting requirements are discussed below under sections D.2.c and D.2.d of this preamble.

(2) OASIS Data and Public Reporting

Section 1895(b)(3)(B)(v)(III) of the Act further states that ''[t]he Secretary shall establish procedures for making data submitted under sub clause (II) available to the public. Such procedures shall ensure that a home health agency has the opportunity to review the data that is to be made public with respect to the agency prior to such data being made public.''

To meet the requirement for making such data public, we propose to continue using a subset of OASIS data that is utilized for quality measure development and reported on the Home Health Compare Web site. Currently, the Home Health Compare web site lists 23 quality measures from the OASIS data set as described below. The Home Health Compare web site, which was redesigned in October 2010, is located at *http://www.medicare.gov/HHCompare/Home.asp.* Each HHA currently has pre-publication access, through the CMS contractor, to its own quality data that the contractor updates periodically. We propose to continue this process, to enable each agency to view its quality measures before public posting of data on Home Health Compare.

The following 13 OASIS–C process measures have been publicly reported on Home Health Compare since October 2010:

- Timely initiation of care.
- Influenza immunization received for current flu season.
- Pneumococcal polysaccharide vaccine ever received.
- Heart failure symptoms addressed during short-term episodes.
- Diabetic foot care and patient education implemented during short-term episodes of care.
- Pain assessment conducted.
- Pain interventions implemented during short-term episodes.
- Depression assessment conducted.
- Drug education on all medications provided to patient/caregiver during short-term episodes.
- Falls risk assessment for patients 65 and older.
- Pressure ulcer prevention plans implemented.
- Pressure ulcer risk assessment conducted.

• Pressure ulcer prevention included in the plan of care.

We published information about these new process measures in the **Federal Register** in the CY 2010 HH PPS proposed and final rules (74 FR 40960 and 74 FR 58096, respectively), and in the CY 2011 HH PPS proposed and final rules (75 FR 43250 and 75 FR 70401, respectively). We proposed and finalized the decision to update Home Health Compare in October 2010 to reflect the addition of the process measures.

We propose to continue publicly reporting these 13 process measures and consider them as measures of home health quality.

The following 10 OASIS–C outcome measures are currently listed on Home Health Compare:

• Improvement in ambulation/locomotion.
• Improvement in bathing.
• Improvement in bed transferring.
• Improvement in management of oral medications.
• Improvement in pain interfering with activity.
• Acute care hospitalization.
• Emergency Department Use Without Hospitalization.
• Improvement in dyspnea.
• Improvement in status of surgical wounds.
• Increase in number of pressure ulcers.

As proposed and finalized in the CY 2011 HH PPS final rule (75 FR 70401), these OASIS–C outcome measure calculations will be publicly reported for the first time in July 2011. (3) Transition from OASIS–B1 to OASIS–C

The implementation of OASIS–C on January 1, 2010 impacted the schedule of quality measure reporting for CY 2010 and CY 2011. Although sufficient OASIS–C data were collected during CY 2010 and early CY 2011 and risk models were in development, the outcome reports (found on Home Health Compare and the contractor outcome reports used for HHA's performance improvement activities) remained static with OASIS–B1 data. The last available OASIS–B1 reports remained in the system and on the Home Health Compare site until they could be replaced with OASIS–C reports. Sufficient numbers of patient episodes were needed to report measures based on new OASIS–C data. This is important because measures based on patient sample sizes taken over short periods of time can be inaccurate and misleading due to issues like seasonal variation and under-representation of long-stay home health patients. Once sufficient OASIS–C data were collected and submitted to CMS's national repository, we could begin producing new reports based on OASIS–C.

December 2009 was the last month for which outcome data were calculated for OASIS–B1 data and OASIS–B1 CASPER outcome reports continued to be available after March 2010. OASIS–C process measures were made available to preview in September 2010 and were publicly reported in October 2010. OASIS–C outcome measures will be available to preview in June 2011 and will be publicly reported in July 2011.

c. Claims Data, Proposed Requirements and Outcome Measure Change

We propose to continue to use the aforementioned specified measures derived from the OASIS–C data for purposes of measuring home health care quality. We propose to also use measures derived from Medicare claims data to measure home health quality. This would also ensure that providers would not have an additional burden of reporting quality of care measures through a separate mechanism, and that the costs associated with the development and testing of a new reporting mechanism would be avoided.

The change to OASIS–C brought about modifications to the OASIS–B1 measure ''Emergent Care,'' and resulted in the following change to that measure:

• *Emergency Department Use without Hospitalization:* This measure replaces the previously reported measure: Emergent care. It excludes emergency department visits that result in a hospital admission because those visits are already captured in the acute care hospitalization measure.

Upon review of actual claims data for emergency department visits and responses to OASIS–C data item M2300, we determined that the claims data are a more robust source of data for this measure, therefore the OASIS-based measure ''Emergency Department Use Without Hospitalization'' will not be publicly reported in July 2011. The ED Use Without Hospitalization measure will be recalculated from claims data and we propose that public reporting of the claims-based measure would begin January 2012. We invite comment on the proposed use of claims data in the calculation of home health quality measures and as an additional measurement of home health quality.

To summarize, we propose that the following 13 process and 9 outcome measures, which comprise measurement of home health care quality, would continue to be publicly reported in July 2011 and quarterly thereafter:

• Timely initiation of care.
• Influenza immunization received for current flu season.
• Pneumococcal polysaccharide vaccine ever received.
• Heart failure symptoms addressed during short-term episodes.
• Diabetic foot care and patient education implemented during short-term episodes of care.
• Pain assessment conducted.
• Pain interventions implemented during short-term episodes.
• Depression assessment conducted.
• Drug education on all medications provided to patient/caregiver during short-term episodes.
• Falls risk assessment for patients 65 and older.
• Pressure ulcer prevention plans implemented.
• Pressure ulcer risk assessment conducted.
• Pressure ulcer prevention included in the plan of care.
• Improvement in ambulation/locomotion.
• Improvement in bathing.
• Improvement in bed transferring.
• Improvement in management of oral medications.
• Improvement in pain interfering with activity.
• Acute care hospitalization.
• Improvement in dyspnea.
• Improvement in status of surgical wounds.
• Increase in number of pressure ulcers.

We propose that the claims-based measure ''Emergency Department Use without Hospitalization'' would be publicly reported in January 2012.

d. Home Health Care CAHPS Survey (HHCAHPS)

In the HH PPS Rate Update for CY 2011 final rule (75 FR 70404 *et seq.*), we stated that the expansion of the HH quality measures reporting requirements for Medicare-certified agencies will include the CAHPS® Home Health Care (HHCAHPS) Survey for the CY 2012 annual payment update (APU). We are maintaining our existing policy as issued in the CY 2011 HH PPS Rate Update, and are moving forward with our plans for HHCAHPS linkage to the pay-for-reporting (P4R) requirements affecting the HH PPS rate update for CY 2012.

(1) Background and Description of HHCAHPS

As part of the U.S. Department of Health and Human Services' (DHHS) Transparency Initiative, we have implemented a process to measure and publicly report patient experiences with home health care using a survey

developed by the Agency for Healthcare Research and Quality's (AHRQ's) Consumer Assessment of Healthcare Providers and Systems (CAHPS®) program, and endorsed by the National Quality Forum (NQF). The HHCAHPS survey is part of a family of CAHPS® surveys that asks patients to report on and rate their experiences with health care. The Home Health Care CAHPS (HHCAHPS) survey presents home health patients with a set of standardized questions about their home health care providers and about the quality of their home health care. Prior to this survey, there was no national standard for collecting information about patient experiences that would enable valid comparisons across all HHAs. The history of the HHCAHPS has been given in previous rules, but it is also available on our Web site at *https://homehealthcahps.org* and also, in the *HHCAHPS Protocols and Guidelines Manual,* which is downloadable from our Web site.

For public reporting purposes, we will present five measures—three composite measures and two global ratings of care from the questions on the HHCAHPS survey. The publicly reported data will be adjusted for differences in patient mix across home health agencies. Each composite measure consists of four or more questions regarding one of the following related topics:

- Patient care (Q9, Q16, Q19, and Q24);
- Communications between providers and patients (Q2, Q15, Q17, Q18, Q22, and Q23);
- Specific care issues on medications, home safety, and pain (Q3, Q4, Q5, Q10, Q12, Q13, and Q14);

The two global ratings are the overall rating of care given by the HHA's care providers, and the patient's willingness to recommend the HHA to family and friends.

The HHCAHPS survey is currently available in six languages. At the time of the CY 2010 HH PPS final rule, HHCAHPS was only available in English and Spanish translations. In the proposed rule for CY 2010, we stated that we would provide additional translations of the survey over time in response to suggestions for any additional language translations. We now offer HHCAHPS in English, Spanish, Mandarin (Simplified) Chinese, Cantonese (Classical) Chinese, Russian, and Vietnamese languages. We will continue to consider additional translations of the HHCAHPS in response to the needs of the home health patient population.

All of the requirements about eligibility for HHCAHPS and conversely, which home health patients are ineligible for HHCAHPS are delineated and detailed in the *HHCAHPS Protocols and Guidelines Manual* which is downloadable from the official Home Health Care CAHPS Web site *https://homehealthcahps.org.* To be eligible, home health patients must have received at least two skilled home health visits in the past 2 months, paid for by Medicare or Medicaid. HHCAHPS surveys will not be taken from patients who are:

- Under the age of 18;
- Deceased;
- Receiving hospice care;
- Receiving routine maternity care only;
- Living in a State that restricts the release of patient information for a specific condition or illness that the patient has; or are
- Requesting that their names not be released to anyone.

We stated in previous rules that Medicare-certified agencies are required to contract with an approved HHCAHPS survey vendor. Beginning in summer 2009, interested vendors applied to become approved HHCAHPS survey vendors. HHCAHPS survey vendors are required to attend introductory and all update trainings conducted by CMS and the HHCAHPS Survey Coordination Team, as well as to pass a post-training certification test. We now have approximately 40 approved HHCAHPS survey vendors. The list of approved vendors is available at *https://homehealthcahps.org.*

(2) HHCAHPS Requirements for CY 2012

In the CY 2010 HH PPS final rule (74 FR 58078 *et seq.*), we stated that HHCAHPS would not be required for the APU for CY 2011. We did this so that HHAs would have more time to prepare for the implementation of HHCAHPS. Therefore, in the CY 2010 HH PPS final rule, we stated that data collection should take place beginning in the third quarter of CY 2010 to meet the HHCAHPS reporting requirements for the CY 2012 APU. In the CY 2010 HH PPS final rule, and in the CY 2011 HH PPS final rule, we stated that Medicare-certified agencies would be required to participate in a dry run for at least 1 month in third quarter of 2010 (July, August, and/or September), and to begin continuous monthly data collection in October 2010 through March 2011, for the CY 2012 APU. The dry run data were due to the Home Health CAHPS® Data Center by 11:59 p.m., eastern standard time (e.s.t.) on January 21, 2011. The dry run data will not be publicly reported on the CMS Home Health Compare web site. The purpose of the dry run was to provide an opportunity for vendors and HHAs to acquire first-hand experience with data collection, including sampling and data submission to the Home Health Care CAHPS® Data Center.

In the CY 2011 HH PPS final rule, it was stated that the mandatory period of data collection for the CY 2012 APU would include the dry run data in the third quarter 2010, data from each month in the fourth quarter of 2010 (October, November and December 2010), and data from each month in the first quarter 2011 (January, February and March 2011). We previously stated that all Medicare-certified HHAs should continuously collect HHCAHPS survey data for every month in every quarter beginning October 2010, and submit these data for the fourth quarter of 2010 to the Home Health CAHPS® Data Center by 11:59 p.m., eastern daylight time (e.d.t.) on April 21, 2011. In the CY 2011 HH PPS final rule, we stated that the data collected for the 3 months of the first quarter 2011 would have to be submitted to the Home Health CAHPS® Data Center by 11:59 p.m., e.d.t. on July 21, 2011. We also stated that these data submission deadlines would be firm (that is, no late submissions would be accepted).

These periods (a dry run in third quarter 2010, and 6 months of data from October 2010 through March 2011) were deliberately chosen to comprise the HHCAHPS reporting requirements for the CY 2012 APU because they coincided with the OASIS–C reporting requirements that would already have been due on June 30, 2011 for the CY 2012 APU. We would also exempt Medicare-certified agencies from the HHCAHPS reporting requirements if they had fewer than 60 HHCAHPS-eligible unique patients from April 1, 2009 through March 31, 2010. In the CY 2011 HH PPS final rule, we stated that by January 21, 2011 HHAs would need to provide CMS with patient counts for the period of April 1, 2009 through March 31, 2010. We have posted a form on *https://homehealthcahps.org* that the HHAs would need to use to submit their patient counts. This patient counts reporting requirement would pertain only to Medicare-certified HHAs with fewer than 60 HHCAHPS eligible, unduplicated or unique patients for that time period. The aforementioned agencies would be exempt from conducting the HHCAHPS survey for the APU in CY 2012.

We stated in the CY 2010 HH PPS final rule (74 FR 58078) and in the CY

2011 HH PPS final rule that we would exempt newly Medicare-certified HHAs. We realize that if an HHA became Medicare-certified April 1, 2010 and after, then they would be exempt from participating in HHCAHPS.

For CY 2012, we propose to maintain our policy that all HHAs, unless covered by specific exclusions, must meet the quality reporting requirements or be subject to a two (2) percentage point reduction in the HH market basket percentage increase, in accordance with section 1895(b)(3)(B)(v)(I) of the Act.

(3) HHCAHPS Reconsiderations and Appeals Process

We stated in the CY 2011 HH PPS final rule that we would propose a reconsiderations and appeals process for HHAs not meeting the HHCAHPS reporting requirements for CY 2012. We are therefore now proposing a reconsiderations and appeals process for HHAs that fail to meet the HHCAHPS data collection requirements. We are proposing that HHAs that are not compliant with OASIS–C and/or HHCAHPS requirements for the CY 2012 APU requirements will be notified after a process is followed to confirm that they were noncompliant with CY 2012 quality reporting requirements. We are proposing to issue a Joint Signature Memorandum to RHHIs/MACs with a list of HHAs not compliant with OASIS and/or HHCAHPS. We are proposing that the September Memorandum include language regarding evidence required for the reconsideration process. We are proposing that the language in the transmittal include information to the HHAs about how to prepare a request for reconsideration of the CMS decision, and these HHAs will have 30 days to file their requests for reconsiderations to CMS. We are proposing that we examine each request and make a determination about whether we plan to uphold our original decision. We are proposing that HHAs receive CMS'reconsideration decision by December 31, 2011. We are proposing that HHAs have a right to appeal under 42 CFR 405, subpart R, to the Provider Reimbursement Review Board (PRRB) if they were not satisfied with the CMS reconsideration determination.

We are proposing that this Memorandum be a CMS transmittal that would be sent out the first week of September 2011 from the CMS Manual System, Medicare Claims Processing. We are proposing that this CMS transmittal be sent to Fiscal Intermediaries (FIs), Regional Home Health Intermediaries (RHHIs) and/or Carriers. We propose that the RHHIs/MACs verify the claims submissions for the identified timeframe for the 2012 APU period, to confirm that the claims match the HHAs we identified as noncompliant with OASIS and HHCAHPS. In late September/early October, the appropriate staff within CMS would review your submission. If necessary, the RHHIs/MACs would identify and notify the HHAs that they could lose 2 percent of their 2012 APU, and provide them with instructions on how to request reconsideration. In early November 2011, the RHHIs/MACS would forward the HHAs reconsiderations to CMS on a flow basis so that we could review and prepare recommendations for cross component review within CMS throughout the month of November. We propose to have CMS finish this process in December, and about mid-December to circulate the recommendations for clearance and final determinations by CMS senior leadership. We propose that the HHAs would be informed about CMS' final decisions by December 31, 2011.

