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Part II

Small Business Administration

13 CFR Parts 121, 127, and 134
Women-Owned Small Business Federal Contract Program; Proposed Rule

SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121, 127, and 134

RIN 3245–AG06

Women-Owned Small Business Federal Contract Program

AGENCY: Small Business Administration.

ACTION: Notice of proposed rulemaking; withdrawal of proposed rule.

SUMMARY: The U.S. Small Business Administration (SBA) proposes to amend its regulations governing small business contracting procedures. This Proposed Rule would amend part 127, that was promulgated in a Final Rule on October 1, 2008, and entitled "The Women-Owned Small Business Federal Contract Assistance Procedures," RIN 3245–AF40. This Proposed Rule would implement procedures authorized by the Small Business Act (Act) (Pub. L. 85–536, as amended) to help ensure a level playing field on which Women-Owned Small Businesses (WOSBs) can compete for Federal contracting opportunities. SBA proposes changes to part 127 that include eliminating the requirement for an agency-by-agency determination of discrimination, adopting both "numbers" and "dollars" measures of underrepresentation, and using the Fiscal Year 2006 Central Contractor Registration (CCR) database as the data source for determining eligible industries under the WOSB Program. This Proposed Rule thus identifies the eligible industries under the Program as those industries in which WOSBs are underrepresented or substantially underrepresented using either the numbers or the dollars approach. This Proposed Rule seeks to retain, for the most part, parts 121 and 134 of the Final Rule published on October 1, 2008, titled "The Women-Owned Small Business Federal Contract Assistance Procedures," RIN 3245–AF40; these portions of the rule govern various implementation procedures of the Program, as more fully discussed below.

In addition, SBA is withdrawing its proposed rule entitled "The Women-Owned Small Business Federal Contract Assistance Procedures," which was published on October 1, 2008, in the **Federal Register** together with a request for comments on two data sets used to determine the eligible industries under the WOSB Program.

DATES:

Date of Withdrawal: The proposed rule published on October 1, 2008, in the **Federal Register** at 73 FR 57014 is withdrawn as of March 4, 2010.

Comment Date: Submit comments on or before May 3, 2010.

ADDRESSES: You may submit comments, identified by 3245–AG06, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail, Hand Delivery/Courier:* Dean Koppel, Assistant Director, Office of Policy and Research, Office of Government Contracting, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

All comments will be posted on *http://www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *http://www.regulations.gov,* please submit the comments to Dean Koppel and highlight the information that you consider to be CBI and explain why you believe this information should be held confidential. SBA will make a final determination as to whether the comments will be published or not.

FOR FURTHER INFORMATION CONTACT: Dean Koppel, Assistant Director, Office of Policy and Research, Office of Government Contracting, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

SUPPLEMENTARY INFORMATION:

I. Background

On December 21, 2000, Congress enacted the Small Business Reauthorization Act of 2000, Public Law 106–554. Section 811 of that Act addressed the difficulties women-owned businesses have endured in competing for Federal procurement contracts by adding a new section 8(m), 15 U.S.C. 637(m), authorizing Federal contracting officers to restrict competition to eligible Women-Owned Small Businesses (WOSBs) for Federal contracts in certain industries. The law responds to decades of sex discrimination that have inhibited the ability of women to form firms and then to compete equally for contracts. By providing small, women-owned businesses an opportunity to gain a critical foothold in the Federal procurement market, the statute helps WOSBs overcome the economic barriers they have faced and helps ensure that the Federal government does not perpetuate the effects of economic sex discrimination.

In enacting this statute, Congress acted against a backdrop of discrimination against women that has been examined in Congressional hearings over many years and which persists to this day, as well as a history of largely unsuccessful Federal attempts to remedy that discrimination and provide a level playing field for WOSBs to compete for Federal contracts. Women-owned firms have been persistently underrepresented in Federal procurement contracting. For example, in 1979, when Executive Order 12138

> charged Federal agencies with responsibility for providing procurement assistance to women-owned businesses, WOSBs received only 0.2% of all Federal procurements.

LaLa Wu and Kate Collier, The National Plan of Action: Then and Now, Bella Abzug Leadership Institute, Nov. 2007 (hereinafter referred to as National Plan of Action), publicly available at *http://www.abzuginstitute.org/NationalPlanofAction_ThenandNow-Final.pdf.*[1] In the nine succeeding years (through 1989), the percentage of WOSB Federal procurements grew to 1 percent. *See id.* In later years,

> [a]lthough the growth rate in the number of women-owned small businesses (WOSBs) was almost twice that of all firms between 1997 and 2002, WOSBs [did] not experience[] a proportional increase in their share of Federal contracting dollars.

See id.

Evidence presented to Congress shows that women-owned firms continue to be significantly underrepresented in Federal contracting.[2] In 2002, for example, there

[1] In 1988, the Women's Business Ownership Act, Public Law 100–588 (Oct. 25, 1988), "was enacted to assist women in starting, managing and growing small businesses." *Ibid.* The National Plan of Action reported that "while this program has assisted thousands of women in obtaining business financing and information, it has had less success" at increasing the percentage of the total value of all prime contract and subcontract awards going to WOSBs or increasing the WOSB share in the economy because WOSBs have not experienced a proportional increase in their share of Federal contracting dollars. Subsequently, in 1994, section 7106 of the Federal Acquisition Streamlining Act (FASA), Public Law 103–355, "amended the Small Business Act by establishing a target that was aimed at increasing opportunities for women to compete for Federal contracts." *Id.* "FASA, among other things, established a government-wide goal for participation by WOSBs in procurement contracts of not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year." *Ibid.* That goal has not been reached to date.

[2] This underrepresentation is mirrored by disparities that women-owned firms face in the marketplace more generally. *See, e.g.,* Opportunities and Challenges for Women Entrepreneurs on the 20th Anniversary of the Women's Business Ownership Act: Roundtable Before the S. Comm. on Small Business and Entrepreneurship, 110th Cong. 3 (2008) (available at *http://www.access.gpo.gov/congress/Senate/Senate17ch110.html*); Expanding Opportunities for Women Entrepreneurs: The Future of Women's Small Business Programs: Hearing Before the S. Comm. on Small Business and Entrepreneurship, 110th Cong. 2 (2007) (statement of the Hon. John F. Kerry, Chairman and Sen. from

were 6.5 million women-owned firms in the United States, which accounted for 28.2 percent of all non-farm businesses in the United States. See SBA Office of Advocacy, Women in Business: A Demographic Review of Women's Business Ownership, 2007 (available at *http://www.sba.gov/advo/research/rs280tot.pdf*). Despite this presence, however, the share of women-owned small business prime contract awards (in dollar terms) was 2.9 percent in FY 2002 and 3.39 percent in FY 2008. See Federal Procurement Data System/Next Generation (available at *http://www.fpds.gov/fpdsng_cms/*).[3]

Substantial academic literature and evidence presented to Congress demonstrates that women face discrimination both in the ability to form and grow their businesses and in the treatment they receive in contracting markets.[4]

The following sections explain the operation of the Program.

II. Section 8(m): The WOSB Program Legislation

Congress established the WOSB Program as a tool to enable contracting officers to identify and establish a sheltered market for competition among WOSBs for the provision of goods and services to the Federal Government. H.R. Rep. No. 106–879, at 2 (2000) (publicly available at *http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr879&dbname=106&*). Consistent with these goals, section 8(m) of the Act authorizes contracting officers to restrict competition for "any contract for the procurement of goods or services by the Federal Government" to WOSBs under certain enumerated circumstances. 15 U.S.C. 637(m)(2). To be deemed a WOSB for purposes of section 8(m), a firm must be a "small business concern owned and controlled by women." As defined in section 3(n) of the Act, this means that at least 51 percent of the concern must be owned by one or more women, and that the management and daily business operations of the concern must be controlled by one or more women. 15 U.S.C. 632(n).

Section 8(m) establishes six criteria that must be satisfied in order for a contracting officer to reserve an acquisition for WOSBs:

- First, each eligible concern must be not less than 51 percent owned by one or more women who are "economically disadvantaged." However, SBA may waive this requirement of economic disadvantage if it determines that the concern is in an industry in which WOSBs are "substantially underrepresented."
- Second, the contracting officer must have a reasonable expectation that two or more WOSBs will submit offers for the contract.
- Third, the anticipated award price of the contract must not exceed $5 million in the case of manufacturing contracts and $3 million in the case of other contracts.
- Fourth, in the estimation of the contracting officer, the contract must be able to be awarded at a fair and reasonable price.
- Fifth, each competing concern must be duly certified by a Federal agency, a State government, or an SBA-approved entity as a WOSB, or must certify to the contracting officer and provide adequate documentation that it is a WOSB. The statute imposes penalties for a concern's misrepresentation of its status as a WOSB.
- Sixth, paragraph (2)(C) of the Act provides that the contract for which competition is restricted must be for the procurement of goods or services with respect to an industry identified by SBA "pursuant to paragraph (3)." However, the reference to paragraph (3) of the Act appears to be a drafting error that resulted from a floor amendment, and the intent of the provision appears to be to identify eligible contracts as those concerning an industry identified pursuant to paragraph (4).[5] Thus, accounting for the apparent drafting error, the sixth condition for the restriction of Federal procurement contracts to WOSBs is that the contract be for the procurement of goods or

Massachusetts) (stating that "women owned small businesses still continue to have markedly lower revenue and fewer employees than firms, even comparable ones, owned by men") (available at *http://sbc.senate.gov/hearings/20070920.cfm*); Women in Business: Leveling the Playing Field: Roundtable Before the S. Comm. on Small Business and Entrepreneurship, 110th Cong. 8 (2008) (available at *http://sbc.senate.gov/hearings/20080319.cfm*).

[3] *See also* Small Business Administration, FY 2008 Official Goaling Report; Small Business Administration (available at *http://www.sba.gov/aboutsba/sbaprograms/goals/index.html* (last visited February 12, 2010).

[4] *See, e.g.,* Women in Business: Leveling the Playing Field: Roundtable Before the S. Comm. on Small Business and Entrepreneurship, 110th Cong. 8 (2008) (discussing challenges facing women business owners) (available at *http://sbc.senate.gov/hearings/20080319.cfm*); The Department of Transportation's Disadvantaged Business Enterprises Program: Hearing Before the H. Comm. on Transp. and Infrastructure, 111th Cong. 299 (2009) (statement of Joann Payne, President, Women First National Legislative Committee) (describing sex discrimination in business lending) (available at *http://transportation.house.gov/hearings/hearingdetail.aspx?NewsID=859*); Opportunities and Challenges for Women Entrepreneurs: Roundtable Before the S. Comm. on Small Business and Entrepreneurship, 110th Cong. 25 (2008) (detailing, among other things, sex discrimination in lending, and women's exclusion from informal business networks that are a crucial source of business opportunities) (available at *http://sbc.senate.gov/hearings/20080909.cfm*); National Economic Research Associates, Inc., Race, Sex and Business Enterprise: Evidence from Memphis, Tennessee 100 (2008) (explaining that discrimination in the labor force reduces the future availability of women-owned businesses by limiting women's ability to obtain the kinds of employment experiences that are most likely to lead to entrepreneurial opportunities) (The Minority Business Development Agency: Enhancing the Prospects for Success: Hearing Before the H. Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce, 111th Cong. (2009) available at *http://energycommerce.house.gov/index.php?option=com_content&view=article&id=1772:the-minority-business-development-agency-enhancing-the-prospects-for-success&catid=129:subcommittee-on-commerce-trade-and-consumer-protection&Itemid=70*).

[5] Paragraph (3) as enacted permits SBA to waive the "economically disadvantaged" requirement for industries in which SBA has determined that WOSBs are substantially underrepresented. However, at the time that the WOSB bill was reported out of the House Committee on Small Business, then-paragraph (3) (eventually enacted as paragraph (4)) required the Administrator to conduct a study to identify industries in which WOSBs are underrepresented with respect to Federal procurement contracting. Thus, the House Committee viewed paragraph (2)(C) as requiring that contracts eligible for the 8(m) program be contracts "for the procurement of goods and services in an industry identified by the Administrator of the Small Business Administration as one in which small business concerns owned and controlled by women are historically underrepresented." H.R. Rep. No. 106–879, at 4 (2000). There is nothing in the legislative history that indicates that Congress intended a different result.

In accord with the legislative history, and to give effect to each provision of the statute, SBA has concluded that paragraph (2)(C)'s reference to paragraph (3) is better understood as a reference to paragraph (4). Paragraph (2)(C) authorizes restricted competition with respect to industries "identified" by SBA pursuant to the referenced paragraph. Paragraph (4) uses the term "identify," calling for SBA to conduct a study to "identify" industries in which WOSBs are underrepresented with respect to Federal procurement contracting. Paragraph (3), in contrast, does not use the term "identify."

Understanding the reference to paragraph (3) as a reference to paragraph (4) also preserves the independent effect of each paragraph in section 8(m), including paragraphs (2)(A) and (3). If, by contrast, paragraph (2)(C) were applied literally, it would generate several anomalies. For example, it would undercut paragraph (2)(A)'s requirement of economic disadvantage (the first condition discussed above), because restricted competition would apply only to industries for which SBA had *waived* the economic disadvantage requirement. Further, a literal reading of paragraph 2(C) would turn paragraph (3), which is clearly phrased as a waiver provision, into an affirmative condition for restricted competition, authorizing restricted competition *only* in industries in which WOSBs are "substantially underrepresented." In addition, the literal application of paragraph (2)(C) would undercut paragraph (4), which requires SBA to conduct a study to identify industries in which WOSBs are "underrepresented" with respect to Federal procurement contracting. If restricted competition were permitted only in industries in which SBA had determined WOSBs to be "substantially underrepresented," there would be no need for SBA to conduct a study to determine underrepresentation (as opposed to substantial underrepresentation).

services with respect to an industry identified by SBA pursuant to the study mandated by paragraph (4) as one in which WOSBs are underrepresented with respect to Federal procurement contracting.

Based on its understanding of the meaning and intent of section 8(m) read as a whole, SBA interprets the statute to authorize restricted competition for industries in which it has determined WOSBs to be underrepresented or substantially underrepresented in Federal procurements, provided the other conditions of section 8(m) are met. This Proposed Rule is drafted accordingly.

III. The RAND Report

Shortly after section 8(m) was enacted, and pursuant to the requirement of paragraph (4) of the law, SBA, using its own internal resources, conducted a study to identify the industries in which WOSBs are underrepresented with respect to Federal procurement contracting. SBA initially completed its study in September 2001, and contracted with the National Academy of Sciences (NAS) to review the study before publication. In March of 2005, the National Research Council, which functions under the auspices of the NAS and other National Academies, issued an independent evaluation concluding that SBA's study was flawed and offering various recommendations for a revised study. In response to this evaluation, SBA issued a solicitation in October 2005 seeking a contractor to perform a revised study in accordance with the NAS recommendations. In February 2006, SBA awarded a contract to the Kauffman-RAND Institute for Entrepreneurship Public Policy (RAND) to complete a revised study of the underrepresentation of WOSBs in Federal prime contracts by industry code. The resulting study—the RAND Report—was published in April 2007 and is available to the public at *http://www.RAND.org/pubs/technical_reports/TR442.*

As the RAND Report explains more fully, RAND measured WOSB representation in each industry code through a "disparity ratio," which is a measure comparing the utilization of WOSBs in Federal contracting in a particular code to their availability for such contracts. The disparity ratio itself is defined as utilization divided by availability. Utilization and availability, in turn, are themselves ratios. The disparity ratio is therefore a ratio of ratios. This disparity ratio provides an estimate of the extent to which WOSBs that are available for Federal contracts in specific industries are actually being utilized to perform such contracts.

Consistent with the NAS's recommendation, RAND measured utilization and availability in two ways: in terms of dollars and numbers. When using dollars as the measure, RAND calculated utilization as the ratio of Federal contract dollars awarded to WOSBs in a given industry code to total Federal contract dollars awarded in that industry code. It calculated availability as the ratio of the gross receipts (revenues) of WOSBs in a particular industry code to the gross receipts (revenues) of all firms in that code.[6] When using numbers as the measure, RAND calculated utilization as the ratio of the number of Federal contracts awarded to WOSBs in a particular industry code to the number of Federal contracts awarded overall in that code, and availability as the ratio of the number of WOSBs in a particular industry code to the total number of firms in that code.

According to the RAND Report, if the disparity ratio in an industry code is equal to 1.0 when measuring in terms of dollars, that indicates that WOSBs have been awarded contract dollars in the same proportion as their economic representation in the industry; that is, they are awarded contracting dollars in proportion to their share of total business in that industry, and are therefore neither over- nor under-represented. Similarly, if the disparity ratio in an industry code is equal to 1.0 when measuring in terms of numbers, this indicates that WOSBs are awarded contracts (of whatever dollar value) in the same proportion as their numerical representation in the industry. A ratio of less than 1.0 (lower utilization than availability) suggests some degree of underrepresentation with respect to that particular means of measuring disparity (dollars or numbers); a ratio of greater than 1.0 (greater utilization than availability) suggests some measure of overrepresentation with respect to a given metric. Following the NAS report's recommendations, RAND classified an industry as "underrepresented" if its disparity ratio was between 0.5 and 0.8 using either the numbers or dollars approach, and "substantially underrepresented" if its ratio was less than 0.5. It is important to note that RAND states

> disparity ratios are not in and of themselves measures of discrimination, although they have been used in numerous court cases to infer discrimination. Nonetheless they are a starting point, a way to identify whether there are any differences in outcomes between different types of firms.