(4) HHCAHPS Oversight Activities

We stated in the CY 2011 HH PPS final rule that vendors and HHAs would be required to participate in HHCAHPS oversight activities to ensure compliance with HHCAHPS protocols, guidelines, and survey requirements. The purpose of the oversight activities is to ensure that HHAs and approved survey vendors follow the *HHCAHPS Protocols and Guidelines Manual*. As stated, all approved survey vendors must develop a Quality Assurance Plan (QAP) for survey administration in accordance with the *HHCAHPS Protocols and Guidelines Manual*. The first QAP must be submitted within 6 weeks of the data submission deadline after the vendor's first quarterly data submission. The QAP must be updated and submitted annually thereafter and at any time that changes occur in staff or vendor capabilities or systems. A model QAP is included in the *HHCAHPS Protocols and Guidelines Manual*. The QAP should include the following:

- Organizational Background and Staff Experience.
- Work Plan.
- Sampling Plan.
- Survey Implementation Plan.
- Data Security, Confidentiality and Privacy Plan.
- Questionnaire Attachments.

As part of the oversight activities, the HHCAHPS Survey Coordination Team conducts on-site visits to the HHCAHPS vendors. The purpose of the site visits is to allow the HHCAHPS Coordination Team to observe the entire Home Health Care CAHPS Survey implementation process, from the sampling stage through file preparation and submission, as well as to assess how the HHCAHPS data are stored. The HHCAHPS Survey Coordination Team reviews the survey vendor's survey systems, and assesses administration protocols based on the *HHCAHPS Protocols and Guidelines Manual* posted at *https://homehealthcahps.org*. The HHCAHPS Survey Coordination Team includes the CMS staff assigned to work on HHCAHPS, and the Federal contractor for the HHCAHPS implementation. HHCAHPS survey vendors are not part of the HHCAHPS Survey Coordination Team. The systems and program review include, but are not limited, to the following:

- Survey management and data systems;
- Printing and mailing materials facilities;
- Telephone call center facilities;
- Data receipt, entry and storage facilities; and
- Written documentation of survey processes.

After the site visits, vendors are given a defined time period in which to correct any identified issues and provide follow-up documentation of corrections for review. In general, we propose that the defined time periods will be between 2 weeks to 1 month after these issues are stated in the HHCAHPS Coordination Team's site visit report to the survey vendor. It is proposed that survey vendors will be subject to follow-up site visits as needed.

(5) HHCAHPS Requirements for CY 2013

For the CY 2013 APU, we propose to require HHCAHPS data collection and reporting for four quarters. The data collection period will include second quarter 2011 through first quarter 2012. We propose that HHAs will be required to submit their HHCAHPS data files to the Home Health CAHPS Data Center the third Thursday of the month (in the months of October, January, April and July). HHAs will be required to submit their HHCAHPS data files to the Home Health CAHPS Data Center for CY 2013 as follows: the data for the second quarter 2011 by 11:59 p.m., e.d.t. on October 20, 2011; the data for the third quarter 2011 by 11:59 p.m., e.s.t. on January 19, 2012; the data for the fourth quarter 2011 by 11:59 p.m., e.d.t. on April 19, 2012; and the data for the first quarter 2012 by 11:59 p.m., e.d.t. on July 19, 2012.

We propose to require that all HHAs that have fewer than 60 HHCAHPS-eligible unduplicated or unique patients in the period of April 1, 2010 through March 31, 2011 will be exempt from the HHCAHPS data collection and submission requirements for the CY 2013 APU. For the CY 2013 APU, agencies with fewer than 60 HHCAHPS-eligible, unduplicated or unique patients would be required to submit their counts on the Participation Exemption Request form posted at *https://homehealthcahps.org* by 11:59 p.m., e.d.t. on April 19, 2012. This deadline is firm, as are all of the quarterly data submission deadlines.

We propose to exempt HHAs receiving Medicare certification on or after April 1, 2011 from the full HHCAHPS reporting requirement for the CY 2013 APU, because these HHAs were not Medicare-certified in the period of April 1, 2010 and March 31, 2011.

(6) HHCAHPS Codified Criteria

The following codified criteria stay the same as issued in the CY 2011 HH PPS final rule (75 FR 70465). We stated in § 484.250(b) that ''An HHA that has less than 60 eligible unique HHCAHPS patients annually must submit to CMS their total HHCAHPS patient count to CMS to be exempt from the HHCAHPS reporting requirements.'' In § 484.250(c), we stated that ''An HHA must contract with an approved, independent HHCAHPS survey vendor to administer the HHCAHPS on its behalf.''

In § 484.250(c)(1), we stated that ''CMS approves an HHCAHPS survey vendor if such applicant has been in business for a minimum of 3 years and has conducted surveys of individuals and samples for at least 2 years. For HHCAHPS, a ''survey of individuals'' is defined as the collection of data from at least 600 individuals selected by statistical sampling methods and the data collected are used for statistical purposes. All applicants that meet these requirements will be approved by CMS.''

In § 484.250(c)(2) we stated that ''No organization, firm, or business that owns, operates, or provides staffing for a HHA is permitted to administer its own Home Health Care CAHPS (HHCAHPS) Survey or administer the survey on behalf of any other HHA in the capacity as an HHCAHPS survey vendor. Such organizations will not be approved by CMS as HHCAHPS survey vendors.''

The following criteria from the CY 2011 HH PPS final rule are proposed to be revised so that the requirements for OASIS and Home Health CAHPS are clearly delineated in the regulations. In the CY 2011 HH PPS final rule (75 FR 70465), we stated for § 484.250, Patient Assessment Data, that ''An HHA must submit to CMS the OASIS–C data described at § 484.55(b)(1) and Home Health Care CAHPS data for CMS to administer the payment rate methodologies described in § 484.215, § 484.230, and § 484.235 of this subpart, and meet the quality reporting requirements of section 1895(b)(3)(B)(v) of the Act.''

We propose to revise this section to clarify that HHCAHPS is associated with the APU described at § 484.225(i) and the quality reporting requirements, and not with other payment requirements.

(7) HHCAHPS Requirements for CY 2014

For the CY 2014 APU, we propose to require HHCAHPS data collection and reporting for four quarters. The data collection period would include second quarter 2012 through first quarter 2013. It is proposed that HHAs will be required to submit their HHCAHPS data files to the Home Health CAHPS Data Center the third Thursday of the month for the months of October, January, April and July. It is proposed that HHAs will be required to submit their HHCAHPS data files to the Home Health CAHPS Data Center for CY 2014 as follows: for the second quarter 2012 by 11:59 p.m., e.d.t. on October 18, 2012; for the third quarter 2012 by 11:59 p.m., e.s.t. on January 17, 2013; for the fourth quarter 2012 by 11:59 p.m., e.d.t. on April 18, 2013; and for the first quarter 2013 by 11:59 p.m., e.d.t. on July 18, 2013.

As noted, we exempt HHAs receiving Medicare certification on or after April 1, 2012 from the full HHCAHPS reporting requirement for the CY 2014 APU, as data submission and analysis will not be possible for an agency that late in the reporting period for the CY 2014 APU requirements.

As noted, we require that all HHAs that have fewer than 60 HHCAHPS-eligible unduplicated or unique patients in the period of April 1, 2011 through March 31, 2012 will be exempt from the HHCAHPS data collection and submission requirements for the CY 2014 APU. For the CY 2014 APU, agencies with fewer than 60 HHCAHPS-eligible, unduplicated or unique patients would be required to submit their counts on the Participation Exemption Request form posted on *https://homehealthcahps.org* by 11:59 p.m., e.d.t. on April 18, 2013. This deadline is firm, as are all of the quarterly data submission deadlines.

(8) For Further Information on the HHCAHPS Survey

We encourage HHAs interested in learning about the survey to view the HHCAHPS Survey Web site at the official Web site for the HHCAHPS at *https://homehealthcahps.org*. Home health agencies can also send an e-mail to the HHCAHPS Survey Coordination Team at *HHCAHPS@rti.org,* or telephone toll-free (1–866–354–0985) for more information about HHCAHPS.

3. Home Health Wage Index

Sections 1895(b)(4)(A)(ii) and (b)(4)(C) of the Act require the Secretary to provide appropriate adjustments to the proportion of the payment amount under the HH PPS to account for area wage differences, using adjustment factors that reflect the relative level of wages and wage-related costs applicable to the furnishing of home health services. We apply the appropriate wage index value to the labor portion of the HH PPS rates based on the site of service for the beneficiary (defined by section 1861(m) of the Act as the beneficiary's place of residence). Previously, we determined each HHA's labor market area based on definitions of Metropolitan Statistical Areas (MSAs) issued by the Office of Management and Budget (OMB). We have consistently used the pre-floor, pre-reclassified hospital wage index data to adjust the labor portion of the HH PPS rates. We believe the use of the pre-floor, pre-reclassified hospital wage index data results in an appropriate adjustment to the labor portion of the costs, as required by statute.

In the CY 2006 HH PPS final rule for (70 FR 68132), we began adopting revised labor market area definitions as discussed in the Office of Management and Budget (OMB) Bulletin No. 03–04 (June 6, 2003). This bulletin announced revised definitions for Metropolitan Statistical Areas (MSAs) and the creation of Micropolitan Statistical Areas and Core-Based Statistical Areas (CBSAs). The bulletin is available online at *http://www.whitehouse.gov/omb/bulletins/b03–04.html*. In addition, OMB published subsequent bulletins regarding CBSA changes, including changes in CBSA numbers and titles. This rule incorporates the CBSA changes published in the most recent OMB bulletin. The OMB bulletins are available at *http://www.whitehouse.gov/omb/bulletins/index.html*.

Finally, we continue to use the methodology discussed in the CY 2007 HH PPS final rule for (71 FR 65884) to address those geographic areas in which there are no IPPS hospitals and, thus, no

hospital wage data on which to base the calculation of the HH PPS wage index. For rural areas that do not have IPPS hospitals and, therefore, lack hospital wage data on which to base a wage index, we use the average wage index from all contiguous CBSAs as a reasonable proxy. Since CY 2007, this methodology was used to calculate the wage index for rural Massachusetts. However, we now have wage data from an IPPS hospital in rural Massachusetts. The hospital was formerly a critical access hospital (CAH), but converted to an IPPS hospital in 2008, the base year for the 2012 wage index. Therefore, it is no longer necessary to apply this methodology to rural Massachusetts for CY 2012.

For rural Puerto Rico, we do not apply this methodology due to the distinct economic circumstances that exist there, but instead continue using the most recent wage index previously available for that area (from CY 2005).

For urban areas without IPPS hospitals, we use the average wage index of all urban areas within the State as a reasonable proxy for the wage index for that CBSA. For CY 2012, there is an additional urban area (Yuba City, CA) without hospital wage data. Therefore, for CY 2012, the two urban areas without hospital wage data are Hinesville-Fort Stewart, Georgia (CBSA 25980) and Yuba City, CA (CBSA 49700).

The wage index values for rural areas and the CBSAs and their associated wage index values are available via the Internet at: *http://www.cms.gov/HomeHealthPPS/HHPPSRN/list.asp*.

4. Proposed CY 2012 Payment Update

a. National Standardized 60-Day Episode Rate

The Medicare HH PPS has been in effect since October 1, 2000. As set forth in the July 3, 2000 final rule (65 FR 41128), the base unit of payment under the Medicare HH PPS is a national standardized 60-day episode rate. As set forth in § 484.220, we adjust the national standardized 60-day episode rate by a case-mix relative weight and a wage index value based on the site of service for the beneficiary.

In the CY 2008 HH PPS final rule with comment period, we refined the case-mix methodology and also rebased and revised the home health market basket. To provide appropriate adjustments to the proportion of the payment amount under the HH PPS to account for area wage difference, we apply the appropriate wage index value to the labor portion of the HH PPS rates. The labor-related share of the case-mix adjusted 60-day episode rate is 77.082 percent and the non-labor-related share is 22.918 percent. The proposed CY 2012 HH PPS rates use the same case-mix methodology and application of the wage index adjustment to the labor portion of the HH PPS rates as set forth in the CY 2008 HH PPS final rule with comment period. Following are the steps we take to compute the case-mix and wage adjusted 60-day episode rate:

(1) Multiply the national 60-day episode rate by the patient's applicable case-mix weight.

(2) Divide the case-mix adjusted amount into a labor (77.082 percent) and a non-labor portion (22.918 percent).

(3) Multiply the labor portion by the applicable wage index based on the site of service of the beneficiary.

(4) Add the wage-adjusted portion to the non-labor portion, yielding the case-mix and wage adjusted 60-day episode rate, subject to any additional applicable adjustments.

In accordance with section 1895(b)(3)(B) of the Act, this document constitutes the annual update of the HH PPS rates. The HH PPS regulations at § 484.225 set forth the specific annual percentage update methodology. In accordance with § 484.225(i), for a HHA that does not submit home health quality data, as specified by the Secretary, the unadjusted national prospective 60-day episode rate is equal to the rate for the previous calendar year increased by the applicable home health market basket index amount minus two percentage points. Any reduction of the percentage change will apply only to the calendar year involved and will not be considered in computing the prospective payment amount for a subsequent calendar year.

For CY 2012, we are proposing to base the wage index adjustment to the labor portion of the HH PPS rates on the most recent pre-floor and pre-reclassified hospital wage index. As discussed in the July 3, 2000 HH PPS final rule, for episodes with four or fewer visits, Medicare pays the national per-visit amount by discipline, referred to as a LUPA. We propose to update the national per-visit rates by discipline annually by the applicable home health market basket percentage. We propose to adjust the national per-visit rate by the appropriate wage index based on the site of service for the beneficiary, as set forth in § 484.230. We propose to adjust the labor portion of the updated national per-visit rates used to calculate LUPAs by the most recent pre-floor and pre-reclassified hospital wage index. We are also proposing to update the LUPA add-on payment amount and the NRS conversion factor by the applicable home health market basket update of 1.5 percent for CY 2012.

Medicare pays the 60-day case-mix and wage-adjusted episode payment on a split percentage payment approach. The split percentage payment approach includes an initial percentage payment and a final percentage payment as set forth in § 484.205(b)(1) and § 484.205(b)(2). We may base the initial percentage payment on the submission of a request for anticipated payment (RAP) and the final percentage payment on the submission of the claim for the episode, as discussed in § 409.43. The claim for the episode that the HHA submits for the final percentage payment determines the total payment amount for the episode and whether we make an applicable adjustment to the 60-day case-mix and wage-adjusted episode payment. The end date of the 60-day episode as reported on the claim determines which calendar year rates Medicare would use to pay the claim.

We may also adjust the 60-day case-mix and wage-adjusted episode payment based on the information submitted on the claim to reflect the following:

- A low utilization payment provided on a per-visit basis as set forth in § 484.205(c) and § 484.230.
- A partial episode payment adjustment as set forth in § 484.205(d) and § 484.235.
- An outlier payment as set forth in § 484.205(e) and § 484.240.

b. Proposed Updated CY 2012 National Standardized 60-Day Episode Payment Rate

In calculating the annual update for the CY 2012 national standardized 60-day episode payment rates, we first look at the CY 2011 rates as a starting point. The CY 2011 national standardized 60-day episode payment rate is $2,192.07.

Next, we update the payment amount by the proposed CY 2012 home health market basket update of 1.5 percent.

As previously discussed in section II.A. (''Case-Mix Measurement'') of this proposed rule, our updated analysis of the change in case-mix that is not due to an underlying change in patient health status reveals an additional increase in nominal change in case-mix. Therefore, we propose to reduce rates by 5.06 percent in CY 2012, resulting in a proposed CY 2012 national standardized 60-day episode payment rate of $2,112.37. The proposed CY 2012 national standardized 60-day episode payment rate for an HHA that submits the required quality data is shown in Table 19. The proposed CY 2012 national standardized 60-day episode

payment rate for an HHA that does not submit the required quality data is updated by the proposed CY 2012 home health market basket update (1.5 percent) minus 2 percentage points and is shown in Table 20.

TABLE 19—PROPOSED CY 2012 NATIONAL 60-DAY EPISODE PAYMENT AMOUNT UPDATED BY THE PROPOSED HOME HEALTH MARKET BASKET UPDATE, BEFORE CASE-MIX ADJUSTMENT AND WAGE ADJUSTMENT BASED ON THE SITE OF SERVICE FOR THE BENEFICIARY

| CY 2011 National standardized 60-day episode payment rate | Multiply by the proposed CY 2012 home health market basket update of 1.5 percent | Reduce by 5.06 percent for nominal change in case-mix | Proposed CY 2012 national standardized 6-day episode payment rate |
|---|---|---|---|
| $2,192.07 | × 1.015 | × 0.9494 | $2,112.37 |

TABLE 20—FOR HHAS THAT DO NOT SUBMIT THE QUALITY DATA—PROPOSED CY 2012 NATIONAL 60-DAY EPISODE PAYMENT AMOUNT UPDATED BY THE PROPOSED HOME HEALTH MARKET BASKET UPDATE BEFORE CASE-MIX ADJUSTMENT AND WAGE ADJUSTMENT BASED ON THE SITE OF SERVICE FOR THE BENEFICIARY

| CY 2011 National standardized 60-day episode payment rate | Multiply by the proposed CY 2012 home health market basket update of 1.5 percent minus 2 percentage points (-0.5 percent) | Reduce by 5.06 percent for nominal change in case-mix | Proposed CY 2012 National standardized 60-day episode payment rate |
|---|---|---|---|
| $2,192.07 | × 0.995 | × 0.9494 | $2070.75 |

c. National Per-Visit Rates Used To Pay LUPAs and Compute Imputed Costs Used in Outlier Calculations

In calculating the CY 2012 national per-visit rates used to calculate payments for LUPA episodes and to compute the imputed costs in outlier calculations, the CY 2011 national per-visit rates for each discipline are updated by the proposed CY 2012 home health market basket update of 1.5 percent. National per-visit rates are not subject to the 5.06 percent reduction related to the nominal increase in case-mix. The CY 2012 national per-visit rates per discipline are shown in Table 21. The six home health disciplines are as follows:

- Home Health Aide (HH aide);
- Medical Social Services (MSS);
- Occupational Therapy (OT);
- Physical Therapy (PT);
- Skilled Nursing (SN); and
- Speech Language Pathology Therapy (SLP).

TABLE 21—PROPOSED CY 2012 NATIONAL PER-VISIT AMOUNTS FOR LUPAS (NOT INCLUDING THE LUPA ADD-ON AMOUNT FOR A BENEFICIARY'S ONLY EPISODE OR THE INITIAL EPISODE IN A SEQUENCE OF ADJACENT EPISODES) AND OUTLIER CALCULATIONS UPDATED BY THE PROPOSED HEALTH MARKET BASKET UPDATE, BEFORE WAGE INDEX ADJUSTMENT

| Home health discipline type | CY 2011 per-visit amounts per 60-day episode | For HHAs that DO submit the required quality data | | For HHAs that DO NOT submit the required quality data | |
|---|---|---|---|---|---|
| | | Multiply by the proposed CY 2012 market basket update of 1.5 percent | Proposed CY 2012 per-visit payment | Multiply by the proposed CY 2012 market basket update of 1.5 percent minus 2 percentage points (−0.5 percent) | Proposed CY 2012 per-visit payment |
| HH Aide | $50.42 | × 1.015 | $51.18 | × 0.995 | $50.17 |
| MSS | 178.46 | × 1.015 | 181.14 | × 0.995 | 177.57 |
| OT | 122.54 | × 1.015 | 124.38 | × 0.995 | 121.93 |
| PT | 121.73 | × 1.015 | 123.56 | × 0.995 | 121.12 |
| SN | 111.32 | × 1.015 | 112.99 | × 0.995 | 110.76 |
| SLP | 132.27 | × 1.015 | 134.25 | × 0.995 | 131.61 |

d. LUPA Add-on Payment Amount Update

Beginning in CY 2008, LUPA episodes that occur as the only episode or initial episode in a sequence of adjacent episodes are adjusted by adding an additional amount to the LUPA payment before adjusting for area wage differences. We update the LUPA payment amount by the proposed CY 2012 home health market basket update percentage of 1.5 percent. The LUPA add-on payment amount is not subject to the 5.06 percent reduction related to the nominal increase in case-mix. For CY 2012, we propose that the add-on to the LUPA payment to HHAs that submit the required quality data be updated by the proposed CY 2012 home health market basket update of 1.5 percent. The proposed CY 2012 LUPA add-on payment amount is shown in Table 22. We propose that the add-on to the LUPA payment to HHAs that do not submit the required quality data would be updated by the proposed CY 2012 home health market basket update (1.5 percent) minus two percentage points.

TABLE 22—PROPOSED CY 2012 LUPA ADD-ON AMOUNTS

| CY 2011 LUPA add-on amount | For HHAs that DO submit the required quality data | | For HHAs that DO NOT submit the required quality data | |
|---|---|---|---|---|
| | Multiply by the proposed CY 2012 market basket update of 1.5 percent | Proposed CY 2012 LUPA add-on amount | Multiply by the proposed CY 2012 market basket update of 1.5 percent minus 2 percentage points (−0.5 percent) | Proposed CY 2012 LUPA add-on amount |
| $93.31 | × 1.015 | $94.71 | × 0.995 | $92.84 |

e. Nonroutine Medical Supply Conversion Factor Update

Payments for nonroutine medical supplies (NRS) are computed by multiplying the relative weight for a particular severity level by the NRS conversion factor. We first increase CY 2010 NRS conversion factor ($52.54) by the proposed market basket of 1.5 percent. Then we reduce that amount by 5.06 percent to account for the increase in nominal case-mix. The final updated CY 2012 NRS conversion factor for 2012 appears in Table 23. For CY 2012, the NRS conversion factor is $53.33.

TABLE 23—PROPOSED CY 2012 NRS CONVERSION FACTOR FOR HHAS THAT DO SUBMIT THE REQUIRED QUALITY DATA

| CY 2011 NRS conversion factor | Multiply by the proposed CY 2012 market basket update of 1.5 percent | Proposed CY 2011 NRS conversion factor |
|---|---|---|
| $52.54 | × 1.015 | $53.33 |

Using the NRS conversion factor ($53.33) for CY 2012, the payment amounts for the various severity levels are shown in Table 24.

TABLE 24—PROPOSED CY 2012 NRS PAYMENT AMOUNTS FOR HHAS THAT DO SUBMIT THE REQUIRED QUALITY DATA

| Severity level | Points (scoring) | Relative weight | Proposed CY 2012 NRS payment amount |
|---|---|---|---|
| 1 | 0 | 0.2698 | $14.39 |
| 2 | 1 to 14 | 0.9742 | 51.95 |
| 3 | 15 to 27 | 2.6712 | 142.46 |
| 4 | 28 to 48 | 3.9686 | 211.65 |
| 5 | 49 to 98 | 6.1198 | 326.37 |
| 6 | 99+ | 10.5254 | 561.32 |

For HHAs that do not submit the required quality data, we again begin with the CY 2011 NRS conversion factor. We first increase the CY 2011 NRS conversion factor ($52.54) by the proposed CY 2012 home health market basket update percentage of 1.5 percent minus 2 percentage points. The CY 2011 NRS conversion factor for HHAs that do not submit quality data is shown in Table 25.

TABLE 25—PROPOSED CY 2012 NRS CONVERSION FACTOR FOR HHAS THAT DO NOT SUBMIT THE REQUIRED QUALITY DATA

| CY 2011 NRS conversion factor | Multiply by the proposed CY 2012 market basket update of 1.5 percent minus 2 percentage points (−0.5 percent) | Proposed CY 2012 NRS conversion factor |
|---|---|---|
| $52.54 | × 0.995 | $52.28 |

The payment amounts for the various severity levels based on the updated conversion factor for HHAs that do not submit quality data are calculated in Table 26.

TABLE 26—PROPOSED CY 2012 NRS PAYMENT AMOUNTS FOR HHAS THAT DO NOT SUBMIT THE REQUIRED QUALITY DATA

| Severity level | Points (scoring) | Relative weight | Proposed NRS payment amount |
|---|---|---|---|
| 1 | 0 | 0.2698 | $14.11 |
| 2 | 1 to 14 | 0.9742 | 50.93 |
| 3 | 15 to 27 | 2.6712 | 139.65 |
| 4 | 28 to 48 | 3.9686 | 207.48 |
| 5 | 49 to 98 | 6.1198 | 319.94 |
| 6 | 99+ | 10.5254 | 550.27 |

5. Rural Add-On

Section 421(a) of the Medicare Prescription Drug, Improvement, and Modernization Act (MMA) of 2003 (Pub. L. 108–173, enacted on December 8, 2003 and as amended by section 3131(c) of the Affordable Care Act) provides an increase of 3 percent of the payment amount otherwise made under section 1895 of the Act for home health services furnished in a rural area (as defined in section 1886(d)(2)(D) of the Act), for episodes and visits ending on or after April 1, 2010 and before January 1, 2016. The statute waives budget neutrality related to this provision, as the statute specifically states that the Secretary shall not reduce the standard prospective payment amount (or amounts) under section 1895 of the Act applicable to home health services furnished during a period to offset the increase in payments resulting in the application of this section of the statute.

The 3 percent rural add-on is applied to the national standardized 60-day episode rate, national per-visit rates, LUPA add-on payment, and NRS conversion factor when home health services are provided in rural (non-CBSA) areas. Refer to Tables 27 thru 31 for these payment rates.

TABLE 27—PROPOSED CY 2012 PAYMENT AMOUNTS FOR 60-DAY EPISODES FOR SERVICES PROVIDED IN A RURAL AREA BEFORE CASE-MIX AND WAGE INDEX ADJUSTMENT

| For HHAs that do submit quality data | | | For HHAs that do not submit quality data | | |
|---|---|---|---|---|---|
| Proposed CY 2012 national standardized 60-day episode payment rate | Multiply by the 3 percent rural add-on | Proposed Rural CY 2012 national standardized 60-day episode payment rate | Proposed CY 2012 national standardized 60-day episode payment rate | Multiply by the 3 percent rural add-on | Proposed rural CY 2012 national standardized 60-day episode payment rate |
| $2,112.37 | × 1.03 | $2,175.74 | $2,070.75 | × 1.03 | $2,132.87 |

TABLE 28—PROPOSED CY 2012 PER-VISIT AMOUNTS FOR SERVICES PROVIDED IN A RURAL AREA, BEFORE WAGE INDEX ADJUSTMENT

| Home health discipline type | For HHAs that do submit quality data | | | For HHAs that do not submit quality data | | |
|---|---|---|---|---|---|---|
| | Proposed CY 2012 per-visit rate | Multiply by the 3 percent rural add-on | Proposed rural CY 2012 per-visit rate | Proposed CY 2012 per-visit rate | Multiply by the 3 percent rural add-on | Proposed rural CY 2012 per-visit rate |
| HH Aide | $51.18 | × 1.03 | $52.72 | $50.17 | × 1.03 | $51.68 |
| MSS | 181.14 | × 1.03 | 186.57 | 177.57 | × 1.03 | 182.90 |
| OT | 124.38 | × 1.03 | 128.11 | 121.93 | × 1.03 | 125.59 |
| PT | 123.56 | × 1.03 | 127.27 | 121.12 | × 1.03 | 124.75 |
| SN | 112.99 | × 1.03 | 116.38 | 110.76 | × 1.03 | 114.08 |

TABLE 28—PROPOSED CY 2012 PER-VISIT AMOUNTS FOR SERVICES PROVIDED IN A RURAL AREA, BEFORE WAGE INDEX ADJUSTMENT—Continued

| Home health discipline type | For HHAs that do submit quality data | | | For HHAs that do not submit quality data | | |
|---|---|---|---|---|---|---|
| | Proposed CY 2012 per-visit rate | Multiply by the 3 percent rural add-on | Proposed rural CY 2012 per-visit rate | Proposed CY 2012 per-visit rate | Multiply by the 3 percent rural add-on | Proposed rural CY 2012 per-visit rate |
| SLP | 134.25 | × 1.03 | 138.28 | 131.61 | × 1.03 | 135.56 |

TABLE 29—PROPOSED CY 2012 LUPA ADD-ON AMOUNTS FOR SERVICES PROVIDED IN RURAL AREAS

| For HHAs that do submit quality data | | | For HHAs that do not submit quality data | | |
|---|---|---|---|---|---|
| Proposed CY 2012 LUPA add-on amount | Multiply by the 3 percent rural add-on | Proposed rural CY 2012 LUPA add-on amount | Proposed CY 2012 LUPA add-on amount | Multiply by the 3 percent rural add-on | Proposed Rural CY 2012 LUPA add-on amount |
| $94.71 | × 1.03 | $97.55 | $92.84 | × 1.03 | $95.63 |

TABLE 30—PROPOSED CY 2012 NRS CONVERSION FACTOR FOR SERVICES PROVIDED IN RURAL AREAS

| For HHAs that do submit quality data | | | For HHAs that do not submit quality data | | |
|---|---|---|---|---|---|
| Proposed CY 2011 conversion factor | Multiply by the 3 percent rural add-on | Proposed rural CY 2012 conversion factor | Proposed CY 2012 conversion factor | Multiply by the 3 percent rural add-on | Proposed CY rural 2012 conversion factor |
| $53.33 | × 1.03 | $54.93 | $52.28 | × 1.03 | $53.85 |

TABLE 31—PROPOSED CY 2012 NRS PAYMENT AMOUNTS FOR SERVICES PROVIDED IN RURAL AREAS

| Severity level | Points (scoring) | For HHAs that do submit quality data (NRS conversion factor = $54.93) | | For HHAs that do not submit quality data (NRS conversion factor = $53.85) | |
|---|---|---|---|---|---|
| | | Relative weight | Total NRS payment amount for rural areas | Relative weight | Total NRS payment amount for rural areas |
| 1 | 0 | 0.2698 | $14.82 | 0.2698 | $14.53 |
| 2 | 1 to 14 | 0.9742 | 53.51 | 0.9742 | 52.46 |
| 3 | 15 to 27 | 2.6712 | 146.73 | 2.6712 | 143.84 |
| 4 | 28 to 48 | 3.9686 | 218.00 | 3.9686 | 213.71 |
| 5 | 49 to 98 | 6.1198 | 336.16 | 6.1198 | 329.55 |
| 6 | 99+ | 10.5254 | 578.16 | 10.5254 | 566.79 |

*E. Therapy Corrections and Clarifications*

1. Therapy Technical Correction to Regulation Text

As part of our ''Home Health Prospective Payment System Rate Update for Calendar Year 2011,'' (75 FR 70389 through 70461), we clarified policies related to how therapy services are to be provided and documented.