(RAND Report at 30; see also discussion at 4 and 5).

RAND calculated these ratios using a variety of different data sets. For the utilization component of the disparity ratio, RAND used the data from the FY 2005 Federal Procurement Data System/Next Generation (FPDS/NG) procurement database. This was the only data source identified by RAND with respect to the utilization component of the disparity ratio. However, RAND did adjust the FPDS to account for possible miscoding of business size. Specifically, RAND linked the FPDS data to 2004 Dun and Bradstreet (D&B) data using the Data Universal Numbering System (DUNS) to identify the parent companies of local establishments, and then used the DUNS to assess whether a firm was small. However, because the data file was also prone to error, RAND presented results both with and without the DUNS cross-reference.

For the availability component of the disparity ratio, RAND used two different databases: The 2002 Survey of Business Owners (SBO) from the five-year Economic Census, and the FY 2006 Central Contractor Registration (CCR) registration database. Using the SBO database, RAND presented results only at the two-digit industry code level, a comparatively generalized level of industry disaggregation. Using the CCR, in contrast, RAND presented results at the two-, three-, and four-digit industry code levels. RAND also presented full sample results and trimmed sample results (eliminating the top and bottom 0.5 percent of the data) for each disparity ratio. RAND did this in order to examine the sensitivity of the disparity ratio to extreme values, such as very large contracts or negative dollar amounts resulting from contract actions based on multi-year contracts or modifications to such contracts to earlier contracts.

Using these different data sources and various adjustments, the RAND Report identified twenty-eight different possible approaches to determining the degree of underrepresentation of WOSBs in Federal procurement contracting. The parameters and results of each approach are summarized in the RAND Report at Table 4.6.

IV. Regulatory History

On June 15, 2006, SBA published in the **Federal Register,** at 71 FR 34550, a Proposed Rule (RIN 3245–AE65), with

[6] This is a fairly conservative method of determining availability and may underestimate the availability of WOSBs because discrimination may limit the revenues of WOSBs that nonetheless are ready, willing, and able to perform work on Federal contracts.

request for comments, that proposed to amend its regulations in accordance with section 8(m). The Proposed Rule contained the infrastructure rules necessary for the WOSB Program implementation, but did not identify the eligible industries for the WOSB Program because the RAND Report had not been published at the time of the issuance of that Proposed Rule. The RAND Report was subsequently published on April 27, 2007. Based on SBA's evaluation of the public and inter-agency comments received on the June 15, 2006 Proposed Rule, as well as discussions with the U.S. Department of Justice (DOJ) and the Office of Federal Procurement Policy (OFPP), and further examination of section 8(m), it was determined that the June 15, 2006 Proposed Rule required significant changes that warranted further public comment and consideration. In addition, SBA had the results of the RAND study.

Therefore, on December 27, 2007, SBA published a new Proposed Rule, titled Women-Owned Small Business Federal Contract Assistance Procedures, RIN 3245–AF40, at 72 FR 73285, that consolidated the infrastructure rules necessary for the WOSB Program implementation with the RAND study findings, which were used to determine the industries in which WOSBs would be eligible for Federal contracting under the WOSB Program.

In determining the eligible industries, the December 2007 Proposed Rule employed the full-sample 4-digit NAICS code dollars approach (using the dollar value of contract awards and the receipts of businesses) to identify the eligible industries under the WOSB Program. This approach identified four industries in which WOSBs were either underrepresented or substantially underrepresented. The comment period for the December 2007 Proposed Rule closed on March 31, 2008. SBA received approximately 1,720 comments on the proposed rule. Of the 1,720 comments received, 1,689 requested withdrawal of the Proposed Rule and/or stated opposition to some portion of the Proposed Rule. Subsequently, on October 1, 2008, SBA published a Final Rule in the **Federal Register** at 73 FR 56940, RIN 3245–AF40. This Final Rule implemented the infrastructure regulations for the WOSB Program, but did not identify the eligible industries for the WOSB Program.

The reason for the approach was that after identifying eligible industries under the program in December 2007, SBA discovered certain limitations in the data RAND used. Therefore, SBA published a Proposed Rule; Request for Comment on October 1, 2008, at 73 FR 57014, which provided for a 30-day public comment period and requested comments on two data sets that SBA could use to determine the eligible industries for the WOSB Program. SBA elected to publish the October 1, 2008, Proposed Rule, rather than a Final Rule, on the identification of the eligible industries to engage in a further review and examination of the RAND study and potential measures of disparity. As a result of this further examination, SBA stated in the Proposed Rule; Request for Comments that it had identified a limitation inherent in the CCR data set when the dollars approach was used. Specifically, SBA explained that vendors input information into CCR relating to the firm's revenues and NAICS codes, which are a method for classifying business establishments. Vendors must supply at least one NAICS code for registration into CCR to be complete, but can supply more than one. Vendors do not input the business's revenues for each NAICS code listed or for each NAICS code in which it does business; rather, vendors input total revenues for the firm. Thus, CCR does not provide information concerning the revenue of a firm in each of the NAICS codes, or industries, it sets forth in its CCR registration. Therefore, when RAND computed the disparity ratio using the CCR dollars approach to determine underrepresentation, each firm's total revenue was counted in every NAICS code associated with the firm.

Upon discovering the CCR data set limitation, SBA contacted the United States Census Bureau (Census Bureau) to determine the availability of an alternative data set. The Census Bureau provided SBA with a data set for the availability component of the disparity ratio that consists of data from the 2002 Survey of Business Owners (SBO) collected through the 5-year Economic Census for firms with employees (hereinafter referred to as "Census SBO data"). Although this data set was not used in the RAND report results, it was mentioned in the RAND report as restricted data which would be available to SBA at a more disaggregated NAICS code level than the public SBO data. The Census Bureau report and associated data are available at *http://www.sba.gov/idc/groups/public/documents/sba_homepage/census_bureau.pdf.*

In its October 1, 2008 Proposed Rule; Request for Comment, SBA sought input from the public on this CCR data limitation as well as the Census SBO data set alternative. SBA received 38 comments on that Proposed Rule. The majority of these comments generally opposed the use of the Census SBO data because the disaggregated data set was not available publicly without undergoing a screening process due to statutory restrictions to protect the confidentiality of the data. No comments addressed the substantive findings of the Census data or challenged its accuracy.

SBA has reviewed the October 1, 2008 Final Rule and the Proposed Rule, as well as the public comments, and determined that changes to both rules are necessary. After careful review of the comments, SBA has decided to withdraw the October 1, 2008 Proposed Rule for the reasons identified in the currently proposed rule. Consequently, SBA has set forth below a new Proposed Rule for the WOSB Program which includes both the infrastructure regulations and the identification of the eligible industries. SBA has set forth the entire Proposed Rule below, rather than only the portions of part 127 that SBA has decided to amend, in order to afford the public an opportunity to comment on all aspects of the program. SBA has determined that setting forth the entire infrastructure and industries in a Proposed Rule will best serve the public's ability to address any concerns or opinions regarding this WOSB Program. For ease of reference, following is a discussion of the substantive changes that the rule proposes to make to the Final Rule and Proposed Rule published on October 1, 2008 at 73 FR 56940 and 73 FR 57014, respectively.

V. Identification of the Eligible Industries

1. Choice of Data sets

As stated earlier, the RAND Report, using various combinations of data sources and methods, identified twenty-eight possible approaches to measuring the underrepresentation and substantial underrepresentation of WOSBs in Federal procurement contracting. Twenty of these approaches compare FY 2006 CCR registration data to FY 2005 FPDS/NG procurement data, while eight of the approaches compare the 2002 SBO data from the five-year Economic Census to FYs 2002/2003 FPDS/NG procurement data.

SBA proposes not to use the eight approaches that rely on a comparison of the 2002 SBO data to FYs 2002/2003 FPDS/NG procurement data for the following reasons:

- The SBO data set generally considers all firms in the economy, and not simply the number of firms that are ready, willing, and able to perform

Federal contracts. In contrast, because firms are generally required to register on the CCR database prior to bidding on a Federal contract, a firm's presence in the CCR reflects its willingness to bid on a Federal contract. However, it is possible that a firm's inability to bid on Federal contracts, and therefore its reluctance to register on the CCR could itself result from gender discrimination.

• The SBO does not distinguish between WOSBs and women-owned businesses in general, large and small. The CCR, in contrast, contains self-reported information on whether a business is small. And the procedures authorized by section 8(m) are specifically targeted towards only small businesses owned by women.

• The SBO is generally not available for two years after the survey is completed. CCR data, in contrast, are updated continuously and made available immediately. It is not clear, however, the degree to which data regarding business ownership and size economic size change from year to year, and therefore not clear how much weight this distinction should carry.

In addition, the SBO data in the RAND Report do not disaggregate industry groupings beyond the two-digit NAICS level. In the NAS 2005 report examining SBA's 2002 internal study, NAS criticized SBA's use of the two-digit Major Group Standard Industrial Classification (SIC) industry codes as inadequate. The two-digit Major Group SIC designation corresponds to the current three-digit Subsector NAICS designation. Thus, while NAS criticized SBA's use of two-digit SIC information, the SBO two-digit NAICS data is even less precise than the two-digit SIC data. Both the CCR and the FPDS/NG, in contrast, provide the capability to use four-digit NAICS classifications.

SBA solicits comment on its decision, in light of the foregoing considerations, not to use any of RAND's approaches that utilize the SBO data and to focus instead on only those approaches that use the CCR data. A further discussion on the appropriateness of the use of the CCR data is set forth below.

Because the NAS criticized SBA's use of the two-digit SIC code and recommended that SBA use industry detail as disaggregated as the data will support, SBA also proposes to eliminate the sixteen approaches that used CCR and FPDS/NG FY 2005 procurement data at the two and three-digit NAICS code level.

Of the remaining four approaches, two are based on full sample results, while the other two are based on trimmed sample results (eliminating the top and bottom 0.5 percent of the data). The RAND Report found little benefit to trimming the sample, and placed more weight on the full sample results. Based on RAND's finding, SBA proposes to eliminate the two approaches based on the trimmed-sample results.

This leaves two possible approaches, both of which use 2004 CCR and 2005 FPDS/NG procurement data at the four-digit NAICS code level.

2. Numbers and Dollars Approaches

After careful analysis of the comments on SBA's 2007 and 2008 Proposed Rules and reconsidering the data and analysis in the RAND Report, SBA has determined that both of the remaining approaches, using numbers and dollars, are viable and appropriate means of identifying industries in which WOSBs are underrepresented or substantially underrepresented for purposes of section 8(m). Both approaches represent legitimate and complementary interpretations of the statutory term "underrepresentation." SBA likewise believes that applying the section 8(m) program in these industries would reduce the effects of the discrimination affecting women-owned small businesses, consistent with Congress's goals, and that both numbers and dollars approaches are substantially related to the purpose of the Program. As a result, as is explained in more detail below, the Proposed Rule would amend the definitions of underrepresentation and substantial underrepresentation and identify the eligible industries under this Program as those industries in which WOSBs are underrepresented or substantially underrepresented using either the numbers or the dollars approach. SBA recognizes that this approach may enable competition restricted to WOSBs in industries where using only one or the other of the disparity measurement methodologies in the RAND study might not show underrepresentation of WOSBs in that industry. SBA therefore seeks comment on this proposed approach.

Section 8(m) instructs SBA to

> conduct a study to identify industries in which small business concerns owned and controlled by women are underrepresented with respect to Federal procurement contracting.

15 U.S.C. 637(m)(4). The statute does not specify how underrepresentation should be identified, or state that only a single disparity measure can be used to identify underrepresentation. SBA must therefore determine the appropriate methods for identifying WOSB underrepresentation, recognizing that it is not bound to any one disparity measure to achieve that goal. As discussed above, the dollars approach compares the proportion of the dollar value of contracts in a particular NAICS code awarded to WOSBs with the proportion of gross receipts (revenues) in that NAICS code earned by WOSBs. The numbers approach compares the proportion of contracts (calculated in terms of number of contracts) awarded to WOSBs in a particular NAICS code with the number of WOSBs in that particular NAICS code.

After reviewing comments and conducting further analysis, SBA concludes that both approaches provide sound and complementary analytical bases for determining the industries in which WOSBs are underrepresented and substantially underrepresented.

Specifically, underrepresentation can occur when WOSBs are not being awarded Federal contracting dollars in proportion to their economic representation (measured by their gross receipts) in an industry. This might occur if, for example, WOSBs were awarded contracts in numbers proportional to their numerical representation in an industry, but received much less in Federal contracting dollars than their non-WOSB counterparts. But underrepresentation can also occur where there is disparity in the number of contracts being awarded to WOSBs, even if there is no measured disparity in contract dollars, due to a handful of WOSBs winning large-dollar contracts. Indeed, as the RAND Report results show, during FY 2005, the top WOSB firm was awarded $673 million dollars in contracts, or 6 percent of the value of all Federal prime contracts awarded to WOSBs ($10.5 billion dollars). In addition, the top 10 WOSBs garnered $1.6 billion, or 15 percent of Federal prime contracts going to WOSBs, and the top 25 WOSBs were awarded $2.1 billion, or 20 percent of Federal prime contracts going to WOSBs. Accordingly, the number of contracts, regardless of size, is a valid alternative measure of whether WOSBs have been offered equality of opportunity.

It is true that the statutory goal for WOSB participation in government contracting is expressed in terms of dollars. However, upon further analysis, SBA does not believe that this fact counsels against use of a numbers approach for purposes of identifying the industries in which the WOSB Program should operate. The 5 percent participation goal—which appears in a different section of the statute from section 8(m)—is a measure of the total volume of Government-awarded prime contracts and subcontracts that, ideally, will be awarded to WOSBs each year.

The goal includes both contracts awarded under the section 8(m) program and contracts awarded in industries deemed ineligible for that program. Section 8(m)'s "underrepresent[ation]" requirement, in contrast, concerns the identification of industries in which the statutorily prescribed contracting assistance to WOSBs should be permitted. There is no basis in the statutory language for determining that "underrepresentation" for purposes of authorizing specific contracting assistance to WOSBs must be measured by the same metric as the total volume of Federal contracts awarded to WOSBs for purposes of an overall participation goal. As discussed above, the numbers approach identifies a valid and important meaning of "underrepresentation" that may exist even in situations where the dollars approach does not identify underrepresentation.

SBA recognizes that these different means of measuring and evaluating underrepresentation are tools to identify those industries in which competition restricted to WOSBs will be authorized. Where different analytical methodologies yield different outcomes on the issue of WOSB underrepresentation in a particular industry, SBA must identify a reasonable means for evaluating, reconciling and applying these methodologies in order to serve the statutory goal of improving WOSBs equal access to Federal contracting in those industries where WOSBs are underrepresented. SBA therefore seeks comment on its proposed approaches to identifying underrepresentation.

3. Appropriateness of Using the CCR Database

Comments on the prior Proposed Rules raised concerns about the RAND study's use of revenue data from the CCR database, concerns SBA noted in its withdrawn 2008 Final Rule. One concern centered on the way vendors, *i.e.,* businesses registering for Federal contracts, input data into the CCR. As described above, the CCR database reflects each firm's total revenue in every NAICS code associated with the firm, rather than the amount of revenue associated with the particular NAICS code at issue. SBA noted in its 2007 Proposed Rule that this feature of the CCR data might result in overstating firms' revenues in some or all NAICS codes.

At least one commenter, in response to a prior version of the rule, asserted that the CCR data only takes into consideration current Federal contractors, whereas the SBO data could include all WOSB that are ready, willing and able to perform Federal work. A further potential viewpoint is that when using the SBO data set, the RAND Study found underrepresentation in a smaller number of industries, which could imply that women-owned firms were "over-represented" in numerous other industries in terms of the dollars of Federal procurement relative to their size in the economy. Consequently, it might be asserted that using the CCR data will allow set-asides in industries where other credible data (SBO data) show women-owned small businesses are not underrepresented in terms of Federal procurement.

Based on further analysis, SBA has concluded that the CCR data set is the best available data to use to determine the availability component of the disparity rations. First, the fact that the CCR database reflects each firm's total revenue in every NAICS code associated with the firm, rather than the amount of revenue associated with the particular NAICS code at issue, does not render unreliable the disparity ratios calculated using the dollars component of the CCR database.[7] As previously discussed, the dollars-based disparity ratios are themselves based on a comparison between two different ratios: the value of the government contracts awarded to WOSBs in a particular industry compared to the value of all government contracts awarded in that industry, on the one hand; and the gross receipts (in the economy at large) of WOSBs registered in the CCR database for that industry compared to the gross receipts for all businesses registered for that industry, on the other. The numerator of this ratio—the value of government contracts awarded to WOSBs and to industries in general within a given industry code—is not calculated using the CCR database.

In addition, with respect to the denominator, SBA believes that it is reasonable to assume that WOSBs and non-WOSBs register in the CCR database and identify industries for which they are available in a similar manner. Thus, if a WOSB in a particular kind of business registers in (and effectively overstates its revenues in) three NAICS codes, a non-WOSB in the same kind of business is likely to register in (and overstate its revenues in) the same three NAICS codes. And because the denominator of the dollars-based disparity ratio is calculated based on a *comparison* between gross receipts earned by WOSBs and non-WOSBs, rather than the absolute values of those receipts, the potential over-reporting of revenue in each NAICS code does not raise serious concerns about the reliability of the dollars analysis of the RAND study.