Specifically, the clarifications included that: (1) Measurable treatment goals be described in the plan of care and that the patient's clinical record demonstrate that the method used to assess a patient's function include objective measurement and successive comparison of measurements, thus enabling objective measurement of progress toward goals and/or therapy effectiveness; (2) a qualified therapist (instead of an assistant) perform the needed therapy service, assess the patient, measure progress, and document progress toward goals at least once every 30 days during a therapy patient's course of treatment; and (3) for those patients needing 13 or 19 therapy visits, we require that a qualified therapist (instead of an assistant) perform the therapy service required at the 13th and 19th visits, assess the patient, and measure and document the effectiveness of the therapy.

As a result of comments received on the CY 2011 proposed rule, we finalized flexibility for the 13th and 19th visit requirements in cases when: (1) The patient resides in a rural area; (2) documented exceptional circumstances prevent the therapist from making the required visit; and (3) patients receive more than one type of therapy. The CY 2011 HH PPS final rule preamble discussions clearly described that even with the flexibility which we finalized, for those patients who require 13 and 19 therapy visits, the qualified therapist's visit, assessment, and documentation must occur no later than the 13th and 19th visits.

However, regulation text associated with these changes at § 409.44(c)(2)(i)(D)(2) reads, ''Where more than one discipline of therapy is being provided, the qualified therapist

from each discipline must provide the therapy service and functionally reassess the patient in accordance with § 409.44(c)(2)(i)(A) during the visit which would occur close to but before the 19th visit per the plan of care.'' Therefore, to better align our regulations with our described final policies, we propose to correct the regulation text at § 409.44(c)(2)(i)(D)(2) to read ''Where more than one discipline of therapy is being provided, the qualified therapist from each discipline must provide the therapy service and functionally reassess the patient in accordance with § 409.44(c)(2)(i)(A) during the visit which would occur close to but no later than the 19th visit per the plan of care.''

2. Occupational Therapy Policy Clarifications

We are proposing to clarify when occupational therapy is considered a dependent service versus when it is considered a qualifying service under the Medicare home health benefit. Section 1861(m)(2) of the Act established occupational therapy as a home health service. Section 1814(2)(C) of the Act provided that to qualify for the benefit, a physician must certify that such services are or were required because the individual needs or needed skilled nursing care (other than solely venipuncture for the purpose of obtaining a blood sample) on an intermittent basis or physical or speech therapy or, in the case of an individual who has been furnished home health services based on such a need and who no longer has such a need for such care or therapy, continues or continued to need occupational therapy. We codified the requirement for skilled services in the Medicare home health benefit at § 409.42(c). This section further delineates beneficiary qualifications for home health, including what is meant by, ''in need of skilled services.'' Following this detailed explanation, skilled services, in § 409.42(c)(2) through (c)(4) include physical therapy services and speech-language pathology services that meet the requirements of § 409.44(c), and continuing occupational therapy services that meet the requirements of § 409.44(c) if the beneficiary's eligibility for home health services has been established by virtue of a prior need for intermittent skilled nursing care, speech-language pathology services, or physical therapy in the current or prior certification period.

In addition to the above-mentioned designation and treatment of occupational therapy as a qualifying home health service, occupational therapy is also described as a dependent service, as currently specified in § 409.45(d) where we state occupational therapy services that are not qualifying services under § 409.44(c) are nevertheless covered as dependent services if the requirements of § 409.44(c)(2)(i) through (iv), as to reasonableness and necessity, are met.

To clarify the status of when occupational therapy becomes a qualifying service, we propose to change the above-mentioned regulation text at § 409.42(c)(4) to establish exactly when occupational therapy becomes a qualifying service. That is, we propose to amend this regulatory text to demonstrate when a continuing need for occupational therapy allows for its continued eligibility even though it becomes the sole skilled service being provided. Specifically, we propose to amend § 409.42(c)(4) to state occupational therapy services that meet the requirements of § 409.44(c) initially qualify for home health coverage as a dependent service as defined in § 409.45(d) if the beneficiary's eligibility for home health services has been established by virtue of a prior need for intermittent skilled nursing care, speech-language pathology services, or physical therapy in the current or prior certification period. Subsequent to an initial covered occupational therapy service, continuing occupational therapy services which meet the requirements of § 409.44(c) are considered to be qualifying services.

We also propose a change to § 409.44(c)to include a technical correction to this regulation text. Specifically, the current regulation text states ''(c) *Physical therapy, speech-language pathology services, and occupational therapy.* To be covered, physical therapy, speech-language pathology services, and occupational therapy must satisfy the criteria in paragraphs (c)(1) through (4) of this section.'' We propose to correct ''(c)(1) through (4)'' to, ''(c)(1) and (2),'' which is the correct reference.

*F. Home Health Face-to-Face Encounter*

As described in the CY 2011 HH PPS final rule (70 FR 70427), section 6407(a) of the Patient Protection and Affordable Care Act, as amended by section 10605 of the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152), amended the requirements for physician certification of home health services contained in sections 1814(a)(2)(C) and 1835(a)(2)(A) of the Act by requiring that, as a condition for payment, prior to certifying a patient's eligibility for the home health benefit, the physician must document that the physician himself or herself or a permitted nonphysician practitioner (NPP) has had a face-to-face encounter with the patient.

The statute describes NPPs who may perform this face-to-face patient encounter as a nurse practitioner or clinical nurse specialist, as those terms are defined in section 1861(aa)(5) of the Act, who is working in collaboration with the physician in accordance with State law, or a certified nurse-midwife (as defined in section 1861(gg) of the Act, as authorized by State law), or a physician assistant (as defined in section 1861(aa)(5) of the Act), under the supervision of the physician.

The statutory provision allows the permitted NPPs to perform the face-to-face encounter and inform the certifying physician, who documents the encounter as part of the certification of eligibility.

Stakeholder feedback received during the CY 2011 rulemaking comment period urged CMS to also allow, in addition to an NPP, the physician who attended to the patient during a recent hospital or post-acute stay to inform the certifying physician regarding their encounters with the patient, as an NPP is allowed to do presently to satisfy the face-to-face encounter requirement. Typically, it is the patient's primary care physician who certifies a patient's eligibility for the home health benefit and oversees the patient's home health care plan. As finalized in the CY 2011 HH PPS final rule, a hospital or post-acute attending physician's encounter with the home health patient satisfies the face-to-face encounter requirement only when the attending physician certifies the patient's home health eligibility.

Stakeholders stated to CMS that many hospital attending physicians may order home health services upon discharge, but do not want the burden associated with certifying home health eligibility and establishing a patient's plan of care. Stakeholders further stated that because NPPs can perform the encounter and inform the certifying physician, it makes no sense to preclude the physician who attended to the patient in the hospital from informing the certifying physician about the patient for the purpose of satisfying the face-to-face encounter. Further, they argued that for patients admitted to home health following a hospital or post-acute discharge, such a policy would be consistent with the goal of the provision, which is increased physician involvement in a patient's home health certification of eligibility.

Fifty percent of home health patients are admitted to home health immediately following a hospital discharge. As such, the physician who attended to these patients in the

hospital has the sort of involvement with the patient and knowledge about the patient's need for home care which was the intent of the provision. Similarly, for patients admitted to home health from a post-acute setting, the physician who attended to the patient during the post-acute stay would also have the involvement with and knowledge of the patient as was the intent of the provision.

We believe that the statute does not preclude a patient's acute or post-acute attending physician from informing the certifying physician regarding their experience with the patient for the purpose of the face-to-face encounter requirement, as an NPP can. Instead, we believe that for patients admitted to home health following discharge from an acute or post-acute stay, the statutory language contains an unintentional gap in that it does not explicitly include language which allows the acute or post-acute attending physician to inform the certifying physician regarding his or her face-to-face encounters with the patient.

Therefore, for patients admitted to home health upon discharge from a hospital or post-acute setting, we propose to allow the physician who attended to the patient in the hospital or post-acute setting to inform the certifying physician regarding their encounters with the patient to satisfy the face-to-face encounter requirement, much like an NPP currently can.

In addition to meeting the goals of the face-to-face encounter provision, we believe this proposed policy change will result in enhanced communication between the attending and certifying physicians. We believe this enhanced communication will result in an improved transition of care from the hospital or post-acute setting to the home health setting. Improving a patient's transition from one healthcare setting to another is widely regarded to be directly related to improved patient care and improved patient outcomes. We believe that this policy change encourages the attending acute or post-acute physician who is best informed of the patient's most current clinical condition to collaboratively communicate the patient's need for home health services to the certifying physician. Because a standard protocol of communication or documentation is not mandated between the acute or post-acute physician and a patient's community physician, we believe the additional flexibility with the face-to-face encounter will encourage increased communication between the physicians and better care coordination for the patient. Increased physician communication regarding the patient's clinical condition fits within the framework of Congress' goals associated with the face-to-face encounter requirement.

We propose to revise § 424.22(a)(1)(v) so that the certifying physician's documentation of the face-to-face encounter clearly states that either the certifying physician himself or herself, the permitted NPP, or, for patients admitted to home health immediately after an acute or post-acute stay, the attending acute or post-acute physician, has had a face-to-face encounter with the patient. We propose that the attending acute or post-acute physician must communicate the clinical findings of the face-to-face encounters with the patient to the certifying physician, so that the certifying physician could document the face-to-face encounter accordingly, as part of the signed certification. Further, we are proposing to simplify the regulation text at § 424.22(a)(1)(v)(A) as some found the current regulation text confusing as it relates to the need for NPPs to document their encounters with the patient. Some confused this documentation, which is required of all practitioners who see Medicare patients, with the face-to-face encounter documentation which is part of the certification. Therefore, we propose to revise in § 424.22(a)(1)(v)(A) that the nonphysician practitioner or the attending acute or post-acute physician performing the face-to-face encounter must communicate the clinical findings of that face-to-face patient encounter to the certifying physician.

We propose implementing the above face-to-face encounter provision for starts of care beginning January 1, 2012 and later.

*G. Payment Reform: Home Health Study and Report*

Section 3131(d) of the Affordable Care Act requires the Secretary to conduct a study on home health agency costs of providing access to care to low-income Medicare beneficiaries or beneficiaries in medically underserved areas, and in treating beneficiaries with varying levels of severity of illness (specifically, patients with ''high levels of severity of illness''). As part of the study, we may analyze methods to revise the current Home Health Prospective Payment System (HH PPS) to ensure access to care and better account for costs for these patients.

The study may analyze the need for payment adjustments for services that involve either more or fewer resources than are reflected in the current HH PPS; changes to reflect resources involved with providing home health services to low-income Medicare beneficiaries or Medicare beneficiaries residing in medically underserved areas, and ways outlier payments could be revised to reflect costs of treating Medicare beneficiaries with high levels of severity of illness. Section 3131(d) of the Affordable Care Act also allows for the study to investigate other issues with the payment system as the Secretary determines appropriate. We plan for the study to evaluate the current HH PPS and develop payment reform options which might minimize vulnerabilities and more accurately align payment with patient resource costs. No later than March 1, 2014, we must deliver a Report to Congress regarding the study, which may include potential recommendations for revisions to the HH PPS, recommendations for legislation and administrative action and recommendations for whether additional research is needed.

The Affordable Care Act study provision was enacted to address concerns that some beneficiaries are at risk of not having access to Medicare home health services and that the current HH PPS encourages providers to adopt selective admission patterns to achieve higher margins.

Congress also provided CMS with the authority to conduct a separate demonstration project to test recommended payment system changes resulting from this study.

To accomplish these goals, in the fall of 2010 we awarded a contract to set the foundation for the study and develop a study analytic approach. Progress to date includes: (1) Reviewing research relevant to the goals of the study; (2) establishing and convening a technical expert panel comprised of home health industry stakeholders, subject matter experts, and researchers to obtain input regarding the study analytic plan (specifically, we solicited input from the panel regarding approaches to define and study these vulnerable populations which may experience difficulties accessing home health care); (3) hosting Open Door Forums to solicit additional input on the study analytic design from HHAs, providers, and trade associations; and (4) currently performing investigatory data analysis and finishing the analytic design. Materials related to the contractor's findings are available at *http://www.cms.gov/HomeHealthPPS/Downloads/HHPPS_LiteratureReview.pdf.*

This summer, we plan to award another contract that will build upon the foundation established. Specifically, this contract will refine the analytic

plan, perform the detailed analysis and ultimately recommend payment model options. We will provide updates regarding our progress in future rulemaking and open door forums.

*H. International Classification of Diseases 10th Edition (ICD–10) Coding*

Effective March 17, 2009, CMS finalized its policies for the HIPAA Administrative Simplification: Modifications to the Medical Data Code Set Standards to Adopt ICD–10–CM and ICD–10–PCS (74 FR 3328). The March 17, 2009 final rule modifies the standard medical data code sets for coding diagnoses by adopting the International Classification of Disease, 10th Revision, Clinical Modification (ICD–10–CM) for diagnosis coding, including the Official ICD–10–CM Guidelines for Coding and Reporting. These new codes replace the International Classification of Diseases, 9th Revision, Clinical Modification, Volumes 1 and 2, including the Official ICD–9–CM Guidelines for Coding and Reporting. Entities are required to have implemented the adopted policies by October 1, 2013. On October 1, 2013, the ICD–9 code sets used to report medical diagnoses will be replaced by the ICD–10 code sets. In preparation for the transition to the use of ICD–10–CM codes, CMS is currently undergoing extensive efforts to update the Medicare payment systems.

One of the key activities identified under this transition to ICD–10–CM codes is the need for CMS to review and update the payment systems which currently use ICD–9–CM codes. Home Health Agencies report ICD–9–CM codes for their patients through OASIS–C. HHAs enter data (including the ICD–9–CM codes) collected from their patients' OASIS assessments into a data collection software tool. For Medicare patients, the data collection software invokes HH PPS Grouper software to assign a Health Insurance Prospective Payment System (HIPPS) code on the Medicare HH PPS bill, ultimately enabling CMS' claims processing system to reimburse the HHA for services provided to patients receiving Medicare's home health benefit. The HH PPS Grouper currently utilizes ICD–9–CM codes to calculate the HIPPS code. Effective October 1, 2013, the HH PPS Grouper will utilize the ICD–10–CM codes to calculate the HIPPS code.

We have been working with the HHRG maintenance contractor to revise the HHRG to accommodate ICD–10–CM codes, as well as identify the appropriate ICD–10–CM codes to be included in each diagnosis group within the HHRG. In addition, we have also contracted with Abt Associates to assist with resolving the transition of certain codes that may be mapped to more than one diagnosis code under ICD–10–CM.

To assist home health agencies and their vendors in preparing for this transition, the Agency is committed to providing information for transitioning the HHRG to accommodate ICD–10–CM codes effective October 1, 2013. The Agency will update providers and vendors through the ICD–10–CM National Provider outreach calls on our conversion plans. Additional detail concerning teleconference registration is available at *http://www.cms.gov/ICD10/Tel10/list.asp?intNumPerPage=20&submit=Go.* Further details pertaining to our plans will be announced through the National Provider outreach calls.

We will provide a proposed list of ICD–10–CM codes for the HHRG through the ICD–10 section of the Web site. Specific dates will be announced through the National Provider outreach calls. The preliminary plans include publishing the proposed list of ICD–10–CM codes for the HHRG by October, 1, 2011, for industry review, as well as describing our testing approach for the HHRG to accommodate and process ICD–10–CM codes through the ICD–10 section of the CMS Web site. The objective of the ICD–10–CM HHRG testing is to verify that all properly formatted input data containing ICD–10–CM diagnosis codes will produce the expected output. The HHRG maintenance contractor will convert current OASIS–C records to their translated ICD–10–CM codes to determine that appropriate outputs are achieved. CMS and the HHRG maintenance contractor will review the results of the testing to determine if additional testing is required.

In addition, in April 2013, we plan to share the ICD–10–CM HHRG software with those vendors and home health agencies that have agreed to serve as Beta Testers and get their feedback regarding the software's functionality. Issues and concerns noted by the Beta Testers will be reviewed and addressed by the HHRG Maintenance Contractor in consultation with CMS.

CMS plans to release the final version of the ICD–10–CM HHRG in July 2013 to permit HHAs and their vendors sufficient time to install the software.

*I. Clarification To Benefit Policy Manual Language on ''Confined to the Home'' Definition*

To address the recommended changes of the Office of Inspector General (OIG) to the home health benefit policy manual, CMS is proposing to clarify its ''confined to the home'' definition to more accurately reflect the definition as articulated in the Act. Further clarification of the ''confined to the home'' definition will not only ensure statutory compatibility, but will also strengthen the position of the Government in applicable court cases. We propose to realign the existing manual criteria with the statute to create a clearer and more accurate ''confined to the home'' definition. We believe that such changes will strengthen our manual's definition of ''confined to the home'', providing more definitive guidance to home health agencies for compliance with this requirement.

We propose to move the requirement that the patient need supportive devices, transportation, etc., to the beginning of section 30.1.1 of the Chapter 7 Home Health Benefit Policy Manual as a necessary requirement to be considered ''confined to the home.'' Further, we propose to remove vague terms from section 30.1.1, such as ''generally speaking,'' to ensure clear and specific requirements for the definition. These changes more closely align our policy manual with the Act to prevent confusion or distortion of requirements and promote a clearer enforcement of the statute. As such, we propose that section 30.1.1 begin with the following, revised language: ''30.1.1—Patient Confined to the Home.''

For a patient to be eligible to receive covered home health services under both Part A and Part B, the statute requires that a physician certify in all cases that the patient is confined to his/her home. For purposes of the statute, an individual shall be considered ''confined to the home'' (that is, homebound) if the following exist:

(1) The individual has a condition due to an illness or injury that restricts his or her ability to leave their place of residence except with: the aid of supportive devices such as crutches, canes, wheelchairs, and walkers; the use of special transportation; or the assistance of another person; or if leaving home is medically contraindicated.

(2) The individual does not have to be bedridden to be considered ''confined to the home''. However, the condition of the patient should be such that there exists a normal inability to leave home and, consequently, leaving home would require a considerable and taxing effort.

If the patient does in fact leave the home, the patient may nevertheless be considered homebound if the absences from the home are infrequent or for periods of relatively short duration, or are attributable to the need to receive health care treatment. Absences

attributable to the need to receive health care treatment include, but are not limited to:

- Attendance at adult day centers, licensed or certified by a State or accredited to furnish adult day-care services in the State, to receive therapeutic, psychological, or medical treatment;
- Ongoing receipt of outpatient kidney dialysis; or
- The receipt of outpatient chemotherapy or radiation therapy.

Any absence of an individual from the home attributable to the need to receive health care treatment, including regular absences for the purpose of participating in therapeutic, psychosocial, or medical treatment in an adult day-care program that is licensed or certified by a State, or accredited to furnish adult day-care services in a State, shall not disqualify an individual from being considered to be confined to his home. Any other absence of an individual from the home shall not so disqualify an individual if the absence is of an infrequent or of relatively short duration. For purposes of the preceding sentence, any absence for the purpose of attending a religious service shall be deemed to be an absence of infrequent or short duration. It is expected that in most instances, absences from the home that occur will be for the purpose of receiving health care treatment. However, occasional absences from the home for nonmedical purposes, for example, an occasional trip to the barber, a walk around the block or a drive, attendance at a family reunion, funeral, graduation, or other infrequent or unique event would not necessitate a finding that the patient is not homebound if the absences are undertaken on an infrequent basis or are of relatively short duration and do not indicate that the patient has the capacity to obtain the health care provided outside rather than in the home.

Some examples of homebound patients that illustrate the factors used to determine whether a homebound condition exists would be: * * *''

## III. Collection of Information Requirements

This document does not impose any new information collection and recordkeeping requirements. The information collection requirements discussed in proposed § 424.22 are currently approved under OMB control number 0938–1083. The information collection requirements discussed in proposed § 484.250, the OASIS–C and Home Health Care CAHPS, are currently approved under OMB control numbers 0938–0760 and 0938–1066, respectively. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

## IV. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

## V. Regulatory Impact Analysis

### *A. Introduction*

We have examined the impact of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). This proposed rule has been designated an ''economically significant'' rule under section 3(f)(1) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

### *B. Statement of Need*

This proposed rule adheres to the following statutory requirements. Section 4603(a) of the BBA mandated the development of a HH PPS for all Medicare-covered HH services provided under a plan of care (POC) that were paid on a reasonable cost basis by adding section 1895 of the Act, entitled ''Prospective Payment For Home Health Services''. Section 1895(b)(1) of the Act requires the Secretary to establish a HH PPS for all costs of HH services paid under Medicare. In addition, section 1895(b)(3)(A) of the Act requires (1) the computation of a standard prospective payment amount include all costs for HH services covered and paid for on a reasonable cost basis and that such amounts be initially based on the most recent audited cost report data available to the Secretary, and (2) the standardized prospective payment amount be adjusted to account for the effects of case-mix and wage levels among HHAs. Section 1895(b)(3)(B) of the Act addresses the annual update to the standard prospective payment amounts by the HH applicable percentage increase. Section 1895(b)(4) of the Act governs the payment computation. Sections 1895(b)(4)(A)(i) and (b)(4)(A)(ii) of the Act require the standard prospective payment amount to be adjusted for case-mix and geographic differences in wage levels. Section 1895(b)(4)(B) of the Act requires the establishment of appropriate case-mix adjustment factors for significant variation in costs among different units of services. Lastly, section 1895(b)(4)(C) of the Act requires the establishment of wage adjustment factors that reflect the relative level of wages, and wage-related costs applicable to HH services furnished in a geographic area compared to the applicable national average level.

Section 1895(b)(5) of the Act, as amended by section 3131 of the Affordable Care Act, gives the Secretary the option to make changes to the payment amount otherwise paid in the case of outliers because of unusual variations in the type or amount of medically necessary care. Section 1895(b)(3)(B)(v) of the Act requires HHAs to submit data for purposes of measuring health care quality, and links the quality data submission to the annual applicable percentage increase. Also, section 3131 of the Affordable Care Act requires that HH services furnished in a rural area (as defined in section 1886(d)(2)(D) of the Act) with respect to episodes and visits ending on or after April 1, 2010, and before January 1, 2016, receive an increase of 3 percent the payment amount otherwise made under section 1895 of the Act.

### *C. Overall Impact*

The update set forth in this proposed rule applies to Medicare payments under HH PPS in CY 2012. Accordingly, the following analysis describes the impact in CY 2012 only. We estimate that the net impact of the proposals in

this rule is approximately $640 million in CY 2012 savings. The $640 million impact due to the proposed CY 2012 HH PPS rule reflects the distributional effects of an updated wage index ($20 million increase) plus the 1.5 percent HH market basket update ($290 million increase), for a total increase of $310 million. The 5.06 percent case-mix adjustment applicable to the national standardized 60-day episode rates ($950 million decrease) plus the combined wage index and market basket ($310 million increase) results in a total savings of $640 million in CY 2012. The $640 million in savings is reflected in the first row of column 3 of Table 32 as a 3.35 percent decrease in expenditures when comparing the current CY 2011 HH PPS to the proposed CY 2012 HH PPS.

The RFA requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of less than $7.0 million to $34.5 million in any 1 year. For the purposes of the RFA, our updated data show that approximately 98 percent of HHAs are considered to be small businesses according to the Small Business Administration's size standards with total revenues of $13.5 million or less in any 1 year. Individuals and States are not included in the definition of a small entity. The Secretary has determined that this proposed rule would have a significant economic impact on a substantial number of small entities. We define small HHAs as those with total revenues of $13.5 million or less in any 1 year. Analysis of Medicare cost report data reveals a 3.63 percent decrease in estimated payments to small HHAs in CY 2012.

A discussion on the alternatives considered is presented in section V.E. below. The following analysis, with the rest of the preamble, constitutes our initial RFA analysis. We solicit comment on the RFA analysis provided.

In this proposed rule, we have stated that our analysis reveals that nominal case-mix continues to grow under the HH PPS. Specifically, nominal case-mix has grown from the 17.45 percent growth identified in our analysis for CY 2011 rulemaking to 19.03 percent for this year's rulemaking (see further discussion in sections II.A. and II.B.). Because we have not yet accounted for all of the increase in nominal case-mix, that is case-mix that is not real (real being related to treatment of more resource intense patients), case-mix reductions are necessary. As such, we believe it is appropriate to reduce the HH PPS rates now, so as to move towards more accurate payment for the delivery of home health services. Our analysis shows that smaller HHAs are impacted slightly more than are larger HHAs by the proposed provisions of this rule.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. This proposed rule applies to HHAs. Therefore, the Secretary has determined that this proposed rule would not have a significant economic impact on the operations of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2011, that threshold is approximately $136 million. This proposed rule is not anticipated to have an effect on State, local, or tribal governments in the aggregate, or by the private sector, of $136 million or more.

*D. Detailed Economic Analysis*

This proposed rule sets forth updates to the HH PPS rates contained in the CY 2011 HH PPS final rule. The impact analysis of this proposed rule presents the estimated expenditure effects of policy changes proposed in this rule. We use the latest data and best analysis available, but we do not make adjustments for future changes in such variables as number of visits or case-mix.

This analysis incorporates the latest estimates of growth in service use and payments under the Medicare home health benefit, based on Medicare claims from 2009. We note that certain events may combine to limit the scope or accuracy of our impact analysis, because such an analysis is future-oriented and, thus, susceptible to errors resulting from other changes in the impact time period assessed. Some examples of such possible events are newly-legislated general Medicare program funding changes made by the Congress, or changes specifically related to HHAs. In addition, changes to the Medicare program may continue to be made as a result of the Affordable Care Act, or new statutory provisions. Although these changes may not be specific to the HH PPS, the nature of the Medicare program is such that the changes may interact, and the complexity of the interaction of these changes could make it difficult to predict accurately the full scope of the impact upon HHAs.

Table 32 represents how HHA revenues are likely to be affected by the policy changes proposed in this rule. For this analysis, we used linked home health claims and OASIS assessments; the claims represented a 20-percent sample of 60-day episodes occurring in CY 2009. The first column of Table 32 classifies HHAs according to a number of characteristics including provider type, geographic region, and urban and rural locations. The second column shows the payment effects of the wage index only. The third column shows the payment effects of all the proposed policies outlined earlier in this rule. For CY 2012, the average impact for all HHAs due to the effects of the wage index is a 0.10 percent increase in payments. The overall impact for all HHAs, in estimated total payments from CY 2011 to CY 2012, is a decrease of approximately 3.35 percent.

As shown in Table 32, the combined effects of all of the changes vary by specific types of providers and by location. Rural and voluntary non-profit agencies fare considerably better than urban and proprietary agencies as a result of the proposed provisions of this rule. We believe this is due mainly to the distributional effects of the recalibration of the case-mix weights as described in section II.A of the proposed rule. Essentially, these impacts suggest that under the current case-mix system, rural and voluntary non-profit agencies bill less for high therapy episodes than do urban and proprietary agencies.

TABLE 32—PROPOSED HOME HEALTH AGENCY POLICY IMPACTS FOR CY 2012, BY FACILITY TYPE AND AREA OF THE COUNTRY

| Group | Comparisons | |
|---|---|---|
| | Percent change due to the effects of the updated wage index (percent) | Impact of all CY 2012 policies [1] (percent) |
| All Agencies | 0.10 | −3.35 |
| Type of Facility | | |
| Free-Standing/Other Vol/NP | 0.29 | −0.49 |
| Free-Standing/Other Proprietary | 0.08 | −4.68 |
| Free-Standing/Other Government | −0.13 | −2.13 |
| Facility-Based Vol/NP | −0.03 | 0.17 |
| Facility-Based Proprietary | 0.03 | −3.02 |
| Facility-Based Government | −0.06 | −0.59 |
| Subtotal: Freestanding | 0.12 | −3.82 |
| Subtotal: Facility-based | −0.03 | −0.21 |
| Subtotal: Vol/NP | 0.17 | −0.24 |
| Subtotal: Proprietary | 0.08 | −4.65 |
| Subtotal: Government | −0.10 | −1.38 |
| Type of Facility (Rural * Only) | | |
| Free-Standing/Other Vol/NP | 1.88 | 0.94 |
| Free-Standing/Other Proprietary | 0.25 | −3.74 |
| Free-Standing/Other Government | −0.21 | −1.39 |
| Facility-Based Vol/NP | −0.20 | 0.20 |
| Facility-Based Proprietary | −0.30 | −2.12 |
| Facility-Based Government | −0.05 | −0.27 |
| Type of Facility (Urban * Only) | | |
| Free-Standing/Other Vol/NP | 0.05 | −0.70 |
| Free-Standing/Other Proprietary | 0.06 | −4.83 |
| Free-Standing/Other Government | −0.02 | −3.13 |
| Facility-Based Vol/NP | 0.02 | 0.16 |
| Facility-Based Proprietary | 0.25 | −3.65 |
| Facility-Based Government | −0.09 | −0.99 |
| Type of Facility (Urban* or Rural*) | | |
| Rural | 0.35 | −2.15 |
| Urban | 0.05 | −3.57 |
| Facility Location: Region* | | |
| North | 0.68 | 0.71 |
| South | −0.08 | −4.97 |
| Midwest | −0.09 | −3.91 |
| West | 0.36 | −0.82 |
| Outlying | 0.43 | −3.05 |
| Facility Location: Area of the Country | | |
| New England | 1.35 | 0.69 |
| Mid Atlantic | 0.30 | 0.71 |
| South Atlantic | −0.49 | −5.77 |
| East South Central | −0.66 | −6.28 |
| West South Central | 0.51 | −3.76 |
| East North Central | −0.22 | −4.41 |
| West North Central | 0.49 | −1.63 |
| Mountain | 0.32 | −4.22 |
| Pacific | 0.37 | 0.68 |
| Outlying | 0.43 | −3.05 |
| Facility Size: (Number of First Episodes) | | |
| < 19 | 0.32 | −3.05 |
| 20 to 49 | 0.32 | −3.41 |
| 50 to 99 | 0.33 | −3.57 |
| 100 to 199 | 0.16 | −3.81 |
| 200 or More | −0.02 | −3.15 |
| Facility Size: (estimated total revenue) | | |
| Small (estimated total revenue <= $13.5 million) | 0.13 | −3.63 |
| Large (estimated total revenue > $13.5 million) | −0.02 | −2.10 |

**Note:** Based on a 20 percent sample of CY 2009 claims linked to OASIS assessments.

*Urban/rural status, for the purposes of these simulations, is based on the wage index on which episode payment is based. The wage index is based on the site of service of the beneficiary.