SBA has also concluded the CCR database appropriately captures those firms ready, willing and able to compete for Federal contracts. The firms in the CCR database have indicated by registering to submit an offer on Federal prime contracts that they are "willing" to perform work on such contracts and have self-identified as firms that are ready and able to perform such work. RAND's review of the data identified no additional means of determining which firms are ready and able to work on these contracts.[8] However, RAND ensured that the firms each had at least one employee as a "proxy for 'able.'" RAND Study at 30. Further, because the SBO data generally considers all firms in the economy, it is possible that it may actually overestimate the number of firms that are ready, willing and able to perform Federal contracts, thus potentially overestimating underrepresentation.

Although the CCR data account for a firm's willingness to submit an offer and receive a Federal contract without also expressly accounting for firm qualifications or abilities, SBA believes that the CCR data is nevertheless an appropriate measure of firm availability. Although some contracting assistance programs may rely on actual bidder lists as the utilized measure of ready, willing, and able firms, see, *e.g., Eng'g Contractors Ass'n of S. Fla., Inc.* v. *Metro. Dade County,* 122 F.3d 895, 912 (11th Cir. 1997), some programs do not, and courts have upheld such programs against challenges. See *Concrete Works of Colorado, Inc.* v. *City and County of Denver,* 321 F.3d 950, 983 (10th Cir. 2003) (rejecting argument that underutilization must be measured by examining "only those firms *actually* bidding on City construction projects"). In *Concrete Works,* the court noted that even those firms that did submit bids might be unqualified, so that the city would always have to make some assumption about qualifications, and further observed that bidder lists might not capture all firms that are qualified. Id. The court concluded that disparity studies may make assumptions about qualifications "as long as the same

[7] This feature of the CCR database has no effect on disparity ratios calculated according to the numbers method, since that method does not make reference to firms' gross receipts.

[8] For instance, although size may be relevant to the ability to perform certain work, RAND found that small firms successfully competed for Federal contracts, and that it was not possible to identify a natural break point in contract size beyond which small businesses generally could not compete.

assumptions can be made for all firms." Id.; cf. *Adarand Constructors, Inc.* v. *Slater,* 228 F.3d 1147, 1173 (2000) (noting that there was no evidence in the record that "those minority subcontractors who *have* been utilized have performed inadequately or otherwise demonstrated a lack of necessary qualifications"). The court also noted that a firm's ability to perform contracts is not static: firms can generally perform services by hiring additional employees or using subcontractors. *Concrete Works,* 321 F.3d at 981. Of course, to the extent that the age and size of a firm may themselves be effectively limited by barriers tied to historical discrimination, using these factors to assess capacity and availability may in some instances extend the effects of past discrimination into this statistical assessment.

For the reasons stated above, this Proposed Rule proposes to evaluate underrepresentation and substantial underrepresentation by using the CCR database and applying both the numbers and dollars approaches to identify eligible industries. Using this methodology, the RAND study found one hundred and nine (109) year-2002 NAICS codes in which WOSBs were either underrepresented or substantially underrepresented.

Because SBA has received comments on this issue in the past, and there is a more detailed data set available (SBO data), it is interested in hearing from the public about this proposal to utilize the CCR data set, and specifically requests comments on whether the WOSB Program should operate, or whether its operation should require special justification, in sectors where women-owned businesses appear not be underrepresented based on other data.

4. The Eligible Industry Codes

NAICS codes are revised every five years (in the years ending in '2' and '7'). RAND used the 2002 NAICS codes in its study. All but three of the 109 2002 NAICS codes identified by RAND correspond with the current 2007 NAICS codes. The three 2002 NAICS codes which do not correspond are: 5161—Internet Publishing and Broadcasting; 5173—Telecommunications Resellers; and 5181—Internet Service Providers and Web Search Portals. However, these three 2002 NAICS codes were made part of other NAICS codes in 2007 that were also designated by RAND as substantially underrepresented—2002 NAICS code 5161 is now part of 2007 NAICS code 5191; 2002 NAICS code 5173 is now a part of 2007 NAICS code 5179; and 2002 NAICS code 5181 is now split between 2007 NAICS codes 5171 and 5179. Because the RAND study found NAICS codes 5191, 5179 and 5171 also to be substantially underrepresented, the change in NAICS code affects only the designation of industries to the extent that there are 106 2007 NAICS codes instead of 109 2002 NAICS codes but does not affect the types of WOSBs eligible under the WOSB Program.

However, the WOSB Program will not operate in three of the 106 2007 NAICS codes in sector 92 (2002 and 2007) because those NAICS codes do not apply to the private sector. These NAICS codes are: 9211—Executive, Legislative, and other General Government Support; 9231—Administration of Human Resource Programs; and 9281—National Security and International Affairs. Firms in these NAICS codes are:

> Federal, state, and local government agencies which administer and oversee government programs and activities that are not performed by private establishments,

see 13 CFR 121.201 n. 19, and contracts are not classified with this NAICS code. *See* 13 CFR 121.402(b).

In addition, twenty of the 106 NAICS codes in sectors 42, 44, and 45 (2002 and 2007) are not available for contracting assistance under the Program. These industries codes are: 4231—Motor Vehicle and Motor Vehicle Parts and Supplies Merchant Wholesalers; 4232—Furniture and Home Furnishing Merchant Wholesalers; 4233—Lumber and Other Construction Materials Merchant Wholesalers; 4234—Professional and Commercial Equipment and Supplies Merchant Wholesalers; 4236—Electrical and Electronic Goods Merchant Wholesalers; 4239—Miscellaneous Durable Goods Merchant Wholesalers; 4241—Paper and Paper Product Merchant Wholesalers; 4243—Apparel, Piece Goods, and Notions Merchant Wholesalers; 4246—Chemical and Allied Products Merchant Wholesalers; 4248—Beer, Wine, and Distilled Alcoholic Beverage Merchant Wholesalers; 4249—Miscellaneous Nondurable Goods Merchant Wholesalers; 4412—Other Motor Vehicle Dealers; 4421—Furniture Stores; 4422—Home Furnishings Stores; 4431—Electronics and Appliance Stores; 4461—Health and Personal Care Stores; 4511—Sporting Goods, Hobby, and Musical Instrument Stores; 4532—Office Supplies, Stationery, and Gift Stores; 4541—Electronic Shopping and Mail-Order Houses; and 4543—Direct Selling Establishments.

These twenty NAICS codes fall under the 2-digit NAICS code sectors 42, 44 and 45, which cover wholesalers and retailers. Contracts are not classified with these NAICS codes. See 13 CFR 121.402(b). SBA regulations specifically state that sectors 42, 44 and 45 are "not applicable to Government procurement of supplies." 13 CFR 121.201. These NAICS codes are not available for set-asides because contracting officers must classify any contract for the procurement of supplies under the applicable manufacturing NAICS code (and then the nonmanufacturer rule would apply to any offerors that are nonmanufacturers of the supply). 13 CFR 121.402.

As a result of the above, this Proposed Rule treats eighty-three NAICS codes as eligible for Federal contracting under the WOSB Program. There are forty-five NAICS codes in which WOSBs are underrepresented and thirty-eight NAICS codes in which WOSBs are substantially underrepresented.

The forty-five NAICS codes in which WOSBs are underrepresented are: 2213—Water, Sewage and Other systems; 2361—Residential Building Construction; 2371—Utility System Construction; 2381—Foundation, Structure, and Building Exterior Contractors; 2382—Building Equipment Contractors; 2383—Building Finishing Contractors; 2389—Other Specialty Trade Contractors; 3149—Other Textile Product Mills; 3159—Apparel Accessories and Other Apparel Manufacturing; 3219—Other Wood Product Manufacturing; 3222—Converted Paper Product Manufacturing; 3321; Forging and Stamping; 3323—Architectural and Structural Metals Manufacturing; 3324—Boiler, Tank, and Shipping Container Manufacturing; 3333—Commercial and Service Industry Machinery Manufacturing; 3342—Communications Equipment Manufacturing; 3345—Navigational, Measuring, Electromedical, and Control Instruments Manufacturing; 3346—Manufacturing and Reproducing Magnetic and Optical Media; 3353—Electrical Equipment Manufacturing; 3359—Other Electrical Equipment and Component Manufacturing; 3369—Other Transportation Equipment Manufacturing; 4842—Specialized Freight Trucking; 4881—Support Activities for Air Transportation; 4884—Support Activities for Road Transportation; 4885—Freight Transportation Arrangement; 5121—Motion Picture and Video Industries; 5311—Lessors of Real Estate; 5413—Architectural, Engineering, and Related Services; 5414—Specialized Design

Services; 5415—Computer Systems Design and Related Services; 5416—Management, Scientific, and Technical Consulting Services; 5419—Other Professional, Scientific, and Technical Services; 5611—Office Administrative Services; 5612—Facilities Support Services; 5614—Business Support Services; 5616—Investigation and Security Services; 5617—Services to Buildings and Dwellings; 6116—Other Schools and Instruction; 6214—Outpatient Care Centers; 6219—Other Ambulatory Health Care Services; 7115—Independent Artists, Writers, and Performers; 7223—Special Food Services; 8111—Automotive Repair and Maintenance; 8113—Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance; and 8114—Personal and Household Goods Repair and Maintenance.

The thirty-eight NAICS codes in which WOSBs are substantially underrepresented are: 2372—Land Subdivision; 3152—Cut and Sew Apparel Manufacturing; 3231—Printing and Related Support Activities; 3259—Other Chemical Product and Preparation Manufacturing; 3328—Coating, Engraving, Heat Treating, and Allied Activities; 3329—Other Fabricated Metal Product Manufacturing; 3371—Household and Institutional Furniture and Kitchen Cabinet Manufacturing; 3372—Office Furniture (including Fixtures) Manufacturing; 3391—Medical Equipment and Supplies Manufacturing; 4841—General Freight Trucking; 4889—Other Support Activities for Transportation; 4931—Warehousing and Storage; 5111—Newspaper, Periodical, Book, and Directory Publishers; 5112—Software Publishers; 5171—Wired Telecommunications Carriers; 5172—Wireless Telecommunications Carriers (except Satellite); 5179—Other Telecommunications; 5182—Data Processing, Hosting, and Related Services; 5191—Other Information Services; 5312—Offices of Real Estate Agents and Brokers; 5324—Commercial and Industrial Machinery and Equipment Rental and Leasing; 5411—Legal Services; 5412—Accounting, Tax Preparation, Bookkeeping, and Payroll Services; 5417—Scientific Research and Development Services; 5418—Advertising, Public Relations, and Related Services; 5615—Travel Arrangement and Reservation Services; 5619—Other Support Services; 5621—Waste Collection; 5622—Waste Treatment and Disposal; 6114—Business Schools and Computer and Management Training; 6115—Technical and Trade Schools; 6117—Educational Support Services; 6242—Community Food and Housing, and Emergency and Other Relief Services; 6243—Vocational Rehabilitation Services; 7211—Traveler Accommodation; 8112—Electronic and Precision Equipment Repair and Maintenance; 8129—Other Personal Services; and 8139—Business, Professional, Labor, Political, and Similar Organizations.

VI. Economic Disadvantage

SBA proposes to clarify current § 127.203 concerning economically disadvantaged women-owned small businesses (EDWOSBs) to address certain interpretations and policies that have been followed informally by SBA with respect to the 8(a) Business Development (BD) Program and that SBA believes would apply to the WOSB Program as well. This includes certain interpretations and policies SBA recently set forth in a rule proposing to amend the 8(a) BD regulations. *See* 74 FR 55694 (Oct. 28, 2009). For example, this Proposed Rule specifically states that SBA does not take community property laws into account when determining economic disadvantage if the woman has no ownership interest. This means that property that is legally in the name of the husband would be considered wholly the husband's, whether or not the couple lived in a community property state. Since community property laws are usually applied when a couple separates, and since spouses in community property states generally have the freedom to keep their property separate while they are married, SBA proposes to treat property owned solely by one spouse as that spouse's property for economic disadvantage determinations. However, if both spouses own the property, SBA would attribute a half interest in such property to the woman claiming economic disadvantage, unless there is evidence to show that the interest in such property is greater or lesser.

This policy also results in equal treatment for applicants in community and non-community property states. In addition, and along the same lines, SBA proposes to provide that it may consider a spouse's financial situation in determining an individual's access to capital and credit.

SBA has also proposed exempting funds in Individual Retirement Accounts (IRAs) and other official retirement accounts from the calculation of net worth, provided that the funds cannot currently be withdrawn from the account prior to retirement age without a significant penalty. While such funds can be useful to an applicant seeking credit, SBA believes that retirement accounts are not assets to be currently enjoyed; rather, they are held for purposes of ensuring future income when an individual is no longer working. SBA believes it is unfair to count those assets as current assets. The basis for this proposal stems from SBA's experience with the 8(a) BD Program, where it has found that including IRAs and other retirement accounts in the calculation of an individual's net worth does not serve to disqualify wealthy individuals. Instead, such an exclusion has worked to make middle and lower income individuals ineligible to the extent they have invested prudently in accounts to ensure income at a time in their lives when they are no longer working.

SBA is cognizant of the potential for abuse of this proposed provision, with individuals attempting to hide current assets in funds labeled "retirement accounts." SBA does not believe such attempts to remove certain assets from an individual's economic disadvantage determination would be appropriate. Therefore, this Proposed Rule states that in order for funds not to be counted in an economic disadvantage determination, the funds cannot be currently withdrawn from the account without a significant penalty. A significant penalty would be one equal or similar to the additional income tax on early distributions under section 72(t) of the Internal Revenue Code. In order for SBA to determine whether funds invested in a specific account labeled a "retirement account" may be excluded from a woman's net worth calculation, the woman must provide to SBA information about the terms and conditions of the account. SBA is interested in hearing from the public about this proposal, and specifically requests comments on how best to exclude legitimate retirement accounts without affording others a mechanism to circumvent the economic disadvantage criterion.

SBA has also proposed exempting income from a corporation taxed under Subchapter S of Chapter 1 of the Internal Revenue Code (S corporation) from the calculation of both income and net worth to the extent such income is reinvested in the firm or used to pay taxes arising from the normal course of operations of an S corporation. Although the income of an S corporation flows through and is taxed to individual shareholders in accordance with their interest in the S corporation for Federal tax purposes, SBA will take such income into account for economic disadvantage purposes

only if it is not reinvested in the business or used to pay the taxes. This proposal would result in equal treatment of corporate income for corporations taxed under Subchapter C of Chapter 1 of the Internal Revenue Code (C corporations) and S corporations. In cases where that income is reinvested in the firm or used to pay taxes arising from the normal course of operations of the S corporation and not retained by the woman, SBA believes it should be treated the same as C corporation income for purposes of determining economic disadvantage. In order to be excluded, the owner of the S corporation would be required to clearly demonstrate that the S corporation distribution was used to pay taxes or was reinvested back into the S corporation within 12 months of the distribution of income. Conversely, the woman owner of an S corporation could not subtract S corporation losses from the income paid by the S corporation to her or from her total income from whatever source. S corporation losses, like C corporation losses, are losses incurred by the company, not by the individual, and based upon the legal structure of the corporation and the protections afforded the principals through this structure, the individual is not personally liable for the debts representing any of those liabilities. Thus, it is inappropriate to consider these personal losses and women should not be able to use them to reduce their personal incomes for purposes of the economic disadvantage.

SBA also proposes to provide that it would presume that a woman is not economically disadvantaged if her yearly income averaged over the past two years exceeds $200,000. SBA considered incorporating into the regulation the present policy for the 8(a) BD Program that a woman is not economically disadvantaged if her adjusted gross income exceeds that for the top two percent of all wage earners according to IRS statistics. Under that approach for the 8(a) BD Program, SBA compares the income of the individual claiming disadvantage to the most currently available, final IRS income tax statistics. In some cases, SBA may be comparing IRS statistics relating to one tax year to an individual's income from a succeeding tax year because final IRS statistics are not available for that succeeding tax year.

Although that policy has been upheld by SBA's Office of Hearings and Appeals (OHA) and the Federal courts (see *SRS Technologies* v. *United States,* 894 F. Supp. 8 (D.D.C. 1995); *Matter of Pride Technologies, Inc.,* SBA No. 557 (1996) SBA No. MSB–557) for the 8(a) BD Program, SBA believes that a straight line numerical figure is more understandable, easier to implement, and avoids any appearance of unfair treatment when statistics for one tax year are compared to an income level for another tax year. Therefore, SBA is proposing for the WOSB Program an income level of $200,000 because that figure closely approximates the income level corresponding to the top two percent of all wage earners, which has been upheld as a reasonable indicator of a lack of economic disadvantage. Although a $200,000 income may seem unduly high as a benchmark, we note that this amount is being used only to presume, without more information, that the woman is not economically disadvantaged. SBA may consider incomes lower than $200,000 as indicative of lack of economic disadvantage. However, it would not presume lack of economic disadvantage in that case. It may also consider income in connection with other factors when determining a woman's access to capital. SBA specifically requests comments on both the straight line approach proposed and the current comparison of income levels to the IRS statistics.