REGION KEY:

New England: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont; Middle Atlantic: Pennsylvania, New Jersey, New York; South Atlantic: Delaware, District of Columbia, Florida, Georgia, Maryland, North Carolina, South Carolina, Virginia, West Virginia; East North Central: Illinois, Indiana, Michigan, Ohio, Wisconsin; East South Central: Alabama, Kentucky, Mississippi, Tennessee; West North Central: Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, South Dakota; West South Central: Arkansas, Louisiana, Oklahoma, Texas; Mountain: Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, Wyoming; Pacific: Alaska, California, Hawaii, Oregon, Washington; Outlying: Guam, Puerto Rico, Virgin Islands.

[1] Percent change due to the effects of the updated wage index, the 1.5 percent proposed market basket update, the 5.06 percent case-mix adjustment, and the 3 percent rural add-on.

*E. Alternatives Considered*

As described in section V.C. above, if we implement the case-mix adjustment for CY 2012 along with the market basket update and the updated wage index, the aggregate impact would be a net decrease of $640 million in payments to HHAs, resulting from a $310 million increase due to the updated wage index and the market basket update and a $950 million reduction from the 5.06 percent case-mix adjustment. If we were to not implement the case-mix adjustment for CY 2012, Medicare would pay an estimated $950 million more to HHAs in CY 2012, for a net increase in payments to HHAs in CY 2012 of $310 million (market basket update and updated wage index). We believe that not implementing a case-mix adjustment, and paying out an additional $950 million to HHAs when those additional payments are not reflective of HHAs treating sicker patients, would not be in line with the intent of the HH PPS, which is to pay accurately and appropriately for the delivery of home health services to Medicare beneficiaries.

Section 1895(b)(3)(B)(iv) of the Act gives CMS the authority to implement payment reductions for nominal case-mix growth, changes in case-mix that are unrelated to actual changes in patient health status. We are committed to monitoring the accuracy of payments to HHAs, which includes the measurement of the increase in nominal case-mix, which is an increase in case-mix that is not due to patient acuity. As discussed in section II.A. of this rule, we have determined that there is a 19.03 percent nominal case-mix change from 2000 to 2009. To account for the remainder of the 19.03 percent residual increase in nominal case-mix beyond that which was has been accounted for in previous payment reductions (2.75 percent in CY 2008 through CY 2010 and 3.79 percent in CY 2011), we have estimated that the percentage reduction to the national standardized 60-day episode rates for nominal case-mix change for CY 2012 would be 5.06 percent.

We believe that the alternative of not implementing a case-mix adjustment to the payment system in CY 2012 to account for the increase in case-mix that is not real would be detrimental to the integrity of the PPS. As discussed in section II.A. of this rule, because nominal case-mix continues to grow (about 1 percent each year in 2006 and 2007, 4 percent in 2008, and 2 percent in 2009), and thus to date we have not accounted for all the increase in nominal case-mix growth, we believe it is appropriate to reduce HH PPS rates now, thereby paying more accurately for the delivery of home health services under the Medicare home health benefit. The other reduction to HH PPS payments, a 1.0 percentage point reduction to the proposed CY 2012 home health market basket update, is discussed in this rule and is not discretionary as it is a requirement in section 1895(b)(3)(B)(vi) of the Act (as amended by the Affordable Care Act).

We solicit comment on the alternatives considered in this analysis.

*F. Accounting Statement and Table*

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/omb/circulars_a004_a-4*), in Table 16 below, we have prepared an accounting statement showing the classification of the transfers associated with the provisions of this proposed rule. This table provides our best estimate of the decrease in Medicare payments under the HH PPS as a result of the changes presented in this proposed rule.

TABLE 33—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED TRANSFERS, FROM THE CY 2011 HH PPS TO THE CY 2012 HH PPS

| Category | Transfers |
|---|---|
| Annualized Monetized Transfers. | −$640 million. |
| From Whom to Whom? | Federal Government to HH providers. |

*G. Conclusion*

In conclusion, we estimate that the net impact of the proposals in this rule is approximately $640 million in CY 2012 savings. The $640 million impact to the proposed CY 2012 HH PPS reflects the distributional effects of an updated wage index ($20 million increase), the 1.5 percent home health market basket update ($290 million increase), and the 5.06 percent case-mix adjustment applicable to the national standardized 60-day episode rates ($950 million decrease). This analysis, together with the remainder of this preamble, provides a Regulatory Impact Analysis.

## VI. Federalism Analysis

Executive Order 13132 on Federalism (August 4, 1999) establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. We have reviewed this proposed rule under the threshold criteria of Executive Order 13132, Federalism, and have determined that it would not have substantial direct effects on the rights, roles, and responsibilities of States, local or tribal governments.

**List of Subjects**

*42 CFR Part 409*

Health facilities, Medicare.

*42 CFR Part 424*

Emergency medical services, Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements.

*42 CFR Part 484*

Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposed to amend 42 CFR chapter IV as set forth below:

## PART 409—HOSPITAL INSURANCE BENEFITS

1. The authority citation for part 409 continues to read as follows:

**Authority:** Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

### Subpart C—Posthospital SNF Care

2. Section 409.42 is amended by revising paragraph (c)(4) to read as follows:

**§ 409.42 Beneficiary qualifications for coverage of services.**

* * * * *

(c) * * *

(4) Occupational therapy services that meet the requirements of § 409.44(c) of this subpart initially qualify for home health coverage as a dependent service as defined in § 409.45(d) of this subpart if the beneficiary's eligibility for home health services has been established by virtue of a prior need for intermittent skilled nursing care, speech-language pathology services, or physical therapy in the current or prior certification

period. Subsequent to an initial covered occupational therapy service, continuing occupational therapy services which meet the requirements of § 409.44(c) of this subpart are considered to be qualifying services.

* * * * *

3. Section 409.44 is amended by—

A. Revising the introductory text of paragraph (c).

B. Revising paragraph (c)(2)(i)(D)(*2*).

The revisions read as follows:

**§ 409.44 Skilled services requirements.**

* * * * *

(c) *Physical therapy, speech-language pathology services, and occupational therapy.* To be covered, physical therapy, speech-language pathology services, and occupational therapy must satisfy the criteria in paragraphs (c)(1) and (2) of this section.

* * * * *

(2) * * *

(i) * * *

(D) * * *

(*2*) Where more than one discipline of therapy is being provided, the qualified therapist from each discipline must provide the therapy service and functionally reassess the patient in accordance with § 409.44(c)(2)(i)(A) of this section during the visit which would occur close to but no later than the 19th visit per the plan of care.

* * * * *

## PART 424—CONDITIONS FOR MEDICARE PAYMENT

4. The authority citation for part 424 continues to read as follows:

**Authority:** Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

### Subpart B—Certification and Plan Requirements

5. Section 424.22 is amended by—

A. Revising the introductory text of paragraph (a)(1)(v).

B. Revising paragraph (a)(1)(v)(A).

The revisions read as follows:

**§ 424.22 Requirements for home health services.**

* * * * *

(a) * * *

(1) * * *

(v) The physician responsible for performing the initial certification must document that the face-to-face patient encounter, which is related to the primary reason the patient requires home health services, has occurred no more than 90 days prior to the home health start of care date or within 30 days of the start of the home health care by including the date of the encounter, and including an explanation of why the clinical findings of such encounter support that the patient is homebound and in need of either intermittent skilled nursing services or therapy services as defined in § 409.42(a) and (c) of this subpart, respectively. Under sections 1814(a)(2)(C) and 1835(a)(2)(A) of the Act, the face-to-face encounter must be performed by the certifying physician himself or herself, by the nurse practitioner, a clinical nurse specialist (as those terms are defined in section 1861(aa)(5) of the Act) who is working in collaboration with the physician in accordance with State law, a certified nurse midwife (as defined in section 1861(gg) of the Act) as authorized by State law, a physician assistant (as defined in section 1861(aa)(5) of the Act) under the supervision of the physician, or, for patients admitted to home health immediately after an acute or post-acute stay, the attending acute or post-acute physician. The documentation of the face-to-face patient encounter must be a separate and distinct section of, or an addendum to, the certification, and must be clearly titled, dated and signed by the certifying physician.

(A) The nonphysician practitioner or the attending acute or post-acute physician performing the face-to-face encounter must communicate the clinical findings of that face-to-face patient encounter to the certifying physician.

* * * * *

## PART 484—HOME HEALTH SERVICES

6. The authority citation for part 484 continues to read as follows:

**Authority:** Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395(hh)).

### Subpart E—Prospective Payment System for Home Health Agencies

7. Section 484.250 is revised to read as follows:

**§ 484.250 Patient assessment data.**

(a) *Data submission.* The following data must be submitted to CMS:

(1) An HHA must submit the OASIS–C data described at § 484.55(b)(1) of this part for CMS to administer the payment rate methodologies described in § 484.215, § 484.230, and § 484.235 of this subpart, and meet the quality reporting requirements of section 1895(b)(3)(B)(v) of the Act.

(2) An HHA must submit the Home Health Care CAHPS survey data for CMS to administer the payment rate methodologies described in § 484.225(i) of this subpart, and meet the quality reporting requirements of section 1895(b)(3)(B)(v) of the Act.

(b) *Patient count.* An HHA that has less than 60 eligible unique HHCAHPS patients annually must annually submit to CMS their total HHCAHPS patient count to CMS to be exempt from the HHCAHPS reporting requirements for a calendar year period.

(c) *Survey requirements.* An HHA must contract with an approved, independent HHCAHPS survey vendor to administer the HHCAHPS Survey on its behalf.

(1) CMS approves an HHCAHPS survey vendor if such applicant has been in business for a minimum of 3 years and has conducted surveys of individuals and samples for at least 2 years.

(i) For HHCAHPS, a ''survey of individuals'' is defined as the collection of data from at least 600 individuals selected by statistical sampling methods and the data collected are used for statistical purposes.

(ii) All applicants that meet these requirements will be approved by CMS.

(2) No organization, firm, or business that owns, operates, or provides staffing for a HHA is permitted to administer its own Home Health Care CAHPS (HHCAHPS) Survey or administer the survey on behalf of any other HHA in the capacity as an HHCAHPS survey vendor. Such organizations will not be approved by CMS as HHCAHPS survey vendors.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: June 10, 2011.

**Donald M. Berwick,**

*Administrator, Centers for Medicare & Medicaid Services.*

Approved: June 24, 2011.

**Kathleen Sebelius,**

*Secretary, Department of Health and Human Services.*

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**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Centers for Medicare & Medicaid Services**

**42 CFR Part 440**

**[CMS 2348–P]**

**RIN 0938–AQ36**

## Medicaid Program; Face-to-Face Requirements for Home Health Services; Policy Changes and Clarifications Related to Home Health

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would revise the Medicaid home health service definition as required by section 6407 of the Affordable Care Act to add a requirement that physicians document the existence of a face-to-face encounter (including through the use of telehealth) with the Medicaid eligible individual within reasonable timeframes. This proposal would align the timeframes with similar regulatory requirements for Medicare home health services in accordance with section 6407 of the Affordable Care Act and reflects CMS' commitment to the general principles of the President's Executive Order 13563 released January 18, 2011, entitled ''Improving Regulation and Regulatory Review.'' In addition, this rule proposes to amend home health services regulations to clarify the definitions of included medical supplies, equipment and appliances, and clarify that States may not limit home health services to services delivered in the home, or to services furnished to individuals who are homebound.

**DATES:** To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. September 12, 2011.

**ADDRESSES:** In commenting, please refer to file code CMS–2348–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the ''Submit a comment'' instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY:
Centers for Medicare & Medicaid Services, Department of Health and Human Services, *Attention:* CMS–2348–P, P.O. Box 8016, Baltimore, MD 21244–8016.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–2348–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments before the close of the comment period to either of the following addresses:

a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal Government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, please call telephone number (410) 786–7195 in advance to schedule your arrival with one of our staff members.

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

*Submission of comments on paperwork requirements.* You may submit comments on this document's paperwork requirements by following the instructions at the end of the ''Collection of Information Requirements'' section in this document.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

**FOR FURTHER INFORMATION CONTACT:** Melissa Harris, (410) 786–3397.

**SUPPLEMENTARY INFORMATION:**

*Inspection of Public Comments:* All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://www.regulations.gov.* Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

### I. Background

*A. General Information*

Title XIX of the Social Security Act (the Act) requires that, in order to receive Federal Medicaid matching funds, a State must offer certain basic services to the categorically needy populations specified in the Act. Home health care for Medicaid-eligible individuals who are entitled to nursing facility services is one of these mandatory services. Individuals ''entitled to'' nursing facility services include the basic categorically needy populations that receive the standard Medicaid benefit package, and can include medically needy populations if nursing facility services are offered to the medically needy within a State. Home health services include skilled nursing, home health aide services, medical supplies, equipment, and appliances, and may include therapeutic services. Current Medicaid regulations require an individual's physician to order home health services as part of a written plan of care reviewed every 60 days.

*B. Summary of New Medicare Home Health Face-to-Face Statutory Requirements*

Section 6407 of the Patient Protection and Affordable Care Act of 2010 (the Affordable Care Act), (Pub. L. 111–148, enacted on March 23, 2010), as amended by section 10605 of the Affordable Care Act, affects the home health benefit under both the Medicare and Medicaid programs.

Section 6407(a) of the Affordable Care Act (as amended by section 10605 of the Affordable Care Act) added new requirements to section 1814(a)(2)(C) of

the Act under Part A of the Medicare program, and section 1835(a)(2)(A) of the Act, under Part B of the Medicare program, that the physician, or certain allowed nonphysician practitioners (NPPs), document a face-to-face encounter with the individual (including through the use of telehealth, subject to the requirements in section 1834(m) of the Act), prior to making a certification that home health services are required under the Medicare home health benefit. Section 1814(a)(2)(C) of the Act indicates that in addition to a physician, a nurse practitioner or clinical nurse specialist (as those terms are defined in section 1861(aa)(5) of the Act) who is working in collaboration with the physician in accordance with State law, or a certified nurse-midwife (as defined in section 1861(gg) of the Act, as authorized by State law), or a physician assistant (as defined in section 1861(aa)(5) of the Act), under the supervision of the physician, may conduct the face-to-face encounters prior to the start of home health services.

Section 6407(b) of the Affordable Care Act amended section 1834(a)(11)(B) of the Act to require documentation of a similar face-to-face encounter with a physician or specific NPPs by a physician ordering durable medical equipment (DME). The NPPs authorized to conduct a face-to-face encounter on behalf of a physician are the same for this provision as for the provision described above, with one exception. We interpret sections 6407(b) and 6407(d) of the Affordable Care Act to prohibit certified nurse-midwives from conducting the face-to-face encounter prior to the physician ordering DME. The timing of this face-to-face encounter is specified as being within the 6-month period preceding the written order for DME, or other reasonable timeframe specified by the Secretary. This provision also maintains the role of the physician in the actual ordering of DME.

*C. Application of Home Health Face-to-Face Requirements to Medicaid*

Section 6407(d) of the Affordable Care Act provides that the requirements for face-to-face encounters in the provisions described above ''shall apply in the case of physicians making certifications for home health services under title XIX of the Social Security Act in the same manner and to the same extent as such requirements apply in the case of physicians making such certifications under title XVIII of such Act.'' The purpose of this regulation is to implement that statutory directive.

In implementing the face-to-face encounter requirements of section 6407 of the Affordable Care Act, we take into consideration the existing regulatory requirements under § 440.70 that provide that a physician must order an individual's services under the Medicaid home health benefit. We read the term ''order'' to be synonymous with the Medicare term ''certify.'' For purposes of this rule, we use the term ''order'' in place of the Affordable Care Act's use of ''certify.''

We do not view implementation of section 6407 of the Affordable Care Act as supplanting the existing Medicaid regulatory requirements related to physician orders but as consistent with those requirements. The provisions of section 6407 of the Affordable Care Act make clear that the physician's order must be based on a face-to-face encounter. In addition, section 6407 of the Affordable Care Act provides that specific NPP may perform the face-to-face encounter with the individual in lieu of the physician, and inform the physician making the initial order for service under the Medicaid home health benefit.

Consistent with that view, in the proposed regulation, we would provide that the physician must document the face-to-face encounter regardless of whether the physician himself or herself or one of the permitted NPPs performed the face-to-face encounter. The timing of this face-to-face encounter is specified as being within the 6-month period preceding the written order for home health services, or other reasonable timeframe specified by the Secretary.

Similarly, in implementing the requirements under section 6407(b) of the Affordable Care Act, relating to DME, we take into account existing Medicaid regulatory requirements under § 440.70 requiring physician orders. Because DME is not a term used in Medicaid in the same manner as in Medicare, we use the Medicaid term ''medical supplies, equipment and appliances'' or the shortened version ''medical equipment.'' The NPPs authorized to conduct a face-to-face encounter on behalf of a physician are the same for this provision as for the provision described above, with one exception. Certified nurse-midwives are not permitted to conduct the face-to-face encounter prior to the physician ordering medical equipment. Therefore, we are proposing to amend the Medicaid regulations at § 440.70 to incorporate both the general home health and the medical equipment face-to-face requirements.

*D. Other Medicaid Home Health Policy Changes*

1. Clarification That Home Health Services Cannot Be Restricted to Individuals Who Are Homebound or to Services Furnished in the Home

We are proposing to incorporate in regulation that home health services may not be subject to a requirement that the individual be ''homebound.'' In addition, we are proposing to clarify that home health services cannot otherwise be restricted to services furnished in the home itself.

On July 25, 2000, we issued a letter to State Medicaid Directors, Olmstead Update No: 3, in which we discussed Federal policies relevant to State efforts to comply with the requirements of the Americans with Disabilities Act (ADA) in light of the Supreme Court decision in *Olmstead* v. *L.C.,* 527 U.S. 581 (1999). In attachments to that letter, we set forth specific policy clarifications to allow States more flexibility to serve individuals with disabilities in various ways and in different settings.

Attachment 3-g of the letter: ''Prohibition of Homebound Requirements in Home Health'' clarified that the use of a ''homebound'' requirement under the Medicaid home health benefit violates Federal regulatory requirements at § 440.230(c) and § 440.240(b). These requirements provide that mandatory benefits must be sufficient in amount, duration and scope to reasonably achieve their purpose, may not be arbitrarily denied or reduced in scope based on diagnosis, type of illness, or condition, and that the same amount, duration and scope must be available to any individual within the group of categorically needy individuals and within any group of medically needy individuals. In the attachment, we stated that the restriction of home health services to individuals who are homebound to the exclusion of other individuals in need of these services ignores the reality that individuals with disabilities can and do live and function in the community. We further noted that developments in technology and service delivery made it possible for individuals with even the most severe disabilities to participate in a wide variety of activities in the community with appropriate supports. We also expressed the importance of ensuring that Medicaid is available to provide medically necessary home health services to individuals in need of those services who are not homebound and continue to be an important part of efforts to offer individuals with disabilities services in the most

integrated setting appropriate to their needs, in accordance with the ADA.

We are clarifying in this rule that Medicaid home health services may not be limited to services furnished in the home. This policy reflects prior court cases on the subject. In *Skubel* v. *Fuoroli, 113 F.3d 330 (2d. Cir. 1997)* the court found that the Medicaid statute did not address the site of care for the mandatory home health benefit. The court found that the State could not limit coverage of home health services to those provided at the individual's residence. In 1990, the same court ruled invalid an interpretation that limited the provision of private duty nursing services to an individual's residence. The case, *Detsel* v. *Sullivan,* 895 F.2d 58 (2d Cir.1990), involved children suffering from severe medical conditions. Following the *Detsel* case, CMS, then the Health Care Financing Administration, ultimately adopted the court's standard and issued nationwide guidance eliminating the at-home restriction on private duty nursing. To date, we have not issued similar guidance requiring nationwide adoption of the *Skubel* ruling. We are using our authority through this rulemaking opportunity to do so.

2. Clarification of the Definition of Medical Supplies, Equipment and Appliances

An important component of the Medicaid home health benefit is medical supplies, equipment and appliances, under § 447.70(b)(3). The current wording of the regulation does not further define these terms, except to indicate that these items should be ''suitable for use in the home.'' Although this phrase could be read to refer only to the type of items included in the benefit, it has been susceptible to reading as a prohibition on use of covered items outside the home. We are using this opportunity to revise that phrase to make clear that it is not a limitation on the location in which items are used, but rather refers to items that are necessary for everyday activities and not specialized for an institutional setting. Thus we would indicate that these items must be ''suitable for use in any non-institutional setting in which normal life activities take place.'' This would clarify that although States may continue to establish medical necessity criteria to determine the authorization of these items, States may not deny requests for these items based on the grounds that they are for use outside of the home.

Current Medicaid regulations do not contain any specific definition of medical supplies, equipment, and appliances under the home health benefit, other than the language discussed in the prior paragraph. States have adopted reasonable definitions of those terms, for example, based on the Medicare definition. But in the absence of a generally applicable definition of the term, there has been confusion as to the proper scope of the benefit.

We believe that a consistent approach to categorizing home health medical supplies, equipment, and appliances will ensure beneficiaries are receiving needed items and provide clear and consistent guidance to States to ensure the use of the appropriate benefit category. We are now taking this opportunity to propose criteria defining home health supplies, equipment, and appliances, to better align with the Medicare program's definition of durable medical equipment found at § 414.202. We propose that supplies are defined as ''health care related items that are consumable or disposable, or cannot withstand repeated use by more than one individual.'' We propose that medical equipment and appliances are ''items that are primarily and customarily used to serve a medical purpose, generally not useful to an individual in the absence of an illness or injury, can withstand repeated use, and can be reusable or removable.''

We believe these standard definitions will ensure that such items will be available to all who are entitled to the home health benefit, and not restricted to individuals eligible for targeted benefits through home and community-based services (HCBS) waivers or the section 1915(i) HCBS State Plan option. Items that meet the criteria for coverage under the home health benefit must be covered as such. States will not be precluded from covering items meeting this definition through a section 1915(c) HCBS waiver service, such as a home modification, or through a section 1915(i) State Plan option. However, the State must also offer those items as home health supplies, equipment and appliances.

3. Other Issues

We note that we are considering whether other clarifications to the home health regulations are warranted. In particular, we are considering whether it would be useful to include language to reflect the policies set forth in a September 4, 1998 letter to State Medicaid Directors, responding in part to a Second Circuit decision in *Desario* v. *Thomas,* 139 F. 3d 80 (1998), about the use of lists or other presumptions in determining coverage of items under the home health benefit for medical equipment. In that letter, we indicated that a State could use such lists or presumptions, but must provide individuals the opportunity to rebut the list or presumption with a process that employs reasonable and specific criteria to assess coverage for an item based on individual medical needs, and determine whether the list or presumption is based on an arbitrary exclusion based on diagnosis, type of illness, or condition. We have not proposed any language to reflect this policy in part because the principles at issue are not specific to home health medical equipment. We invite comment on this issue.

In addition, in the May 5, 2010 **Federal Register** (75 FR 24437), we issued the ''Medicare and Medicaid Programs: Changes in Provider and Supplier Enrollment, Ordering and Referring, and Documentation Requirements; and Changes in Provider Agreements'', interim final rule which was effective on July 6, 2010. Although we have not incorporated changes to the scope of providers that may order medical supplies, equipment and appliances in the Medicaid program, as section 6405(a) of the Affordable Care Act was not applicable to Title XIX, we are specifically soliciting comments through this rule on the merits of doing so.

## II. Provisions of the Proposed Regulations

Please note that although the Affordable Care Act uses the term ''individual'' to refer to the Medicaid beneficiary, throughout this proposed rule we have used ''recipient'' to mirror the regulation text in the current Medicaid home health regulations. At this time, we do not intend to modify this term.

For the reasons discussed above, we propose to modify § 440.70(b)(3) to say the following: ''Medical supplies, equipment and appliances suitable for use in any non-institutional setting in which normal life activities take place.''

In § 440.70(b)(3)(i) and (ii), we propose revising the current text to define what constitutes medical supplies, equipment, and appliances. We propose to indicate that supplies are defined as ''health care related items that are consumable or disposable, or cannot withstand repeated use by more than one individual.'' We propose to indicate that medical equipment and appliances are ''items that are primarily and customarily used to serve a medical purpose, generally not useful to an individual in the absence of an illness or injury, can withstand repeated use, and can be reusable or removable.'' We

are specifically soliciting comment on these proposed provisions.

For the reasons discussed above, we propose to modify § 440.70(c), to add the following text to the end of the current provision: ''Nothing in this section should be read to prohibit a recipient from receiving home health services in any non-institutional setting in which normal life activities take place.'' Although the Court indicated that individuals would be limited to the same number of service hours they would have received if the home health services were provided only in their place of residence, in an effort to not limit the ability of States to offer a more robust home health benefit, we propose to allow States the option to authorize additional services or hours of services to account for this new flexibility. We also propose to add more text at the end of this provision as follows: ''Additional services or service hours may, at the State's option, be authorized to account for medical needs that arise in these settings''. This will incorporate both the *Skubel* and *Olmstead* decisions into the provision of home health services. This State flexibility would be applied to the State's Medicaid program as a whole, and would not be a person-specific flexibility. State medical necessity criteria would continue to be applied uniformly to all Medicaid individuals. We note that any such additional hours of service that are authorized by the State would be matched at the State's current Federal Medical Assistance Percentage (FMAP).

The remainder of this section pertains to proposed changes to § 440.70 to incorporate provisions of the Affordable Care Act.

Section 6407 of the Affordable Care Act requires, as a condition for payment for home health services, documentation of a face-to-face encounter prior to an order for such services. Section 6407 of the Affordable Care Act requires that the timing of the face-to-face encounter for home health services must occur within the 6-month period preceding certification, or other reasonable timeframe determined by the Secretary. Based on the same reasoning set out in the Medicare final rule, Medicare Program; Home Health Prospective Payment System Rate Update for Calendar Year 2011; Changes in Certification Requirements for Home Health Agencies and Hospices as published in the November 17, 2010, **Federal Register**, we propose to determine a reasonable timeframe for the face-to-face encounter that is shorter than 6 months. The statutory goal is to achieve greater physician accountability in ordering home health services. To achieve this goal, the encounter must occur close enough to the start of home health services to ensure that the clinical conditions exhibited by the recipient during the encounter are related to the primary reason for the recipient's need for home health services. As such, we believe that encounters would need to occur closer to the start of home health services rather than the 6-month period initially indicated, but not required by the Affordable Care Act.

Consistent with the Medicare program's implementation of this provision, we propose to indicate in a new § 440.70(f)(1) that for the initial ordering of home health services, the physician must document that a face-to-face encounter that is related to the primary reason the individual requires home health services has occurred no more than 90 days prior to the start of services under the Medicaid home health benefit. We believe that in most cases, a face-to-face encounter with a recipient within the 90 days prior to the start of home health services will provide the physician and/or specified NPPs with a current clinical presentation of the recipient's condition such that the physician can accurately order home health services and establish an effective care plan, based on the encounter conducted by either the physician or allowed NPP. We also believe that a face-to-face encounter which occurs within 90 days prior to the start of services would be generally relevant to the reason for the recipient's need for home health services, and therefore such a face-to-face encounter would be sufficient to meet the goals of this statutory requirement. We recognize, however, that there may be circumstances when it may not be possible to meet this general requirement, and the individual's access to needed services must be protected. To account for these circumstances, we also propose in § 440.70(f)(1) to allow an opportunity to meet the face-to-face encounter requirement through an encounter with the recipient within 30 days after the start of home health services.

While we recognize the necessity of permitting face-to-face encounters to occur after the start of services in the instances described above, we emphasize that the timing of the face-to-face encounter in normal circumstances should occur within the 90 days prior to the start of home health services.

The statute describes NPPs who may perform this face-to-face encounter as a nurse practitioner or clinical nurse specialist, as those terms are defined in section 1861(aa)(5) of the Act, who is working in collaboration with the physician in accordance with State law, or a certified nurse-midwife (as defined in section 1861(gg) of the Act, as authorized by State law), or a physician assistant (as defined in section 1861(aa)(5) of the Act), under the supervision of the physician.

The statutory provision allows the permitted NPPs to perform the face-to-face encounter and inform the physician, who documents the encounter.

Based on the same reasoning set out in the Medicare proposed rule, Medicare Program; Home Health Prospective Payment System Rate Update for Calendar Year 2012; published elsewhere in this **Federal Register**, for individuals admitted to home health upon discharge from a hospital or post-acute setting, we propose to also allow the physician who attended to the individual in the hospital or post-acute setting to inform the ordering physician regarding their encounters with the individual to satisfy the face-to-face encounter requirement, much like an NPP currently can.

We propose to add a new § 440.70(f)(2) to list the practitioners that may perform the face-to-face encounters. These practitioners include the physician already referenced in § 440.70(a)(2), and the following NPPs: A nurse practitioner or clinical nurse specialist (as those terms are defined in section 1861(aa)(5) of the Act) who is working in collaboration with the physician in accordance with State law, or a certified nurse-midwife (as defined in section 1861(gg) of the Act, as authorized by State law), or a physician assistant (as defined in section 1861(aa)(5) of the Act), under the supervision of the physician, and for recipients admitted to home health immediately after an acute or post-acute stay, the attending acute or post-acute physician.

We also propose to add a new § 440.70(f)(3) to indicate that if an attending acute or post-acute physician or allowed NPP conducts the face-to-face visit, the attending acute or post-acute physician or practitioner is required to communicate the clinical findings of the face-to-face encounter to the physician, in order for the physician to document the face-to-face encounter accordingly. This requirement is necessary to ensure that the physician has sufficient information to determine the need for home health services, in the absence of conducting the face-to-face encounter himself or herself. We are also proposing to specify that these clinical findings must be reflected in a written or electronic document included

in the recipient's medical record (whether by the physician or by the NPP). We are not prescribing at the Federal level the specific elements necessary to document the face-to-face encounter, as that is a matter of clinical judgment that could vary according to the individual circumstance. However, States may choose to implement a minimum list of required information to adequately document the encounter.