This proposed regulation would permit applicants to rebut the presumption of lack of economic disadvantage upon a showing that the income is not indicative of lack of economic disadvantage. For example, the presumption could be rebutted by a showing that the income was unusual (inheritance) and is unlikely to occur again. The presumption could also be rebutted, for example, by showing that the earnings were winnings that are offset by related losses as in the case of winnings and losses from gambling resulting in a net gain far less than the actual gambling income received. SBA may still consider any unusual earnings or windfalls as part of its review of total assets. Thus, although an inheritance of $5 million, for example, may be unusual income and excluded from SBA's determination of economic disadvantage based on income, it would not be excluded from SBA's determination of economic disadvantage based on total assets. In such a case, a $5 million inheritance would render the woman not economically disadvantaged based on total assets.

This rule also proposes to establish an objective standard by which a woman may not qualify as economically disadvantaged based on her total assets. With respect to the 8(a) BD Program, SBA's findings that an individual was not economically disadvantaged with total asset levels of $4.1 million and $4.6 million have been upheld as reasonable. See *Matter of Pride Technologies,* SBA No. 557 (1996), and *SRS Technologies* v. *U.S.,* 843 F. Supp. 740 (D.D.C. 1994). Alternatively, and again with respect to the 8(a) BD Program, SBA's finding that an individual was not economically disadvantaged with total assets of $1.26 million was overturned. See *Matter of Tower Communications,* SBA No. 587 (1997). This rule proposes to eliminate any confusion as to what level of total assets qualifies as economic disadvantage for EDWOSB purposes as has occurred in the 8(a) BD Program. Under this Proposed Rule, a woman generally would not be considered economically disadvantaged if the fair market value of all her assets exceeds $3 million. While this Proposed Rule would exclude retirement accounts from a woman's net worth in determining economic disadvantage, it would not exclude such amounts from her total assets in determining economic disadvantage on that basis.

VII. Certification

The Act sets forth the certification criteria for the WOSB Program. Specifically, the Act states that a WOSB or EDWOSB must: (1) Be certified by a Federal agency, a State government, or a national certifying entity approved by the Administrator, as a small business concern owned and controlled by women; or, (2) certify to the contracting officer that it is a small business concern owned and controlled by women and provide adequate documentation, in accordance with standards established by SBA, to support such certification.

The legislative history for this statutory provision explains that certification by a Federal agency, State government or national certifying entity should be acceptable if it tracks the statutory and regulatory definition of WOSB and EDWOSB. H.R. Rep. No. 106–879, at 4 (2000). Consequently, to identify approved third-party certifiers, SBA will review those entities that certify WOSBs and designate those with certification criteria meeting the requirements of this program at a later date.

In addition, the legislative history explains that

> the Committee expects the contracting officers will accept self-certification so long as the documentation provided along with the response to the solicitation enables the contracting officer to determine that

the WOSB or EDWOSB meets the requirements of the program. Id. As a result of the statutory provision, and the

supporting legislative history, SBA has proposed a rule that will require WOSBs and EDWOSBs to first certify their status in the Online Representations and Certifications Application (ORCA) at *https://orca.bpn.gov,* and then provide the contracting officer with certain documents verifying their status.

SBA believes that the statute and supporting legislative history permit several means for providing the requisite documents to the contracting officer. Therefore, SBA is proposing to establish a repository (WOSB Program Repository) for the documents where WOSBs and EDWOSBs that certify in ORCA would submit the documents. The documents would be stored in a secure, web-based environment that would be accessible to WOSB and EDWOSB applicants, contracting community and SBA.

This idea is analogous to a system already utilized in the government. CCR

is a web-enabled government-wide application that collects, validates, stores, and disseminates business information about the Federal government's trading partners in support of the contract award, grants, and the electronic payment processes.

See Federal Agency Registration FAQs, publicly available at *https://www.bpn.gov/FAR/docs/FAQ.pdf.* Although CCR is used to electronically share secure and encrypted data with the Federal agencies' finance offices to facilitate paperless payments through electronic funds transfer, and does not necessarily serve as a repository for documents, the concept would be similar.

WOSBs and EDWOSBs that certify in ORCA would be required to submit documents verifying their status to the repository at the time of initial self-certification in ORCA and then every year thereafter, and in addition if there is a change in such information that would necessitate the submission of supplemental or new information. The contracting officer would be able to access the documents prior to contract award to review the submitted documents. This proposal would mean that WOSBs and EDWOSBs would not have to submit documents each time they receive a WOSB or EDWOSB contract.

SBA also proposes that WOSBs or EDWOSBs will submit certain documents at the time of self certification in ORCA and then must submit additional documents in the event of a protest or program examination. SBA intends for those additional documents to be placed into the document repository, as well.

With respect to the specific documents that must be submitted at the time of initial certification (and updated anytime after) the Proposed Regulation sets forth several documents that will assist in verifying ownership and control. For those WOSBs and EDWOSBs that have not received an approved third-party certification, SBA reviewed the requirements and standards established for a similar program, the 8(a) BD Program, in determining which documents must be provided. In the 8(a) BD Program, the applicant must complete a standard form and provide SBA with appropriate documents to support and verify the statements made in the application.

Using the 8(a) BD Program application process as a guide, and in accordance with the proposed eligibility criteria for the WOSB Program, SBA has proposed that a WOSB or EDWOSB, which has not received a third-party certification from an approved certifier, provide the following documents to the repository:

- WOSBs or EDWOSBs that are corporations would need to submit their articles of incorporation, stock certificates (both sides), stock ledger, shareholders' agreements, by-laws and amendments.
- WOSBs or EDWOSBs that are LLCs must submit their articles of organization (also referred to as the certificate of organization or articles of formation) and any amendments and operating agreement with any amendments.
- WOSBs or EDWOSBs that are partnerships must submit an original and amended partnership agreement.

In addition, all WOSBs and EDWOSBs must submit evidence of gender and U.S. citizenship for women (women) owners(s), such as a copy of a birth certificate, naturalization papers or passport. EDWOSBs would also need to submit a Form 413, Personal Financial Statement, for at least each woman claiming economic disadvantage. Further, all EDWOSBs or WOSBs must also provide a copy of the joint venture agreement, if applicable.

SBA anticipates that the repository will also house copies of the third party certifications. With respect to those WOSBs or EDWOSBs that have received an approved third-party certification, this Proposed Rule requires that the WOSB or EDWOSB must provide a copy of the certification to the repository at the time of certification in ORCA. If the WOSB or EDWOSB has a third-party certification as a DOT Disadvantaged Business Enterprise (DBE), it must submit a copy of the DBE certification at the time of certification in ORCA showing that it received such certification because it is owned and controlled by women. In addition, the WOSB or EDWOSB must provide a statement identifying the woman or women upon whom eligibility was based and documents, such as birth certificates or passports, evidencing that the woman or women are citizens of the United States as defined by 13 CFR 127.102.

SBA believes that it is not necessary for these concerns to submit any other documents to verify eligibility, at that time, since such documents have already been submitted to and reviewed by a third party.

SBA intends that the WOSB Program Repository preclude modification or retrieval of any document submitted; however, documents can be supplemented in a separate submission. This would allow the system to be a historical site for each change in documentation. This historical data may be useful in determining whether, over a period of time, the data is consistent rather than contradictory.

Until SBA is able to establish a repository, or if the system is otherwise unavailable, then SBA is proposing that the WOSB or EDWOSBs submit the documents directly to the contracting officer prior to each WOSB or EDWOSB award. The contracting officer must retain these documents in the contract file so that SBA may later review the file for purposes of a status protest or eligibility examination. However, the WOSB or EDWOSB will also be required to post the documents to the WOSB Program Repository within thirty (30) days of the repository becoming available.

The Proposed Rule also explains the consequences for failure to provide the required documents and the contracting officer's duties in those situations. If the apparent successful WOSB or EDWOSB fails to provide any of the required documents, the contracting officer cannot make a WOSB or EDWOSB award to that concern and must file a protest with SBA. In addition, if the contracting officer believes that the apparent successful offeror does not meet the requirements of the program, the contracting officer must file a protest with SBA concerning the status of the concern.

In addition to the documents, SBA proposes that the WOSB or EDWOSB represent that it meets all of the eligibility of the program. Therefore, SBA is proposing that the WOSB represent the information in Table 1, Proposed WOSB Representations in ORCA, to ORCA.

Proposed WOSB Representations in ORCA

(i) It is certified as a WOSB by a certifying entity approved by SBA, the certifying entity has not issued a decision currently in effect finding that the concern does not qualify as a WOSB, and there have been no changes in its circumstances affecting its eligibility since its certification.

☐ Yes ☐ No ☐ N/A

(ii) It is certified as a as a U.S. Department of Transportation (DOT) Disadvantaged Business Enterprise (DBE) because it is owned and controlled by one or more women who are citizens of the United States, as defined in 13 CFR § 127.102.

☐ Yes ☐ No ☐ N/A

(iii) It is certified by the U.S. Small Business Administration as an 8(a) BD Program Participant due to the owner(s) status as an economically disadvantaged woman (or women).

☐ Yes ☐ No ☐ N/A

(iv) If a corporation, the stock ledger and stock certificates evidence that at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding is unconditionally and directly owned by one or more women. In determining unconditional ownership of the concern, any unexercised stock options or similar agreements held by a woman will be disregarded. However, any unexercised stock option or other agreement, including the right to convert non-voting stock or debentures into voting stock, held by any other individual or entity will be treated as having been exercised.

☐ Yes ☐ No ☐ N/A

(v) If a partnership, the partnership agreement evidences that at least 51 percent of each class of partnership interest is unconditionally and directly owned by one or more women.

☐ Yes ☐ No ☐ N/A

(vi) If a limited liability company, the articles of organization and any amendments, and operating agreement and amendments, evidence that at least 51 percent of each class of member interest is unconditionally and directly owned by one or more women.

☐ Yes ☐ No ☐ N/A

(vii) The birth certificates, naturalization papers, or passports for owners who are women show that the company is at least 51% owned and controlled by women who are U.S. citizens.

☐ Yes ☐ No

(viii) The ownership by women is not subject to any conditions, executory agreements, voting trusts, or other arrangements that cause or potentially cause ownership benefits to go to another.

☐ Yes ☐ No

(ix) The 51 percent ownership by women is not through another business entity (including employee stock ownership plan) that is, in turn, owned and controlled by one or more women.

☐ Yes ☐ No

(x) The 51 percent ownership by women is held through a trust, the trust is revocable, and the woman is the grantor, a trustee, and the sole current beneficiary of the trust.

☐ Yes ☐ No ☐ N/A

(xi) The management and daily business operations of the concern are controlled by one or more women. Control means that both the long-term decision making and the day-to-day management and administration of the business operations are conducted by one or more women.

☐ Yes ☐ No

(xii) A woman holds the highest officer position in the concern and her resume evidences that she has the managerial experience of the extent and complexity needed to run the concern.

☐ Yes ☐ No

(xiii) The woman manager does not have the technical expertise or possess the required license for the business but has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise.

☐ Yes ☐ No ☐ N/A

(xiv) The woman who holds the highest officer position of the concern manages it on a full-time basis and devotes full-time to the business concern during the normal working hours of business concerns in the same or similar line of business.

☐ Yes ☐ No

(xv) The woman who holds the highest officer position does not engage in outside employment that prevents her from devoting sufficient time and attention to the daily affairs of the concern to control its management and daily business operations.

☐ Yes ☐ No

(xvi) If a corporation, the articles of incorporation and any amendments, articles of conversion, by-laws and amendments, shareholder meeting minutes showing director elections, shareholder meeting minutes showing officer elections, organizational meeting minutes, all issued stock certificates, stock ledger, buy-sell agreements, stock transfer agreements, voting agreements, and documents relating to stock options, including the right to convert non-voting stock or debentures into voting stock evidence that one or more women control the Board of Directors of the concern. Women are considered to control the Board of Directors when either: (1) one or more women own at least 51 percent of all voting stock of the concern, are on the Board of Directors and have the percentage of voting stock necessary to overcome any super majority voting requirements; or (2) women comprise the majority of voting directors through actual numbers or, where permitted by state law, through weighted voting.

☐ Yes ☐ No ☐ N/A

(xvii) If a partnership, the partnership agreement evidences that one or more women serve as general partners, with control over all partnership decisions.

☐ Yes ☐ No ☐ N/A

(xviii) If a limited liability company, the articles of organization and any amendments, and operating agreement and amendments evidence that one or more women serve as management members, with control over all decisions of the limited liability company.

☐ Yes ☐ No ☐ N/A

(xix) No males or other entity exercise actual control or have the power to control the concern.

☐ Yes ☐ No

(xx) SBA, in connection with an examination or protest, has not issued a decision currently in effect finding that this company does not qualify as a WOSB.

☐ Yes ☐ No

(xxi) All required documents verifying eligibility for a WOSB requirement have been submitted to the WOSB Program Repository, including any supplemental documents if there have been changes since the last representation.

☐ Yes ☐ No

In addition, the EDWOSB must represent the information in Table 2, Proposed EDWOSB Representations in ORCA, to ORCA.

Proposed EDWOSB Representations in ORCA

(i) It is certified as an EDWOSB by a certifying entity approved by SBA, the certifying entity has not issued a decision currently in effect finding that the concern does not qualify as a EDWOSB, and there have been no changes in its circumstances affecting its eligibility since its certification.

☐ Yes ☐ No ☐ N/A

(ii) It is certified as a as a U.S. Department of Transportation (DOT) Disadvantaged Business Enterprise (DBE) because it is owned and controlled by one or more women who are citizens of the United States, as defined in 13 CFR § 127.102.

☐ Yes ☐ No ☐ N/A

(iii) It is certified by the U.S. Small Business Administration as an 8(a) BD Program Participant due to the owner(s) status as an economically disadvantaged woman (or women).

☐ Yes ☐ No ☐ N/A

(iv) If a corporation, the stock ledger and stock certificates evidence that at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding is unconditionally and directly owned by one or more women who are economically disadvantaged. In determining unconditional ownership of the concern, any unexercised stock options or similar agreements held by an economically disadvantaged woman will be disregarded. However, any unexercised stock option or other agreement, including the right to convert non-voting stock or debentures into voting stock, held by any other individual or entity will be treated as having been exercised.

☐ Yes ☐ No ☐ N/A

(v) If a partnership, the partnership agreement evidences that at least 51 percent of each class of partnership interest is unconditionally and directly owned by one or more economically disadvantaged women.

☐ Yes ☐ No ☐ N/A

(vi) If a limited liability company, the articles of organization and any amendments, and operating agreement and amendments, evidence that at least 51 percent of each class of member interest is unconditionally and directly owned by one or more economically disadvantaged women.

☐ Yes ☐ No ☐ N/A

(vii) The birth certificates, naturalization papers, or passports show that the company is at least 51% owned and controlled by economically disadvantaged women who are U.S. citizens.

☐ Yes ☐ No

(viii) The ownership by economically disadvantaged women is not subject to any conditions, executory agreements, voting trusts, or other arrangements that cause or potentially cause ownership benefits to go to another.

☐ Yes ☐ No

(ix) The 51 percent ownership by economically disadvantaged women is not through another business entity (including employee stock ownership plan) that is, in turn, owned and controlled by one or more economically disadvantaged women.

☐ Yes ☐ No

(x) The 51 percent ownership by economically disadvantaged women is held through a trust, the trust is revocable, and the economically disadvantaged woman is the grantor, a trustee, and the sole current beneficiary of the trust.

☐ Yes ☐ No ☐ N/A

(xi) The management and daily business operations of the concern are controlled by one or more economically disadvantaged women. Control means that both the long-term decision making and the day-to-day management and administration of the business operations are conducted by one or more economically disadvantaged women.

☐ Yes ☐ No

(xii) An economically disadvantaged woman holds the highest officer position in the concern and her resume evidences that she has the managerial experience of the extent and complexity needed to run the concern.

☐ Yes ☐ No

(xiii) The economically disadvantaged woman manager does not have the technical expertise or possess the required license for the business but has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise.

☐ Yes ☐ No ☐ N/A

(xiv) The economically disadvantaged woman who holds the highest officer position of the concern manages it on a full-time basis and devotes full-time to the business concern during the normal working hours of business concerns in the same or similar line of business.

☐ Yes ☐ No

(xv) The economically disadvantaged woman who holds the highest officer position does not engage in outside employment that prevents her from devoting sufficient time and attention to the daily affairs of the concern to control its management and daily business operations.

☐ Yes ☐ No

(xvi) If a corporation, the articles of incorporation and any amendments, articles of conversion, by-laws and amendments, shareholder meeting minutes showing director elections, shareholder meeting minutes showing officer elections, organizational meeting minutes, all issued stock certificates, stock ledger, buy-sell agreements, stock transfer agreements, voting agreements, and documents relating to stock options, including the right to convert non-voting stock or debentures into voting stock evidence that one or more economically disadvantaged women control the Board of Directors of the concern. Economically disadvantaged women are considered to control the Board of Directors when either: (1) one or more economically disadvantaged women own at least 51 percent of all voting stock of the concern, are on the Board of Directors and have the percentage of voting stock necessary to overcome any super majority voting requirements; or (2) economically disadvantaged women comprise the majority of voting directors through actual numbers or, where permitted by state law, through weighted voting.

☐ Yes ☐ No ☐ N/A

(xvii) If a partnership, the partnership agreement evidences that one or more economically disadvantaged women serve as general partners, with control over all partnership decisions.

☐ Yes ☐ No ☐ N/A

(xviii) If a limited liability company, the articles of organization and any amendments, and operating agreement and amendments evidence that one or more economically disadvantaged women serve as management members, with control over all decisions of the limited liability company.

☐ Yes ☐ No ☐ N/A

(xix) No males or other entity exercise actual control or have the power to control the concern.

☐ Yes ☐ No

(xx) The economically disadvantaged woman or women upon whom eligibility is based can demonstrate that their ability to compete in the free

enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business (not considering community property laws when determining economic disadvantage when the woman has no ownership interest in the property).

☐ Yes ☐ No

(xxi) The economically disadvantaged woman upon whom eligibility is based has read the SBA's regulations defining economic disadvantage and can demonstrate that her personal net worth is less than $750,000, excluding her ownership interest in the concern and her equity interest in her primary personal residence.

☐ Yes ☐ No

(xxii) The personal financial condition of the woman claiming economic disadvantage, including her personal income for the past two years (including bonuses, and the value of company stock given in lieu of cash), her personal net worth and the fair market value of all of her assets, whether encumbered or not, evidences that she is economically disadvantaged.

☐ Yes ☐ No

(xxiii) The adjusted gross income of the woman claiming economic disadvantage averaged over the two years preceding the certification does not exceed $200,000.

☐ Yes ☐ No

(xxiv) The adjusted gross income of the woman claiming economic disadvantage averaged over the two years preceding the certification exceeds $200,000; however, the woman can show that this income level was unusual and not likely to occur in the future, that losses commensurate with and directly related to the earnings were suffered, or that the income is not indicative of lack of economic disadvantage.

☐ Yes ☐ No ☐ N/A

(xxv) The fair market value of all the assets (including her primary residence and the value of the business concern but excluding funds invested in an Individual Retirement Account or other official retirement account that are unavailable until retirement age without a significant penalty) of the woman claiming economic disadvantage does not exceed $3 million.

☐ Yes ☐ No

(xxvi) The woman claiming economic disadvantage has not transferred any assets within two years of the date of the certification.

☐ Yes ☐ No

(xxvii) The woman claiming economic disadvantage has transferred assets within two years of the date of the certification. However, the transferred assets were: (1) to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support; or (2) to an immediate family member in recognition of a special occasion, such as a birthday, graduation, anniversary, or retirement.

☐ Yes ☐ No ☐ N/A

(xxviii) SBA, in connection with an examination or protest, has not issued a decision currently in effect finding that this company does not qualify as a EDWOSB.

☐ Yes ☐ No

(xxix) All required documents verifying eligibility for the EDWOSB requirement have been submitted to the WOSB Program Repository, including any supplemental documents if there have been changes since the last representation.

☐ Yes ☐ No

SBA is specifically requesting comments on all of these approaches to certification, or other alternatives that would meet the statutory requirements and ensure that only eligible small businesses receive WOSB or EDWOSB contracts.

VIII. Eligibility Examinations

SBA also proposes amending current § 127.400 concerning eligibility examinations. The rule currently states that SBA will conduct an examination to determine eligibility at the time of the examination. However, the Act states that the Administrator shall establish procedures for verification of the accuracy of any certifications and those procedures may provide for program examinations, including random examinations. 15 U.S.C. 637(m)(5). It is clear that the examinations are to serve as a mechanism against fraud, waste and abuse in the program. Thus, SBA believes that the purpose of such examinations is broader, and that examinations should be used to verify eligibility at any time, including when an EDWOSB or WOSB certifies it is such a concern in ORCA, CCR, or at the time of offer or award of a contract. Therefore, SBA has amended this rule to explain that eligibility examinations will be used to verify eligibility at those times, as well.

In addition, this Proposed Rule states that SBA will conduct such examinations, as a way to combat fraud and abuse of the program. Further, as permitted by statute, SBA may adopt one or more various approaches from time to time and as appropriate by the circumstances when determining which WOSBs or EDWOSBs to examine. This may include the utilization of robust random sampling, as well as higher levels of random examinations of WOSBS or EDWOSBs that have received the most contracts or most contract dollars during any applicable period. Further, SBA may decide to conduct examinations when it has received credible information that certain WOSBS or EDWOSBs do not meet the eligibility criteria of the WOSB Program.

As part of these examinations, the WOSB or EDWOSB must submit documents to verify its eligibility. Specifically, this Proposed Rule requires WOSBs and EDWOSBs to submit documents to verify eligibility, including those submitted under proposed § 127.300(c), as well as copies of proposals or bids submitted in response to an EDWOSB or WOSB solicitation. In addition, EDWOSBs will be required to submit the two most recent personal income tax returns (including all schedules and W–2 forms) for the women claiming economic disadvantage and their spouses and SBA Form 4506–T, Request for Tax Transcript Form. In some cases, SBA may be able to obtain those documents from the third-party certifier or the contracting officer's contract file.

However, because the examination may look at eligibility at the time of certification in ORCA, this Proposed Rule requires that WOSBs or EDWOSBs retain documents demonstrating satisfaction of the eligibility requirements for six (6) years from date of self-certification. SBA believes that WOSBs and EDWOSBs already retain this information in the ordinary course of business and that it does not impose a burden on these businesses.

IX. Agency-by-Agency Determination

This Proposed Rule seeks to strike from the 2008 Final Rule the requirement at § 127.501 for an agency-by-agency determination of discrimination. Specifically, in response to SBA's June 15, 2006 Proposed Rule, commenters voiced concerns over the requirement in proposed § 127.501(b) that the procuring agency conduct its own additional analysis of its procurement history and make a determination whether the agency itself had discriminated against WOSBs in the relevant industry. The comments state

that this requirement would frustrate Congressional intent by applying an erroneous and overly restrictive standard of constitutional scrutiny. The comments also state that the disparity study analysis conducted by RAND is sufficient to satisfy the intermediate scrutiny standard that applies to the WOSB Program and that the agency determination of discrimination requirement exceeds what would be required even under the strict scrutiny standard applicable to classifications based on race and national origin. The comments further state that the requirement would inappropriately limit the industries in which WOSBs were recognized as underrepresented or substantially underrepresented. Lastly, the comments state that this requirement would substantially burden the procuring agencies and that the procuring agencies would avoid fulfilling the goals of the program to avoid self-incrimination and litigation.

Based on these comments and further analysis, SBA agrees that an agency-by-agency analysis is not required.

First, the equal protection requirements of the Fifth Amendment establish that programs that use gender as a factor in distributing benefits to individuals must further important governmental objectives and employ means that are substantially related to the achievement of those objectives. See *United States* v. *Virginia,* 518 U.S. 515, 533 (1996).

In applying this standard to the WOSB Program, the government has an important objective: to redress the effects of past discrimination against women in contracting and to ensure that the effects of that discrimination do not serve to limit WOSBs' opportunities to participate in Federal contracting opportunities. (See *City of Richmond* v. *Croson Co.,* 488 U.S. at 492, "It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.")

This objective—to overcome the effects of past sex discrimination and to ensure that the effects of such discrimination are not extended into its own procurement activity—is sufficiently "important" to sustain the WOSB Program. See *Califano* v. *Webster,* 430 U.S. 313, 318 (1977). More specifically, the Court has repeatedly upheld as an important government objective the reduction of disparities in condition or treatment between men and women caused by the long history of discrimination against women. See *Califano,* 430 U.S. at 317; *Miss. Univ. for Women* v. *Hogan,* 458 U.S. 718, 728 (1982); *Schlesinger* v. *Ballard,* 419 U.S. 498 (1975); *Kahn* v. *Shevin,* 416 U.S. 351 (1974).

Moreover, the benefits provided through the WOSB program are not a result of "archaic and overbroad generalizations" about women, *Schlesinger,* 219 U.S. at 508, or of "the role-typing society has long imposed" upon women, *Stanton* v. *Stanton,* 421 U.S. 7, 15 (1975). Instead, they are a targeted means to redress the discrimination to which women have long been subjected and which has prevented them from competing equally for Federal contracts.

The means chosen by Congress to implement the WOSB Program ensure that the Program is substantially related to its goals. Congress expressly limited application of the WOSB Program only to industries in which women are substantially underrepresented or underrepresented in contracting. The RAND Report, as is more fully explained above, is a detailed analysis of WOSBs which identifies the disparity ratio of WOSBs in Federal prime contracting by 4-digit NAICS code.

This Proposed Rule is limited to the eligible industries identified in the RAND study, and SBA in the future may conduct new studies or update existing studies as appropriate.

In addition, SBA agrees with commenters that an agency-by-agency determination is not required for the WOSB Program to be substantially related to an important government objective or to be properly implemented. The Supreme Court has rejected the contention that government may adopt a race-conscious contracting program only "to eradicate the effects of its own prior discrimination," and this conclusion also applies to gender-conscious contracting programs. *Croson,* 488 U.S. at 486. Accordingly, this Proposed Rule seeks to strike from the Final Rule at § 127.501 the requirement for an agency-by-agency determination of discrimination.

X. Contract File

This Proposed Rule requires contracting officers to document the contract file with results of market research and the fact that the NAICS code assigned to the contract is for an industry that SBA has designated as a substantially underrepresented industry with respect to WOSBs. SBA is considering adding the following additional language to § 127.503(e):

In addition, the contracting officer must document the contract file showing that the apparent successful offeror's ORCA certifications and associated representations were reviewed.

SBA is requesting comments on this proposal.

XI. Joint Venture Requirements

SBA has also proposed amendments to the current joint venture regulation, permitting EDWOSB or WOSB joint ventures for EDWOSB or WOSB contracts. The rule currently provides that the EDWOSB or WOSB must perform a significant portion of the contract. SBA has proposed clarifying this requirement by requiring that not less than 51 percent of the net profits earned by the joint venture must be distributed to the EDWOSB or WOSB. SBA also proposes clarifying that the joint venture agreement must be in writing and set forth the following provisions: the purpose of the joint venture, that an EDWOSB or WOSB must be the managing venturer, that an employee of the managing venturer must be the project manager responsible for the performance of the contract, and the responsibilities of the parties with regard to contract performance, sources of labor, and negotiation of the EDWOSB or WOSB contract.

XII. Request for Comments

SBA seeks comments on all aspects of this Proposed Rule. This includes comments relating to the eligible industries, and especially the use of the CCR data set and SBA's concerns with the use of the SBO data set. This also includes comments relating to the certification procedures, including the certification requirements, representations in ORCA, and submission of documents to the document repository.

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

Executive Order 12866

OMB has determined that this rule is a "significant" regulatory action under Executive Order 12866. The Regulatory Impact Analysis is set forth below.

Regulatory Impact Analysis

1. Necessity of Regulation

This regulatory action implements section 8(m) of the Act, which was enacted as part of section 811 of the Small Business Reauthorization Act of 2000, Public Law 106–554. Section 8(m) authorizes the creation of the contracting assistance mechanism described in this regulation. Under this regulation, contracting officers will be

allowed to restrict competition to EDWOSBs in industries in which SBA has determined that WOSBs are underrepresented or substantially underrepresented and to WOSBs in industries in which SBA has determined that WOSBs are substantially underrepresented and waived the economically disadvantaged requirement. This Proposed Rule will establish the requirements and procedures necessary to administer these restricted competitions.

2. Alternative Approaches to Proposed Rule

In developing this Proposed Rule, SBA considered the costs and benefits of alternatives for certification of small business concerns that claim EDWOSB or WOSB status, particularly the alternatives provided by section 8(m) of the Act. Specifically, section 8(m)(2)(F) provides that in order to qualify as a WOSB or EDWOSB, a concern must either be certified by a Federal agency, a State government, or a national certifying entity approved by the Administrator, or, alternatively, must certify to the contracting officer that it is a small business concern owned and controlled by women and provide supporting documents. In light of this provision, SBA considered performing the certifications by requiring each concern to submit a formal application to SBA for a determination of its status. That approach, however, is not required or intended by the statute or legislative history.

In addition, SBA considered utilizing third-party certifiers. For the reasons set forth in the preamble, SBA has decided to propose the use of such third-party certifiers. SBA believes that the proposed process would be the most beneficial and cost-effective approach for the small business concerns because they will not have to submit formal applications to SBA to become eligible for restricted competition for WOSB and EDWOSB procurements.

In this Proposed Rule, SBA has proposed the use of an ORCA certification and document submission process, which is similar to the one that is used in other existing SBA set-aside programs. For example, SBA's program for small businesses permits those concerns to self-represent their size when submitting offers on Federal contracts. The set-aside program for small businesses has worked well for decades. SBA believes that the certification process proposed in this rule is credible because it supported by robust protest procedures as well as eligibility examinations. In addition, the business concern must provide documents verifying its eligibility.

SBA did consider another option with respect to the submission of documents to the contracting officer. As discussed in the preamble above, the Act states that a WOSB or EDWOSB can certify to the contracting officer that it is such an entity and must provide supporting documents to the contracting officer verifying its eligibility. This Proposed Rule requires the WOSB or EDWOSB to submit certain documents to the contracting officer via an electronic repository at the time of initial certification in ORCA and then every year after that. In addition, WOSBs and EDWOSBs must also provide updated documents anytime there is a change that necessitates supplementing the original document submission. In the alternative, if the repository is not available, the WOSB or EDWOSB must submit those documents directly to the contracting officer prior to the award of a WOSB or EDWOSB contract. SBA did consider having the EDWOSB or WOSB provide all necessary documents to the contracting officer at the time of award in order to verify eligibility of the awardee (*e.g.,* tax returns, resumes). However, SBA believes this may be a burden on both the small business and contracting community and therefore did not propose this alternative. SBA is still exploring the feasibility of all of these approaches and has requested comments from the public on all of them and any other the public may have.

SBA also considered alternative data sets and measures of disparity. SBA proposes to use the CCR database and both numbers and dollars approaches for the reasons set forth in the preamble but solicits comments on this approach.

3. What Are the Potential Benefits and Costs of This Regulatory Action?

This rule directs benefits to EDWOSBs and WOSBs at a cost to concerns ineligible for the program. In addition, this rule may result in new administrative costs of managing a Federal contracting assistance program. However, SBA believes that these costs are significantly outweighed by the benefits to be gained by reducing the inefficiencies caused by discriminatory barriers that currently impede WOSBs' full participation in the Federal contracting market.

Any concern about an increase in product or service cost is balanced by the requirement in the statute and Proposed Rule that any contract award under the WOSB Program be made at a fair and reasonable price. Further, there will not be any additional cost associated with the length of the procurement since the process will not be any longer, and could in some instances be shorter, than would be the case in the absence of the WOSB program. Finally, the creation and development of WOSBs could well, over time, result in enhanced bidding for Federal contracts, ultimately resulting in lower costs of contracts for the Federal government.

This rule aims to aid EDWOSBs and WOSBs by enabling contracting officers to restrict competition to EDWOSBs in industries in which SBA has determined that WOSBs are underrepresented and substantially underrepresented and to WOSBs in industries in which SBA has determined that WOSBs are substantially underrepresented where certain threshold determinations are made by an agency. It is difficult to estimate the total number of potential beneficiaries that will be eligible for Federal small business assistance as a result of this Proposed Rule. Utilizing the RAND FPDS/NG data set for the total number of WOSBs (identified by Dun and Bradstreet DUNS number) that received obligated funds from awards, contracts, orders and modifications to existing contracts for FY 2005, approximately 12,000 WOSBs were identified as recipients of Federal contracts in the 83 NAICS codes that would be eligible under the WOSB Program. It is expected that the number of awards to EDWOSBs and WOSBs will increase within these NAICS codes should an agency restrict competition to those groups in accordance with the procedures in this Proposed Rule.

To the extent that additional firms become active in government programs, additional administrative costs to the Federal government may arise due to additional bidders for Federal small business procurement programs, additional firms seeking SBA guaranteed lending programs, and additional firms eligible for enrollment in SBA's Dynamic Small Business Search data base. Among businesses in this group seeking SBA assistance, there will be some additional costs associated with compliance and verification associated with certification of small business status and protests of small business status. However, these activities are likely to generate minimal incremental costs since mechanisms are currently in place to handle these administrative requirements.

In addition, as more EDWOSBs and WOSBs enter into the Federal arena, competition will likely increase, lowering the cost of the program and ultimately, we hope, eliminating

underrepresentation within the industries covered by this Proposed Rule and the industry's participation in the program. In the long run, small business opportunities—and the amount of competition in the Federal procurement market as a whole—will be enhanced by the experience WOSBs gain in Federal contracting through participation in this Program. While WOSBs gain this experience, moreover, this Rule ensures that any contract award to them will be based on a fair and reasonable price to the government. Indeed, the current barriers that inhibit WOSBs' ability to compete equally for contracts and subcontracts impose upon the government increased costs due to lessened competition; these costs are likely to be reduced as more WOSBs become economically successful and competition for contracts and subcontracts therefore increases.

This regulatory action promotes the government's objectives. One of SBA's goals is to help individual small businesses succeed through fair and equitable access to capital and credit, government contracts, and management and technical assistance. Implementation of this Proposed Rule ensures that the intended beneficiaries have access to small business programs designed to assist them. This Proposed Rule does not interfere with State, local, and tribal governments in the exercise of their government functions. In a few instances, in fact, State and local governments have voluntarily adopted SBA's regulations for their programs; those state and local governments that do so here will save resources that otherwise would be consumed by the need to establish their own administrative standards and processes.