In a new § 440.70(f)(4)(i), we propose to require that the physician's documentation of the face-to-face encounter must be either a separate and distinct area on the written order, an addendum to the order that is easily identifiable and clearly titled, or a separate document easily identifiable and clearly titled in the recipient's medical record. The documentation must also describe how the health status of the recipient at the time of the face-to-face encounter is related to the primary reason the recipient requires home health services. In a new § 440.70(f)(4)(ii), we propose to require that the physician's documentation of the face-to-face encounter be clearly titled, and state that either the physician himself or herself, or the applicable NPP, has conducted a face-to-face encounter with the recipient and include the date of that encounter.

Finally, we propose to add a new § 440.70(f)(5) to indicate that the face-to-face encounters may be performed through the use of telehealth. We are aware that many States currently make use of telehealth or telemedicine in the delivery of Medicaid services. Medicaid has issued informal guidance on the parameters of telehealth and telemedicine that is modeled after Medicare requirements. We are proposing to allow States to continue utilizing their current telehealth technologies as they apply to the implementation of this provision, however we are cognizant that State Medicaid telehealth policies may not align with Medicare's. We wish to minimize duplication and fragmentation of services for beneficiaries who are dually-eligible for Medicare and Medicaid, and therefore we are specifically soliciting comment on approaches to telehealth policy that would further this goal.

In a new § 440.70(g), we propose to apply all of the requirements of § 440.70(f) to the provision of supplies, equipment and appliances as described in § 440.70(b)(3) to the extent that a face-to-face encounter would be required under the Medicare program for durable medical equipment, with one exception from the requirements at § 440.70(f). The Affordable Care Act does not permit certified nurse midwives to conduct face-to-face encounters required for these items. This is reflected in our proposed § 440.70(g)(2).

The proposal to limit the face-to-face requirements to items that would be subject to such requirements as durable medical equipment under the Medicare program is based on the aim of maximizing consistency with the Medicare program's implementation of section 6407 of the Affordable Care Act and reducing administrative burden on the provider community. Thus we would only require that, for items of durable medical equipment specified by CMS under the Medicare program as subject to a face-to-face encounter requirement, the physician must document that a face-to-face encounter that is related to the primary reason the individual requires the item has occurred no more than 90 days before the order is written or within 30 days after the order is written. We intend to issue guidance to States indicating how they, and providers, can access the current Medicare list of specific durable medical equipment items subject to the face-to-face requirement.

Medical supplies, equipment and appliances for which a face-to-face encounter would not be required under the Medicare program as durable medical equipment, would not require a face-to-face encounter prior to the ordering of items under the Medicaid program. These items will be of a smaller dollar value, and at a decreased risk for fraud, waste and abuse. We welcome public comment on this approach.

We recognize the difficulty that some recipients with complex medical needs may face in participating in a face-to-face encounter (such as issues with accessing transportation, obtaining caregiver support, etc.,) particularly in rural areas. Once this rule is finalized, we expect States to implement this provision in a way that does not result in barriers to service delivery, as this is not the intent of the legislation. The statute specifically references telehealth as an alternative for ensuring that this new requirement is implemented in a way that protects continuity of services. We encourage States to work with the home health provider community to incorporate these face-to-face visits in creative and flexible ways to account for individual circumstances. We are available to provide technical assistance to States in achieving this goal.

In keeping with a movement across all Medicaid services, we expect the plans of care developed to address a recipient's home health needs be done in a way that embraces a person-centered philosophy. For clarification and consistency among programs, our expectation regarding the person-centered philosophy is that the plan of care reflects what is important to the recipient and for the recipient. The person-centered approach is a process, directed by the recipient with long-term support needs, or by another person important in the life of the recipient who the recipient has freely chosen to direct this process, intended to identify the strengths, capacities, preferences, needs, and desired outcomes of the recipient. The person-centered process includes the opportunity for the recipient to choose others to serve as important contributors to the planning process.

This process and the resulting service plan will assist the recipient in achieving personally defined outcomes in the most integrated community setting in a manner that reflects what is important to the recipient to ensure delivery of services in a manner that reflects personal preferences and choices, and what is important for the recipient to meet identified support needs.

## III. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We are soliciting public comment on each of these issues for the following sections of this document that contain information collection requirements (ICRs):

Proposed § 440.70(f)(3) and (g)(1) require NPPs and attending acute or post-acute physicians to communicate the clinical findings of the face-to-face encounter to the ordering physician. The burden associated with these

requirements would be the time and effort required for the NPP and attending acute or post-acute physicians to complete this communication. This is estimated at 10 minutes for each encounter. We estimate that there would be 1,143,443 initial home health episodes in a year based on our 2008 claims data. As such, the estimated burden for the NPP and attending acute or post-acute physicians documenting, signing, and dating the recipient's face-to-face encounter would be 190,574 hours for CY 2011.

Proposed § 440.70(f)(4) and (g)(1) would require that physicians document the existence of a face-to-face encounter with the Medicaid eligible recipient. The burden associated with these requirements would be the time and effort required for the physician to complete and maintain this documentation. The ordering physician's burden for composing the face-to-face documentation, which would include determining how the clinical findings of the encounter support eligibility; writing, typing, or dictating the face-to-face documentation; signing, and dating the recipient's face-to-face encounter is estimated at 10 minutes for each encounter. We estimate that there would be 1,143,443 initial home health episodes in a year based on our 2008 claims data. As such, the estimated burden for the physician documenting, signing, and dating the recipient's face-to-face encounter would be 190,574 hours for CY 2011. We acknowledge that this figure is inflated by the instances in which the physician himself or herself conducted the face-to-face encounter with the individual, making this second 10-minute documentation burden unnecessary.

This notice of proposed rulemaking also serves as the required 60-day **Federal Register** notification for aforementioned information collection requirements. To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web site at *http://www.cms.gov/PaperworkReductionActof1995/PRAL/list.asp#TopOfPage* or e-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office at 410–786–1326.

If you comment on these information collection and recordkeeping requirements, please do either of the following:

1. Submit your comments electronically as specified in the **ADDRESSES** section of this proposed rule; or

2. Submit your comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, *Attention:* CMS Desk Officer, [CMS–2348–P] *Fax:* (202) 395–6974; or *E-mail: OIRA_submission@omb.eop.gov.*

## IV. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

## V. Regulatory Impact Statement

### *A. Statement of Need*

This regulation is necessary to implement Section 6407 of the Patient Protection and Affordable Care Act of 2009 (the Affordable Care Act), (Pub. L. 111–148, enacted on March 23, 2010), as amended by section 10605 of the Affordable Care Act which affects the home health benefit under both the Medicare and Medicaid programs.

Section 6407(a) of the Affordable Care Act (as amended by section 10605) added new requirements to section 1814(a)(2)(C) of the Act under Part A of the Medicare program, and section 1835(a)(2)(A) of the Act, under Part B of the Medicare program, that the physician, or certain allowed nonphysician practitioners (NPPs), document a face-to-face encounter with the individual (including through the use of telehealth, subject to the requirements in section 1834(m) of the Act), prior to making a certification that home health services are required under the Medicare home health benefit. Section 1814(a)(2)(C) of the Act indicates that in addition to a physician, a nurse practitioner or clinical nurse specialist (as those terms are defined in section 1861(aa)(5) of the Act) who is working in collaboration with the physician in accordance with State law, or a certified nurse-midwife (as defined in section 1861(gg) of the Act, as authorized by State law), or a physician assistant (as defined in section 1861(aa)(5) of the Act), under the supervision of the physician, may conduct the face-to-face encounters prior to the start of home health services.

Section 6407(b) of the Affordable Care Act amended section 1834(a)(11)(B) of the Act to require documentation of a similar face-to-face encounter with a physician or specific NPPs by a physician ordering durable medical equipment (DME). The NPPs authorized to conduct a face-to-face encounter on behalf of a physician are the same for this provision as for the provision described above, with one exception. Certified nurse-midwives are not permitted to conduct the face-to-face encounter prior to the physician ordering DME. The timing of this face-to-face encounter is specified as being within the 6-month period preceding the written order for DME, or other reasonable timeframe specified by the Secretary. This provision also maintains the role of the physician in the actual ordering of DME.

### *B. Overall Impact*

We have examined the impacts of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995, Pub. L. 104–4), and Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). We tentatively estimate that this rulemaking may be ''economically significant'' as measured by the $100 million threshold, and, therefore, may be a major rule under the Congressional Review Act. Accordingly, we have prepared a Regulatory Impact Analysis which to the best of our ability presents the costs and benefits of the rulemaking.

The CMS Office of the Actuary estimated Section 6407 as having no potential impact on Federal Medicaid costs and savings. According to the CMS Actuarial estimates, Section 6407 would bring an estimated $350 million in

savings to the Medicare program from 2010–2014 and $870 million in savings from 2010–2019. Although this provision applies to Medicaid in the same manner and to the same extent as the Medicare program, no estimates (costs or savings) were noted for the Medicaid program.

Although there is no quantitative data to arrive at a specific dollar figure to attribute to the additional medical supplies, equipment, and appliances that may now be authorized in accordance with § 440.70(b)(3), we acknowledge the potential for this provision to surpass the threshold for economic significance. We wish to note however, that this provision may result in offsetting benefits to both beneficiaries and State budgets, including the ability for individuals to return to or enter the workforce, thereby increasing the pool of taxpayers, and decreasing reliance on other Medicaid benefits, including institutional care. Although there is no specific estimate regarding these benefits, they nonetheless should be taken into account. We are specifically soliciting comment on the potential increased costs and benefits associated with this provision, as well as the various sections throughout the RIA.

The RFA requires agencies to analyze options for regulatory relief for small entities, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small government jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $7.0 million to $34.5 million in any 1 year. For details, see the Small Business Administration's final rule that set forth size standards for health care industries, (65 FR 69432, November 17, 2000). Individuals and States are not included in the definition of a small entity. We are not preparing an analysis for the RFA because the Secretary has determined that this proposed rule would not have a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Social Security Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because the Secretary has determined that this proposed rule would not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act (UMRA) of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule that may result in expenditure in any one year of $100 million in 1995 dollars, updated annually for inflation. In 2011, that threshold level is approximately $136 million. This proposed rule will not result in an impact of $136 million or more on State, local or tribal governments, in the aggregate, or on the private sector.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. Since this regulation does not impose any costs on State or local governments, the requirements of Executive Order 13132 are not applicable.

*C. Conclusion*

We tentatively estimate that this rule may be ''economically significant'' as measured by the $100 million threshold as set forth by Executive Order 12866, as well as the Congressional Review Act. The analysis above provides our initial Regulatory Impact Analysis. We have not prepared an analysis for the RFA, section 1102(b) of the Act, section 202 of the UMRA, and Executive Order 13132 because the provisions are not impacted by this rule.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

**List of Subjects in 42 CFR Part 440**

Grant programs—health, Medicaid.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR chapter IV as set forth below:

## PART 440—SERVICES: GENERAL PROVISIONS

1. The authority citation for part 440 continues to read as follows:

**Authority:** Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

### Subpart A—Definitions

2. Section 440.70 is amended by—

A. Redesignating paragraphs (b)(3)(i) and (ii) as (b)(3)(iii) and (iv), respectively.

B. Revising the introductory text of paragraph (b)(3).

C. Adding new paragraphs (b)(3)(i) and (ii).

D. Adding paragraphs (c)(1) and (2).

E. Adding paragraphs (f) and (g).

The revisions and additions read as follows:

**§ 440.70 Home health services.**

* * * * *

(b) * * *

(3) Medical supplies, equipment, and appliances suitable for use in any non-institutional setting in which normal life activities take place.

(i) Supplies are defined as health care related items that are consumable or disposable, or cannot withstand repeated use by more than one individual.

(ii) Equipment and appliances are defined as items that are primarily and customarily used to serve a medical purpose, generally not useful to an individual in the absence of an illness or injury, can withstand repeated use, and can be reusable or removable.

* * * * *

(c) * * *

(1) Nothing in this section should be read to prohibit a recipient from receiving home health services in any non-institutional setting in which normal life activities take place.

(2) Additional services or service hours may, at the State's option, be authorized to account for medical needs that arise in these settings.

* * * * *

(f) No payment may be made for services referenced in paragraphs (b)(1), (2), and (4) of this section, unless the physician referenced in paragraph (a)(2) of this section documents that there was a face-to-face encounter with the recipient that meets the following requirements:

(1) For the initiation of services, the face-to-face encounter must be related to the primary reason the recipient requires home health services and must occur within the 90 days prior to or within the 30 days after the start of the services.

(2) The face-to-face encounter may be conducted by one of the following practitioners:

(i) The physician referenced in paragraph (a)(2) of this section;

(ii) A nurse practitioner or clinical nurse specialist, as those terms are defined in section 1861(aa)(5) of the Act, working in collaboration with the physician described in paragraph (a) of

this section, in accordance with State law;

(iii) A certified nurse midwife, as defined in section 1861(gg) of the Act, as authorized by State law;

(iv) A physician assistant, as defined in section 1861(aa)(5) of the Act, under the supervision of the physician described in subparagraph (a) of this section; or

(v) For recipients admitted to home health immediately after an acute or post-acute stay, the attending acute or post-acute physician.

(3) The allowed nonphysician practitioner, as described in paragraph (f)(3)(ii) through (iv) of this section, or the attending acute or post-acute physician, as described in paragraph (f)(3)(v) of this section, performing the face-to-face encounter must communicate the clinical findings of that face-to-face encounter to the ordering physician. Those clinical findings must be incorporated into a written or electronic document included in the recipient's medical record.

(4) To assure clinical correlation between the face-to-face encounter and the associated home health services, the physician responsible for ordering the services must:

(i) Document the face-to-face encounter as a separate and distinct area on the order itself, as an easily identifiable and clearly titled addendum to the order, or a separate document easily identifiable and clearly titled in the recipient's medical record, to describe how the health status of the recipient at the time of the face-to-face encounter is related to the primary reason the recipient requires home health services.

(ii) Must indicate the practitioner who conducted the encounter, and be clearly titled and dated on the documentation of the face-to-face encounter.

(5) The face-to-face encounter may occur through telehealth, as implemented by the State.

(g)(1) No payment may be made for medical equipment, supplies, or appliances referenced in paragraph (b)(3) of this section to the extent that a face-to-face encounter requirement would apply as durable medical equipment under the Medicare program, unless the physician referenced in paragraph (a)(2) of this section documents a face-to-face encounter with the recipient consistent with the requirements of paragraph (f) of this section except as indicated below.

(2) The face-to-face encounter may be performed by any of the practitioners described in paragraph (f)(2)of this section, with the exception of certified nurse-midwives, as described in paragraph (f)(2)(iii)of this section.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program).

Dated: March 2, 2011.

**Donald M. Berwick,**

*Administrator, Centers for Medicare & Medicaid Services.*

Approved: June 3, 2011.

**Kathleen Sebelius,**

*Secretary, Department of Health and Human Services.*

[FR Doc. 2011–16937 Filed 7–5–11; 4:15 pm]

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**H.R. 2279/P.L. 112–21**

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)

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