This regulatory action will also enable the Federal government to avoid extending the effects of discrimination against women through the government's own contracting processes. As explained in Section I, Background, of the preamble, the Federal government has an obligation to ensure that it is not implementing contracting procedures that permit the effects of sex discrimination to continue to impede the ability of WOSBs to participate in Federal contracting. As stated in *Croson,* these remedial programs not only help businesses overcome the effects of discrimination, but ensure that the public's tax dollars are not spent in a discriminatory manner. This program, by creating a sheltered market for a very small percentage of Federal contracts, thus advances the Federal government's commitment to ensuring equal opportunity in its contracting processes.

Executive Order 12988

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

Executive Order 13132

This rule does not have federalism implications as defined in the Executive Order. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132.

Paperwork Reduction Act (PRA)

For purposes of the Paperwork Reduction Act, 44 U.S.C. Chapter 35, SBA has determined that this Proposed Rule imposes new reporting and recordkeeping requirements. The certification process described in Subpart C, §§ 127.300 to 127.302, is an information collection. The proposed self-certification process requires a concern seeking to benefit from Federal contracting opportunities designated for WOSBs or EDWOSBs to verify its status by using the existing electronic contracting system (*i.e.,* ORCA). The WOSB or EDWOSB will have to represent in ORCA that it meets each eligibility requirement of the program. In addition, the WOSB or EDWOSB will be required to submit certain documents verifying eligibility at the time of certification in ORCA (and every year after). SBA proposes that these documents be submitted to a document repository, or until the repository is established, the contracting office upon notice of a proposed award. Further, the protest and eligibility examination procedures will require the submission of documents from those parties subject to a protest and eligibility examination. To reduce the burden on the WOSBs or EDWOSBs, the same documents submitted at the time of certification will be used for the protests and eligibility examinations, except that for protests and eligibility examinations, SBA will also request copies of proposals submitted in response to a WOSB or EDWOSB solicitation and certain other documents and information to verify the status of an EDWOSB.

Finally this proposed rule also requires the WOSBs or EDWOSBs to retain copies of the documents submitted for a period of six (6) years. SBA believes, however, that any additional burden imposed by this recordkeeping requirement would be de minimus since the firms would maintain the information in their general course of business.

SBA has submitted this information collection to OMB for review.

Title and Description of Information Collection: Women-Owned Small Business Federal Contract Assistance Program Purpose: The information collected is modeled on two currently approved information collections: SBA Form 1010, OMB Control 3245–0331, SBA's Application for 8(a) Business Development, and SBA Form 413, OMB Control 3245–0188, SBA's Application for Personal Financial Statement, which are used to collect personal and business information on the businesses and owners applying to this program. The information requested for this program includes information verifying the WOSB/EDWOSB status of the business concern, including tax returns, personal statements, and business documents.

OMB Control Number: New collection.

Description of and Estimated Number of Respondents: This information will be collected from the small business concerns that are not already certified by an approved third party certifier and therefore must self-certify and verify their status by submitting certain required documents to a document repository at the time of ORCA certification. This same information must also be collected by the third party certifier when making its certification determination. As noted above, utilizing the RAND FPDS data set for the total number of WOSBs (identified by Dun and Bradstreet DUNS number) that received obligated funds from awards, contracts, orders and modifications to existing contracts for FY 2005, approximately 12,000 WOSBs were identified as recipients of Federal contracts in the 83 NAICS codes that would be eligible under the WOSB Program. Estimated Number of Responses: In FY 2005, there were 12,000 WOSBs that were identified as recipients of Federal contracts in the 83 NAICS codes that would be eligible under the WOSB Program. Thus, SBA estimates that there will be 12,000 responses. In addition, SBA intends to conduct eligibility examinations and protests and appeals. The total estimated number of responses is 12,200.

Estimated Response Time: 2 hours. Total Estimated Annual Hour Burden: 24,400 hours.

Please send comments by the closing date for comment for this Proposed Rule

to SBA Desk Officer, Office of Management and Budget, Office of Information and Regulatory Affairs, 725 17th Street, NW., Washington, DC 20503 and to Dean Koppel, Assistant Director, Office of Government Contracting, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

Regulatory Flexibility Act

SBA has determined that this Proposed Rule establishing a set-aside mechanism for WOSBs may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601, *et seq.* Accordingly, SBA has prepared an Initial Regulatory Flexibility Analysis (IRFA) addressing the impact of this Rule in accordance with section 603, title 5, of the United States Code. The IRFA examines the objectives and legal basis for this Proposed Rule; the kind and number of small entities that may be affected; the projected recordkeeping, reporting, and other requirements; whether there are any Federal rules that may duplicate, overlap, or conflict with this Proposed Rule; and whether there are any significant alternatives to this Proposed Rule.

1. What Are the Reasons for, and Objectives of, This Proposed Rule?

SBA is establishing procedures whereby Federal procuring agencies may use restricted competition in industries where WOSBs are substantially underrepresented, or, in some cases, underrepresented in Federal procurement and when certain other conditions are met. The purpose of this Proposed Rule is to create an initial framework and infrastructure for implementing these new procedures, thereby providing a tool for Federal agencies to ensure that WOSBs have an equal opportunity to participate in Federal contracting. The objectives of this Proposed Rule are to overcome the effects of sex discrimination on women's opportunities to participate equally in Federal contracting, to ensure a level playing field on which women-owned small businesses have a fair opportunity to compete for Federal contracts, and to ensure that the WOSB Program is substantially related to the Congressional goals in accordance with applicable law.

2. What Is the Legal Basis for This Proposed Rule?

SBA is proposing this regulation pursuant to section 8(m) of the Small Business Act, 15 U.S.C. 637(m), which authorizes the creation and implementation of a new mechanism for Federal contracting with WOSBs.

3. What Is SBA's Description and Estimate of the Number of Small Entities to Which the Rule Will Apply?

The RFA directs agencies to provide a description, and where feasible, an estimate of the number of small business concerns that may be affected by the rule. This Proposed Rule will ultimately establish in the FAR a new procurement mechanism to benefit WOSBs. Therefore, WOSBs that compete for Federal contracts are the specific group of small business concerns most directly affected by this rule. The rule may also affect other small businesses to the extent that small businesses not owned and controlled by women may be excluded from competing for certain Federal contracting opportunities.

SBA searched CCR's DSBS and determined that there were approximately 76,000 WOSBs listed. However, it is not likely that all of these firms will be affected by this rule because not all of these firms likely do business in one of the 83 four-digit NAICS codes identified as underrepresented or substantially underrepresented by the Proposed Rule. SBA attempted to approximate the number of WOSBs in the 83 industries, but there is no simple method of determining how many firms actually participated in these NAICS codes. SBA did review the DSBS to determine that, as of June 30, 2009, there were approximately 230,005 WOSBs identified in the 83 industries that will be eligible for contract assistance under the WOSB Program. However, this approach counted a WOSB multiple times if it listed itself in more than one NAICS code, and therefore likely overstates the number of WOSBs that will be affected by this rule. Therefore, the best estimate of the maximum number of currently registered WOSBs that could be affected by this rule is approximately 76,000. However, there may be more WOSBs affected if additional firms list themselves in DSBS or if SBA approves additional industries for set-aside procurements under these procedures. However, the number could be less because many otherwise-qualified EDWOSBs and WOSBs will not find it advantageous to participate in the WOSB Program, since the industries in which they do business are not one of the 83 eligible industries.

This Proposed Rule would affect small businesses other than WOSBs that are excluded from competition for Federal contracts that are included in the Program. Non-WOSBs in the 83 designated industries may be excluded from opportunities from which they would have otherwise benefited. However, the Federal government purchases billions of dollars of goods and services every year, and SBA believes that there are sufficient acquisitions available for all small businesses. Therefore, the number of small businesses that could be excluded under the proposed determination of eligible industries or future such determinations is not known at this time.

Additional contracting opportunities identified by Federal agencies as candidates for the WOSB program will come from new contracting requirements and contracts currently performed by small and large businesses. At this time, SBA cannot accurately predict how the existing distribution of contracts by business type may change by this rule.

4. What Are the Projected Reporting, Recordkeeping, Paperwork Reduction Act and Other Compliance Requirements?

WOSBs are not required to be certified as such in order to contract with the Federal Government; this will still be true if this Proposed Rule is adopted. For a WOSB to be eligible for Federal contracts restricted to WOSBs or EDWOSBs, however, it will have to self-certify its status as a WOSB in ORCA and CCR. Any WOSB or EDWOSB that is the apparent successful offeror will have to provide certain documents to the contracting officer, prior to award, to verify its eligibility. This procedure is required by statute. This requirement ensures that participation in certain contracting opportunities is restricted to qualified WOSBs according to the terms of section 8(m) of the Act and the criteria in this Proposed Rule. In addition, concerns would have to submit information to SBA in the context of a protest or examination. In the case of a protest or examination, SBA might request that a particular WOSB submit documentation to substantiate its claim. WOSBs or EDWOSBs are required to retain documentation demonstrating satisfaction of the eligibility requirements for six (6) years from date of self-certification in ORCA. SBA proposes to require the documents be kept for six (6) years from the date of a self-certification because the government can bring an action under 31 U.S.C. 3730 for false claims six (6) years from the date the false claim is made. 31 U.S.C. 3731.

The proposed document retention will require WOSBs and EDWOSBs to

have a filing system to retain the documents; however, SBA believes this information is already retained by a WOSB or EDWOSB in the ordinary course of business. Therefore this Proposed Rule will not likely impose any additional burden on WOSBs and EDWOSBs. To the extent that WOSBs and EDWOSBs typically retain this information for less than six (6) years, the concern may have to increase the capacity of its filing and document tracking system.

In addition, any documents submitted to a contracting officer as part of an offer are considered source selection sensitive under FAR and cannot be released prior to award of a contract. 48 CFR 3.104–3. After award of a contract, all information and/or documents submitted to a Federal agency, including SBA, are protected to the fullest extent permitted by law, including the Privacy Act and Freedom of Information Act, 5 U.S.C. 552.

The Paperwork Reduction Act requirements are addressed further below. SBA would welcome any comments on the process as described.

5. What Relevant Federal Rules May Duplicate, Overlap, or Conflict With This Rule?

SBA has not identified any relevant Federal rules currently in effect that duplicate or conflict with this rule. The restricted-competition feature of the WOSB program will be an addition to the existing contracting programs that agencies currently administer, such as small business set-asides, HUBZone set-asides, service-disabled veteran-owned small business set-asides, and contracts reserved for the 8(a) Business Development Program. For any particular contract, a contracting officer may have a range of set-aside options from which to select. Because any contract awarded to a WOSB will also count towards an agency's small business goal, these procedures may lead a contracting officer to select this program in lieu of another.

Therefore, although there may be some overlap, the addition of the set-aside mechanism for women-owned small business should complement rather than conflict with the goals of existing set-aside programs.

6. What Significant Alternatives Did SBA Consider That Accomplish the Stated Objectives and Minimize Any Significant Economic Impact on Small Entities?

The RFA requires agencies to identify alternatives to the rule in an effort to minimize any significant economic impact of the rule on small entities. SBA has determined that this rule may have a significant economic impact on a substantial number of small entities. This rule will implement the set-aside mechanism for WOSBs, as established by section 8(m) of the Act. All of the provisions of this rule reflect requirements under that statute.

The legislation does provide SBA with alternative approaches, however, for the certification of WOSBs. Specifically, a WOSB may be certified by a Federal agency, a State government, or a national certifying entity approved by the Administrator. SBA has reviewed some sources and believes that such certification is different depending on the location and size of the business and that the range for such a certification is approximately $200–$1000 for the initial certification and every year thereafter for recertification. In some cases, the costs may be higher. Thus, the WOSB may, in the alternative, self-certify in ORCA and provide adequate documentation to the contracting officer (via an electronic repository or directly to the contracting officer if the repository is unavailable) that it is a WOSB in accordance with standards established by the Administration, with minimal costs (to include document retention). SBA did consider limiting certification to either third party certification or self-certification with the provision of documents, but SBA believes that this Proposed Rule provides the most flexibility to WOSBs and EDWOSBs in participating in the program. SBA estimates that implementation of this regulation will require no additional proposal costs for WOSBs, as compared to submitting proposals under any other small business set-aside program. Moreover, WOSBs currently represent their status for purposes of data collection that is needed to implement 15 U.S.C. 644(g). In addition, although WOSBs or EDWOSBs must make available documentation to the contracting officer at the time of certification in ORCA, the documents provided are kept in the normal course of business and therefore should not require additional proposal costs.

List of Subjects

13 CFR Part 121

Government procurement, Government property, Grant programs—business, Individuals with disabilities, Loan programs—business, Small businesses.

13 CFR Part 127

Government procurement, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 134

Administrative practice and procedure, Claims, Equal access to justice, Lawyers, Organization and functions (Government agencies).

Accordingly, for the reasons stated in the preamble, SBA withdraws the Proposed Rule published on October 1, 2008 at 73 FR 57014, and proposes to amend 13 CFR parts 121, 127 and 134 as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

1. The authority citation for 13 CFR part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 636(b), 637, 644, and 662(5); and Pub. L. 105–135, sec. 401 *et seq.,* 111 Stat. 2592.

2. Revise § 121.401 to read as follows:

§ 121.401 What procurement programs are subject to size determinations?

The rules set forth in §§ 121.401 through 121.413 apply to all Federal procurement programs for which status as a small business is required or advantageous, including the small business set-aside program, SBA's Certificate of Competency program, SBA's 8(a) Business Development program, SBA's HUBZone program, the Women Owned Small Business (WOSB) Federal Contract Assistance Program, SBA's Service-Disabled Veteran-Owned Small Business program, the Small Business Subcontracting program, and the Federal Small Disadvantaged Business (SDB) program.

3. Amend § 121.1001 by revising paragraph (a)(9) to read as follows:

§ 121.1001 Who may initiate a size protest or request a formal size determination?

(a) * * *

(9) For SBA's WOSB Federal Contracting Assistance Program, the following entities may protest:

(i) Any concern that submits an offer for a specific requirement set aside for WOSBs or WOSBs owned by one or more women who are economically disadvantaged (EDWOSB) pursuant to part 127 of this chapter;

(ii) The contracting officer;

(iii) The SBA Government Contracting Area Director; and

(iv) The Director for Government Contracting, or designee.

* * * * *

4. Amend § 121.1008(a) by adding a sentence after the third sentence to read as follows:

§ 121.1008 What occurs after SBA receives a size protest or request for a formal size determination?

(a) * * * If the protest pertains to a requirement set aside for WOSBs or EDWOSBs, the Area Director will also notify SBA's Director for Government Contracting of the protest. * * *

5. Revise part 127 to read as follows:

PART 127—WOMEN-OWNED SMALL BUSINESS FEDERAL CONTRACT PROGRAM

Subpart A—General Provisions

Subpart B—Eligibility Requirements To Qualify as an EDWOSB or WOSB

Subpart C—Certification of EDWOSB or WOSB Status

Subpart D—Eligibility Examinations

Subpart E—Federal Contract Assistance

Subpart F—Protests

Subpart G—Penalties

Authority: 15 U.S.C. 632, 634(b)(6), 637(m), and 644.

Subpart A—General Provisions

§ 127.100 What is the purpose of this part?

Section 8(m) of the Small Business Act authorizes certain procurement mechanisms to ensure that women-owned small businesses (WOSBs) have an equal opportunity to participate in Federal contracting, and to ensure that the WOSB Program is substantially related to Congressional goals in accordance with applicable law.

§ 127.101 What type of assistance is available under this part?

This part authorizes contracting officers to restrict competition to eligible Economically Disadvantaged Women-Owned Small Businesses (EDWOSBs) for certain Federal contracts in industries in which the Small Business Administration (SBA) determines that Women-Owned Small Businesses (WOSBs) are underrepresented or substantially underrepresented in Federal procurement and to eligible WOSBs for certain Federal contracts in industries in which SBA determines that WOSBs are substantially underrepresented in Federal procurement and has waived the economically disadvantaged requirement.

§ 127.102 What are the definitions of the terms used in this part?

For purposes of this part:

8(a) Business Development (8(a) BD) concern means a concern that SBA has certified as an 8(a) BD program participant.

AA/GC&BD means SBA's Associate Administrator for Government Contracting and Business Development.

Central Contractor Registration (CCR) means the system that functions as the central registration and repository of contractor data for the Federal government and is a means for conducting searches of small business contractors. In general, prospective Federal contractors must be registered in CCR prior to award of a contract or purchase agreement, unless the award results from a solicitation issued on or before May 31, 1998.

Citizen means a person born or naturalized in the United States. Resident aliens and holders of permanent visas are not considered to be citizens.

Concern means a firm that satisfies the requirements in § 121.105 of this chapter.

Contracting officer has the meaning given to that term in Section 27(f)(5) of the Office of Federal Procurement Policy Act (codified at 41 U.S.C. 423(f)(5)).

D/GC means SBA's Director for Government Contracting.

Economically disadvantaged WOSB (EDWOSB) means a concern that is small pursuant to part 121 of this chapter and that is at least 51 percent owned and controlled by one or more women who are U.S. citizens and who are economically disadvantaged in accordance with §§ 127.200, 127.201, 127.202 and 127.203. An EDWOSB automatically qualifies as a WOSB.

EDWOSB requirement means a Federal requirement for services or supplies for which a contracting officer has restricted competition to EDWOSBs.

Immediate family member means father, mother, husband, wife, son, daughter, stepchild, brother, sister, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, and daughter-in-law.

Interested party means any concern that submits an offer for a specific EDWOSB or WOSB requirement, the contracting activity's contracting officer, or SBA.

ORCA means the Online Representations and Certifications Application at *https://orca.bpn.gov,* a required registration for contractors interested in submitting an offer, bid or quote on most Federal contracts.

Primary industry classification means the six-digit North American Industry Classification System (NAICS) code designation that best describes the

primary business activity of the concern. The NAICS code designations are described in the NAICS manual available via the Internet at *http://www.census.gov/NAICS.* In determining the primary industry in which a concern is engaged, SBA will consider the factors set forth in § 121.107 of this chapter.

Same or similar line of business means business activities within the same four-digit "Industry Group" of the NAICS Manual as the primary industry classification of the applicant or Participant.

Substantial underrepresentation means a disparity ratio which is less than 0.5.

Underrepresentation means a disparity ratio between 0.5 and 0.8.

WOSB means a concern that is small pursuant to part 121 of this chapter, and that is at least 51 percent owned and controlled by one or more women in accordance with §§ 127.200, 127.201 and 127.202.

WOSB Program Repository means a secure, web-based application that collects, stores and disseminates documents to the contracting community and SBA, which verify the eligibility of a business concern for a contract to be awarded under a WOSB or EDWOSB requirement.

WOSB requirement means a Federal requirement for services or supplies for which a contracting officer has restricted competition to eligible WOSBs.

Subpart B—Eligibility Requirements To Qualify as an EDWOSB or WOSB

§ 127.200 What are the requirements a concern must meet to qualify as an EDWOSB or WOSB?

(a) *Qualification as an EDWOSB.* To qualify as an EDWOSB, a concern must be:

(1) A small business as defined in part 121 of this chapter; and

(2) Not less than 51 percent unconditionally and directly owned and controlled by one or more women who are United States citizens and are economically disadvantaged.

(b) *Qualification as a WOSB.* To qualify as a WOSB, a concern must be:

(1) A small business as defined in part 121 of this chapter; and

(2) Not less than 51 percent unconditionally and directly owned and controlled by one or more women who are United States citizens.

§ 127.201 What are the requirements for ownership of an EDWOSB and WOSB?

(a) *General.* To qualify as an EDWOSB or WOSB, one or more women must unconditionally and directly own at least 51 percent of the concern. Ownership will be determined without regard to community property laws.

(b) *Requirement for unconditional ownership.* To be considered unconditional, the ownership must not be subject to any conditions, executory agreements, voting trusts, or other arrangements that cause or potentially cause ownership benefits to go to another. The pledge or encumbrance of stock or other ownership interest as collateral, including seller-financed transactions, does not affect the unconditional nature of ownership if the terms follow normal commercial practices and the owner retains control absent violations of the terms.

(c) *Requirement for direct ownership.* To be considered direct, the qualifying women must own 51 percent of the concern directly. The 51 percent ownership may not be through another business entity or a trust (including employee stock ownership plan) that is, in turn, owned and controlled by one or more women or economically disadvantaged women. However, ownership by a trust, such as a living trust, may be treated as the functional equivalent of ownership by a woman or economically disadvantaged woman where the trust is revocable, and the woman is the grantor, a trustee, and the sole current beneficiary of the trust.

(d) *Ownership of a partnership.* In the case of a concern that is a partnership, at least 51 percent of each class of partnership interest must be unconditionally owned by one or more women. The ownership must be reflected in the concern's partnership agreement. For purposes of this requirement, general and limited partnership interests are considered different classes of partnership interest.

(e) *Ownership of a limited liability company.* In the case of a concern that is a limited liability company, at least 51 percent of each class of member interest must be unconditionally owned by one or more women.

(f) *Ownership of a corporation.* In the case of a concern that is a corporation, at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding must be unconditionally owned by one or more women. In determining unconditional ownership of the concern, any unexercised stock options or similar agreements held by a woman will be disregarded. However, any unexercised stock option or other agreement, including the right to convert non-voting stock or debentures into voting stock, held by any other individual or entity will be treated as having been exercised.

§ 127.202 What are the requirements for control of an EDWOSB or WOSB?

(a) *General.* To qualify as a WOSB, the management and daily business operations of the concern must be controlled by one or more women. To qualify as an EDWOSB, the management and daily business operations of the concern must be controlled by one or more women who are economically disadvantaged. Control by one or more women means that both the long-term decision making and the day-to-day management and administration of the business operations must be conducted by one or more women.

(b) *Managerial position and experience.* A woman must hold the highest officer position in the concern and must have managerial experience of the extent and complexity needed to run the concern. The woman manager need not have the technical expertise or possess the required license to be found to control the concern if she can demonstrate that she has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise. However, if a man possesses the required license and has an equity interest in the concern, he may be found to control the concern.

(c) *Limitation on outside employment.* The woman who holds the highest officer position of the concern must manage it on a full-time basis and devote full-time to the business concern during the normal working hours of business concerns in the same or similar line of business. The woman who holds the highest officer position may not engage in outside employment that prevents her from devoting sufficient time and attention to the daily affairs of the concern to control its management and daily business operations.

(d) *Control over a partnership.* In the case of a partnership, one or more women must serve as general partners, with control over all partnership decisions.

(e) *Control over a limited liability company.* In the case of a limited liability company, one or more women must serve as management members, with control over all decisions of the limited liability company.

(f) *Control over a corporation.* One or more women must control the Board of Directors of the concern. Women are considered to control the Board of Directors when either:

(1) One or more women own at least 51 percent of all voting stock of the concern, are on the Board of Directors and have the percentage of voting stock necessary to overcome any super majority voting requirements; or

(2) Women comprise the majority of voting directors through actual numbers or, where permitted by state law, through weighted voting.

(g) *Involvement in the concern by other individuals or entities.* Men or other entities may be involved in the management of the concern and may be stockholders, partners or limited liability members of the concern. However, no males or other entity may exercise actual control or have the power to control the concern.

§ 127.203 What are the rules governing the requirement that economically disadvantaged women must own EDWOSBs?

(a) *General.* To qualify as an EDWOSB, the concern must be at least 51 percent owned by one or more women who are economically disadvantaged. A woman is economically disadvantaged if she can demonstrate that her ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business. SBA may consider a spouse's financial situation in determining a woman's access to credit and capital. SBA does not take into consideration community property laws when determining economic disadvantage when the woman has no ownership interest in the property.

(b) *Limitation on personal net worth.*

(1) In order to be considered economically disadvantaged, the woman's personal net worth must be less than $750,000, excluding her ownership interest in the concern and her equity interest in her primary personal residence.

(2) Income received from an S corporation will be excluded from net worth where the EDWOSB provides documentary evidence demonstrating that the income was reinvested in the business concern or the distribution was solely for the purposes of paying taxes arising in the normal course of operations of the business concern.

(3) Funds invested in an Individual Retirement Account (IRA) or other official retirement account that are unavailable until retirement age without a significant penalty will not be considered in determining a woman's net worth. In order to properly assess whether funds invested in a retirement account may be excluded from a woman's net worth, she must provide information about the terms and restrictions of the account to SBA.

(c) *Factors that may be considered.*

(1) *General.* The personal financial condition of the woman claiming economic disadvantage, including her personal income for the past two years (including bonuses, and the value of company stock given in lieu of cash), her personal net worth and the fair market value of all of her assets, whether encumbered or not, may be considered in determining whether she is economically disadvantaged.

(2) *Income.*

(i) When considering a woman's personal income, if the adjusted gross yearly income averaged over the two years preceding the certification exceeds $200,000, SBA will presume that she is not economically disadvantaged. The presumption may be rebutted by a showing that this income level was unusual and not likely to occur in the future, that losses commensurate with and directly related to the earnings were suffered, or by evidence that the income is not indicative of lack of economic disadvantage.

(ii) Income earned by S corporations, which is reinvested in or the distribution was solely for the purposes of paying taxes arising in the normal course of operations of the business concern, is exempted from income for purposes of this section provided that documentary evidence is submitted demonstrating this use. Likewise, S corporation losses may not be subtracted from a woman's income to reduce that income.

(3) *Fair market value of all assets.* A woman will generally not be considered economically disadvantaged if the fair market value of all her assets (including her primary residence and the value of the business concern) exceeds $3 million. The only assets excluded from this determination are funds excluded under paragraph (b)(3) of this section as being invested in a qualified IRA account or other official retirement account.

(d) *Transfers within two years.* Assets that a woman claiming economic disadvantage transferred within two years of the date of the concern's certification will be attributed to the woman claiming economic disadvantage if the assets were transferred to an immediate family member, or to a trust that has as a beneficiary an immediate family member. The transferred assets within the two-year period will not be attributed to the woman if the transfer was:

(1) To or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support; or

(2) To an immediate family member in recognition of a special occasion, such as a birthday, graduation, anniversary, or retirement.

Subpart C—Certification of EDWOSB or WOSB Status

§ 127.300 How is a concern certified as an EDWOSB or WOSB?

(a) *General.* At the time a concern submits an offer on a specific contract reserved for competition under this Part, it must be registered in the Central Contractor Registration (CCR) and have a current self-certification posted on the Online Representations and Certifications Application (ORCA) that it qualifies as an EDWOSB or WOSB.

(b) *Form of certification.* In conjunction with its required registration in the CCR database, the concern must submit a self-certification to the electronic annual representations and certifications at *http://orca.bpn.gov,* that it is a qualified EDWOSB or WOSB. The self-certification must include a representation, subject to penalties for misrepresentation, that:

(1) The concern is certified as an EDWOSB or WOSB by a certifying entity approved by SBA and there have been no changes in its circumstances affecting its eligibility since certification;

(2) The concern meets *each* of the applicable individual eligibility requirements described in subpart B of this part, including that:

(i) It is a small business concern under the size standard assigned to the particular procurement;

(ii) It is at least 51 percent owned and controlled by one or more women who are United States citizens, or it is at least 51 percent owned and controlled by one or more women who are United States citizens and are economically disadvantaged; and

(iii) Neither SBA, in connection with an examination or protest, nor an SBA-approved certifier has issued a decision currently in effect finding that it does not qualify as an EDWOSB or WOSB.

(c) *Documents provided to contracting officer.* All of the documents set forth in paragraphs (d) and (e) of this section must be provided to the contracting officer to verify eligibility at the time of initial offer. The documents will be provided via the WOSB Program Repository or, if the repository is unavailable, directly to the contracting officer. The documents must be retained for a minimum of six (6) years.

(d) *Third Party Certification.*

(1) *General.* At the time of certification in ORCA, the WOSB or EDWOSB that has been certified as a WOSB or EDWOSB by a certifying entity approved by SBA must provide a copy of the certification to the WOSB Program Repository. If the repository is unavailable, then prior to the award of

a WOSB or EDWOSB contract, the apparent successful offeror WOSB or EDWOSB that has been certified as a EDWOSB or WOSB by a certifying entity approved by SBA must provide a copy of the certification to the contracting officer verifying that it was a WOSB or EDWOSB at the time of initial offer. In addition, the EDWOSB or WOSB must also provide a copy of the joint venture agreement, if applicable. Within thirty (30) days of the repository becoming available, the WOSB or EDWOSB must provide the same documents to the repository.

(2) *U.S. Department of Transportation (DOT) Certification.* At the time of certification in ORCA, the WOSB or EDWOSB that has been certified as a as a DOT Disadvantaged Business Enterprise must submit a copy of the DBE certification showing that it received such certification because it is owned and controlled by one or more women to the WOSB Program Repository. If the repository is unavailable, then prior to award of a WOSB or EDWOSB contract, the apparent successful offeror must provide a copy of the DOT Disadvantaged Business Enterprise certification to the contracting officer showing that it received such certification because it is owned and controlled by one or more women, verifying that it was a WOSB or EDWOSB at the time of initial offer. In addition, the WOSB or EDWOSB must provide a statement identifying the woman or women upon whom eligibility was based and documents, such as birth certificates or passports, evidencing that the women are citizens of the United States, as defined in § 127.102. Within thirty (30) days of the repository becoming available, the WOSB or EDWOSB must provide the same documents to the repository.

(e) *Non-Third Party Certification.* A concern that has not been certified as a WOSB or EDWOSB by a third-party certifier approved by SBA must provide documents to the WOSB Program Repository. If the repository is unavailable, then prior to award of a WOSB or EDWOSB contract, the apparent successful offeror must provide a copy of the documents to the contracting officer verifying that it was a WOSB or EDWOSB at the time of initial offer. Within thirty (30) days of the repository becoming available, the WOSB or EDWOSB must provide the same documents to the repository. These documents must include the following:

(1) Birth certificates, Naturalization papers, or passports for owners who are women;

(2) Copy of the joint venture agreement, if applicable;

(3) For limited liability companies:

(i) Articles of organization (also referred to as certificate of organization or articles of formation) and any amendments; and

(ii) Operating agreement, and any amendments;

(4) For corporations:

(i) Articles of incorporation and any amendments;

(ii) By-laws and any amendments;

(iii) All issued stock certificates, including the front and back copies, signed in accord with the by-laws;

(iv) Stock ledger; and

(v) Voting agreements, if any;

(5) For partnerships, the partnership agreement and any amendments;

(6) For sole proprietorships, the assumed/fictitious name certificate(s); and

(7) For EDWOSBs, in addition to the above, the SBA Form 413, Personal Financial Statement, available to the public at *http://www.sba.gov/tools/Forms/index.html,* for each woman claiming economic disadvantage.

(f) *Update of certification and documents.*

(1) The concern must update its EDWOSB and WOSB representations and self-certification on ORCA as necessary, but at least annually, to ensure they are kept current, accurate, and complete. The representations and self-certification are effective for a period of one year from the date of submission or update to ORCA.

(2) The WOSB or EDWOSB must update the documents submitted to the contracting officer via the WOSB Program Repository as necessary to ensure they are kept current, accurate and complete. If the repository is not available, the WOSB or EDWOSB must provide current, accurate and complete documents to the contracting officer for each contract award. Within thirty (30) days of the repository becoming available, the WOSB or EDWOSB must provide the same documents to the repository.

§ 127.301 When may a contracting officer accept a concern's self-certification?

(a) *General.*

(1) *Third Party Certifications.* A contracting officer may accept a concern's self-certification on ORCA as accurate for a specific procurement reserved for award under this Part if the apparent successful offeror WOSB or EDWOSB provided the required documents, which are set forth in § 127.300(d), and there has been no protest or other credible information that calls into question the concern's eligibility as a EDWOSB or WOSB. An example of such credible evidence includes information that the concern was determined by SBA or an SBA-approved certifier not to qualify as an EDWOSB or WOSB.

(2) *Non-Third Party Certification.* A contracting officer may accept a concern's self-certification in ORCA if the apparent successful offeror WOSB or EDWOSB has provided the required documents, which are set forth in § 127.300(e). If the apparent successful offeror WOSB or EDWOSB fails to submit any of the required documents, the contracting officer cannot award a WOSB or EDWOSB contract to that business concern.

(b) *Referral to SBA.* When the contracting officer has information that calls into question the eligibility of a concern as an EDWOSB or WOSB or the concern fails to provide all of the required documents to verify its eligibility, the contracting officer shall refer the concern's self-certification to SBA for verification of the concern's eligibility by filing an EDWOSB or WOSB status protest pursuant to subpart F of this part.

§ 127.302 What third-party certifications may a concern use as evidence of its status as a qualified EDWOSB or WOSB?

In order for a concern to use a certification by another entity as evidence of its status as a qualified EDWOSB or WOSB in support of its representations in ORCA pursuant to § 127.300(b), the concern must have a current, valid certification from:

(a) SBA as an 8(a) BD Program participant due to their status as a women-owned concern; or

(b) An entity designated as an SBA-approved certifier on SBA's Web site located at *http://www.sba.gov/GC.*

§ 127.303 How will SBA select and identify approved certifiers?

(a) *General.* SBA may enter into written agreements to accept the EDWOSB or WOSB certification of a Federal agency, State government, or national certifying entity if SBA determines that the entity's certification process complies with SBA-approved certification standards and tracks the EDWOSB or WOSB eligibility requirements set forth in subpart B of this part. The written agreement will include a provision authorizing SBA to terminate the agreement if SBA subsequently determines that the entity's certification process does not comply with SBA-approved certification standards or is not based on the same EDWOSB or WOSB eligibility requirements as set forth in subpart B of this part.

(b) *Required certification standards.* In order for SBA to enter into an agreement to accept the EDWOSB or WOSB certification of a Federal agency, State government, or national certifying entity, the entity must establish the following:

(1) It will render fair and impartial EDWOSB or WOSB eligibility determinations.

(2) It will retain the documents submitted by the approved WOSB or EDWOSB for a period of six (6) years from the date of certification (initial and any recertification).

(3) Its certification process will require applicant concerns to pre-register on CCR and submit sufficient information as determined by SBA to enable it to determine whether the concern qualifies as an EDWOSB or WOSB. This information must include documentation demonstrating whether the concern is:

(i) A small business concern under SBA's size standards for its primary industry classification;

(ii) At least 51 percent owned and controlled by one or more women who are United States citizens; and

(iii) In the case of a concern applying for EDWOSB certification, at least 51 percent owned and controlled by one or more women who are United States citizens and economically disadvantaged.

(4) It will not decline to accept a concern's application for EDWOSB or WOSB certification on the basis of race, color, national origin, religion, age, disability, sexual orientation, or marital or family status.

(c) *List of SBA-approved certifiers.* SBA will maintain a list of approved certifiers on SBA's Internet Web site at *http://www.sba.gov/GC.* Any interested person may also obtain a copy of the list from the local SBA district office.

§ 127.304 How does a concern obtain certification from an approved certifier?

A concern that seeks EDWOSB or WOSB certification from an SBA-approved certifier must submit its application directly to the approved certifier in accordance with the specific application procedures of the particular certifier. Any interested party may obtain such certification information and application by contacting the approved certifier at the address provided on SBA's list of approved certifiers.

§ 127.305 May a concern determined not to qualify as an EDWOSB or WOSB submit a self-certification for a particular EDWOSB or WOSB requirement?

A concern that SBA or an SBA-approved certifier determines does not qualify as an EDWOSB or WOSB may not represent itself to be an EDWOSB or WOSB, as applicable, unless SBA subsequently determines that it is an eligible EDWOSB or WOSB pursuant to the examination procedures under § 127.405, and there have been no material changes in its circumstances affecting its eligibility since SBA's eligibility determination. Any concern determined not to be a qualified EDWOSB or WOSB may request that SBA conduct an examination to determine its EDWOSB or WOSB eligibility at any time once it believes in good faith that it satisfies all of the eligibility requirements to qualify as an EDWOSB or WOSB.

Subpart D—Eligibility Examinations

§ 127.400 What is an eligibility examination?

Eligibility examinations are investigations that verify the accuracy of any certification made or information provided as part of the certification process or in connection with an EDWOSB or WOSB contract. In addition, eligibility examinations may verify that a concern meets the EDWOSB or WOSB eligibility requirements at the time of the examination. SBA will, in its sole discretion, perform eligibility examinations at any time after a concern self-certifies in CCR or ORCA that it is an EDWOSB or WOSB. SBA may conduct the examination, or parts of the examination, at one or all of the concern's offices. SBA may consider protest allegations set forth in a protest in determining whether to conduct an examination of a concern pursuant to this subpart D of this part, notwithstanding a dismissal or denial of a protest pursuant to § 127.604. SBA may also consider information provided to the D/GC by a third party that questions the eligibility of a WOSB or EDWOSB that has certified its status in ORCA or CCR in determining whether to conduct an eligibility examination.

§ 127.401 What is the difference between an eligibility examination and an EDWOSB or WOSB status protest pursuant to subpart F of this part?

(a) *Eligibility examination.* An eligibility examination is the formal process through which SBA verifies and monitors the accuracy of any certification made or information provided as part of the certification process or in connection with an EDWOSB or WOSB contract. If SBA is conducting an eligibility examination on a concern that has submitted an offer on a pending EDWOSB or WOSB procurement and SBA has credible information that the concern may not qualify as an EDWOSB or WOSB, then SBA may initiate a protest pursuant to § 127.600 to suspend award of the contract for fifteen (15) business days pending SBA's determination of the concern's eligibility.

(b) *EDWOSB or WOSB protests.* An EDWOSB or WOSB status protest provides a mechanism for challenging or verifying the EDWOSB or WOSB eligibility of a concern in connection with a specific EDWOSB or WOSB requirement. SBA will process EDWOSB or WOSB protests in accordance with the procedures and timeframe set forth in subpart F, and will determine the EDWOSB or WOSB eligibility of the protested concern as of the date the concern represented its EDWOSB or WOSB status as part of its initial offer including price. SBA's protest determination will apply to the specific procurement to which the protest relates and to future procurements.

§ 127.402 How will SBA conduct an examination?

(a) *Notification.* No less than five (5) business days before commencing an examination, SBA will notify the concern in writing that it will conduct an examination to verify the status of the concern as an EDWOSB or WOSB. However, SBA reserves the right to conduct a site visit without prior notification to the concern.

(b) *Request for information.* SBA will request that the concern or contracting officer provide documentation and information related to the concern's EDWOSB or WOSB eligibility. These documents will include those submitted under § 127.300(c) and any other pertinent documents requested by SBA at the time of eligibility examination to verify eligibility, including but not limited to, documents submitted by a concern in connection with any WOSB or EDWOSB certification. SBA may also request copies of proposals or bids submitted in response to an EDWOSB or WOSB solicitation. In addition, EDWOSBs will be required to submit a copy of a SBA Form 413, Personal Financial Statement, the two most recent personal income tax returns (including all schedules and W–2 forms) for the women claiming economic disadvantage and their spouses, unless the individuals and their spouses are legally separated, and SBA Form 4506–T, Request for Tax Transcript Form, available to the public at *http://www.sba.gov/tools/Forms/index.html.* SBA may draw an adverse inference where a concern fails to cooperate in providing the requested information.

The WOSB or EDWOSB must retain documentation demonstrating satisfaction of the eligibility requirements for six (6) years from date of self-certification.

§ 127.403 What happens if SBA verifies the concern's eligibility?

If SBA verifies that the concern satisfies the applicable EDWOSB or WOSB eligibility requirements, then the D/GC will send the concern a written decision to that effect and will allow the concern's EDWOSB or WOSB designation in CCR and ORCA to stand and the concern may continue to self-certify its EDWOSB or WOSB status.

§ 127.404 What happens if SBA is unable to verify a concern's eligibility?

(a) *Notice of proposed determination of ineligibility.* If SBA is unable to verify that the concern qualifies as an EDWOSB or WOSB, then the D/GC will send the concern a written notice explaining the reasons SBA believes the concern did not qualify at the time of certification or does not qualify as an EDWOSB or WOSB. The notice will advise the concern that it has fifteen (15) calendar days from the date it receives the notice to respond.

(b) *SBA determination.* Following the fifteen (15) day response period, the D/GC or designee will consider the reasons of proposed ineligibility and any information the concern submitted in response, and will send the concern a written decision with its findings. The D/GC's decision is effective immediately and remains in full force and effect unless a new examination verifies the concern is an eligible EDWOSB or WOSB or the concern is certified by a third party certifier.

(1) If SBA determines that the concern does not qualify as an EDWOSB or WOSB, then the D/GC will send the concern a written decision explaining the basis of ineligibility, and will require that the concern remove its EDWOSB or WOSB designation in the CCR and ORCA within five (5) calendar days after the date of the decision.

(2) If the concern has already certified itself as a WOSB or EDWOSB on a pending procurement the concern must immediately inform the officials responsible for the procurement of the adverse determination.

(3) If SBA determines that the concern did not qualify as an EDWOSB or WOSB at the time it submitted its initial offer for an EDWOSB or WOSB contract, the contracting officer may terminate the contract, not exercise any option, or not award further task or delivery orders.

(4) Whether or not a contracting officer decides to allow or not allow an ineligible concern to fully perform a contract under paragraph (b)(2) of this section, the contracting officer cannot count the award as one to an EDWOSB or WOSB and must update the Federal Procurement Data System—Next Generation (FPDS–NG) and other databases from the date of award accordingly.

(c) A concern that has been found to be ineligible may not represent itself as a WOSB or EDWOSB until it cures the reason for its ineligibility and SBA determines that the concern qualifies as a WOSB or EDWOSB. A concern that believes in good faith that it has cured the reason(s) for its ineligibility may request an examination under the procedures set forth in this section.

§ 127.405 What is the process for requesting an eligibility examination?

(a) *General.* A concern may request that SBA conduct an examination to verify its eligibility as an EDWOSB or WOSB at any time after it is determined by SBA not to qualify as an EDWOSB or WOSB, if the concern believes in good faith that it satisfies all of the EDWOSB or WOSB eligibility requirements under subpart B of this part.

(b) *Format.* The request for an examination must be in writing and must specify the particular reasons the concern was determined not to qualify as an EDWOSB or WOSB.

(c) *Submission of request.* The concern must submit its request directly to the Director for Government Contracting, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416, or by fax to (202) 205–6390, marked "Attn: Request for Women-Owned Small Business Program Examination."

(d) *Notice of receipt of request.* SBA will immediately notify the concern in writing once SBA receives its request for an examination. SBA will request that the concern provide documentation and information related to the concern's EDWOSB or WOSB eligibility and may draw an adverse inference if the concern fails to cooperate in providing the requested information.

(e) *Determination of eligibility.* The D/GC will send the concern a written decision finding that it either qualifies or does not qualify as an EDWOSB or WOSB.

(1) If the D/GC determines that the concern does not qualify as an EDWOSB or WOSB, the decision will explain the specific reasons for the adverse determination and advise the concern that it is prohibited from self-certifying as an EDWOSB or WOSB. If the concern self-certifies as an EDWOSB or WOSB notwithstanding SBA's adverse determination, the concern will be subject to the penalties under subpart G of this part.

(2) If the D/GC determines that the concern qualifies as an EDWOSB or WOSB, then the D/GC will send the concern a written decision to that effect and will advise the concern that it may self-certify as an EDWOSB or WOSB, as applicable.

(f) *Effect of decision.* The D/GC's decision is effective immediately and remains in full force and effect unless a new examination verifies the concern is an eligible EDWOSB or WOSB or the concern is certified by a third party certifier. If the concern has already certified itself as a WOSB or EDWOSB on a pending procurement the concern must immediately inform the officials responsible for the procurement of the adverse determination.

(g) A concern that has been found to be ineligible may not represent itself as a WOSB or EDWOSB until it cures the reason for its ineligibility and SBA determines that the concern qualifies as a WOSB or EDWOSB. A concern that believes in good faith that it has cured the reason(s) for its ineligibility may request an examination under the procedures set forth in this section.

Subpart E—Federal Contract Assistance

§ 127.500 In what industries is a contracting officer authorized to restrict competition under this part?

A contracting officer may restrict competition under this part only in those industries in which SBA has determined that WOSBs are underrepresented or substantially underrepresented in Federal procurement, as specified in § 127.501.

§ 127.501 How will SBA determine the industries that are eligible for EDWOSB or WOSB requirements?

(a) Based upon its analysis, SBA will designate by NAICS Industry Subsector Code those industries in which WOSBs are underrepresented and substantially underrepresented.

(b) In determining the extent of disparity of WOSBs, SBA may request that the head of any Federal department or agency provide SBA, data or information necessary to analyze the extent of disparity of WOSBs.

§ 127.502 How will SBA identify and provide notice of the designated industries?

SBA will post on its Internet Web site a list of NAICS Industry Subsector industries it designates under § 127.501. The list of designated industries also

may be obtained from the local SBA district office and may be posted on the General Services Administration Internet Web site.

§ 127.503 When is a contracting officer authorized to restrict competition under this part?

(a) *EDWOSB requirements.* For requirements in industries designated by SBA pursuant to § 127.501, a contracting officer may restrict competition to EDWOSBs if the contracting officer has a reasonable expectation based on market research that:

(1) Two or more EDWOSBs will submit offers for the contract;

(2) The anticipated award price of the contract (including options) does not exceed $5,000,000, in the case of a contract assigned an NAICS code for manufacturing; or $3,000,000, in the case of all other contracts; and

(3) Contract award may be made at a fair and reasonable price.

(b) *WOSB requirements.* Only if the contracting officer determines that the market research indicates that the criteria in paragraph (a) of this section are not met for restricting competition to EDWOSBs may the contracting officer then restrict competition to WOSBs. In addition, to restrict competition to WOSBs, the contractor must determine that the following criteria are met:

(1) The requirement is in an industry that SBA has designated as substantially underrepresented with respect to WOSBs; and

(2) The contracting officer has a reasonable expectation based on market research that—

(i) Two or more WOSBs will submit offers;

(ii) The anticipated award price of the contract (including options) will not exceed $5,000,000, in the case of a contract assigned an NAICS code for manufacturing, or $3,000,000 in the case of all other contracts; and

(iii) Contract award may be made at a fair and reasonable price.

(c) *8(a) BD requirements.* A contracting officer may not restrict competition to eligible EDWOSBs or WOSBs if an 8(a) BD Participant is currently performing the requirement under the 8(a) BD Program or SBA has accepted the requirement for performance under the authority of the 8(a) BD program, unless SBA consented to release the requirement from the 8(a) BD program.

(d) *Contracting Among Small Business Programs.*

(1) *Acquisitions Valued At or Below $100,000/Simplified Acquisition Threshold.* The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding $3,000 ($15,000 for acquisitions as described in the Federal Acquisition Regulation (FAR) at 48 CFR 13.201(g)(1)) but valued below $100,000 ($250,000 for acquisitions described in paragraph (1) of the Simplified Acquisition Threshold definition in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. This requirement does not preclude a contracting officer from awarding a contract under the 8(a) BD, HUBZone, Service Disabled Veteran Owned (SDVO), or WOSB programs.

(2) *Acquisitions Valued Above $100,000/Simplified Acquisition Threshold.* The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding $100,000 ($250,000 for acquisitions described in paragraph (1) of the Simplified Acquisition Threshold definition in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. However, after conducting market research, the contracting officer shall first consider a set-aside or sole source award under the 8(a) BD, HUBZone, SDVO SBC or WOSB programs before setting aside the requirement as a small business set-aside. There is no order of precedence among the 8(a) BD, HUBZone, SDVO SBC or WOSB programs. SBA believes that progress in fulfilling the various small business goals, as well as other factors such as the results of market research, programmatic needs specific to the procuring agency, anticipated award price, and the acquisition history, should be considered in making a decision as to which program to use for the acquisition.

(e) *Contract file.* When restricting competition to WOSBs or EDWOSBs in accordance with § 127.503, the contracting officer must document the contract file accordingly, including the type and extent of market research and the fact that the NAICS code assigned to the contract is for an industry that SBA has designated as a as underrepresented or, with respect to WOSBs, substantially underrepresented, industry.

§ 127.504 What additional requirements must a concern satisfy to submit an offer on an EDWOSB or WOSB requirement?

In order for a concern to submit an offer on a specific EDWOSB or WOSB requirement, the concern must ensure that the appropriate representations and certifications on ORCA are accurate and complete at the time it submits its offer to the contracting officer, including, but not limited to, the fact that:

(a) It is small under the size standard corresponding to the NAICS code assigned to the contract;

(b) It is listed on CCR and ORCA as an EDWOSB or WOSB;

(c) There has been no material change in any of its circumstances affecting its EDWOSB or WOSB eligibility; and

(d) It will meet the applicable percentages of work requirement as set forth in § 125.6 of this chapter (limitations on subcontracting rule).

§ 127.505 May a non-manufacturer submit an offer on an EDWOSB or WOSB requirement for supplies?

An EDWOSB or WOSB that is a non-manufacturer, as defined in § 121.406(b) of this chapter, may submit an offer on an EDWOSB or WOSB contract for supplies, if it meets the requirements under the non-manufacturer rule set forth in § 121.406(b) of this chapter.

§ 127.506 May a joint venture submit an offer on an EDWOSB or WOSB requirement?

A joint venture may submit an offer on an EDWOSB or WOSB contract if the joint venture meets all of the following requirements:

(a) Except as provided in § 121.103(h)(3) of this chapter, the combined annual receipts or employees of the concerns entering into the joint venture must meet the applicable size standard corresponding to the NAICS code assigned to the contract;

(b) The EDWOSB or WOSB participant of the joint venture must be designated on the CCR and the ORCA as an EDWOSB or WOSB;

(c) The parties to the joint venture must enter into a written joint venture agreement. The joint venture agreement must contain a provision:

(1) Setting forth the purpose of the joint venture.

(2) Designating an EDWOSB or WOSB as the managing venturer of the joint venture, and an employee of the managing venturer as the project manager responsible for the performance of the contract;

(3) Stating that not less than 51 percent of the net profits earned by the joint venture will be distributed to the EDWOSB or WOSB;

(4) Specifying the responsibilities of the parties with regard to contract performance, sources of labor, and negotiation of the EDWOSB or WOSB contract; and

(5) Requiring the final original records be retained by the managing venturer upon completion of the EDWOSB or WOSB contract performed by the joint venture.

(d) The joint venture must perform the applicable percentage of work required of the EDWOSB or WOSB offerors in accordance with § 125.6 of this chapter (limitations on subcontracting rule);

(e) The procuring activity will execute the contract in the name of the EDWOSB or WOSB or joint venture.

Subpart F—Protests

§ 127.600 Who may protest the status of a concern as an EDWOSB or WOSB?

An interested party may protest the EDWOSB or WOSB status of an apparent successful offeror on an EDWOSB or WOSB contract. Any other party or individual may submit information to the contracting officer or SBA in an effort to persuade them to initiate a protest or to persuade SBA to conduct an examination pursuant to subpart D of this part.

§ 127.601 May a protest challenging the size and status of a concern as an EDWOSB or WOSB be filed together?

An interested party seeking to protest both the size and the EDWOSB or WOSB status of an apparent successful offeror on an EDWOSB or WOSB requirement must file two separate protests, one size protest pursuant to part 121 of this chapter and one EDWOSB or WOSB status protest pursuant to this subpart. An interested party seeking to protest only the size of an apparent successful EDWOSB or WOSB offeror must file a size protest to the contracting officer pursuant to part 121 of this chapter.

§ 127.602 What are the grounds for filing an EDWOSB or WOSB status protest?

SBA will consider a protest challenging the status of a concern as an EDWOSB or WOSB if the protest presents credible evidence that the concern is not owned and controlled by one or more women who are United States citizens and, if the protest is in connection with an EDWOSB contract, that the concern is not at least 51 percent owned and controlled by one or more women who are economically disadvantaged. In addition, SBA will consider a protest challenging the status of a concern as an EDWOSB or WOSB if the contracting officer has protested because the WOSB or EDWOSB apparent successful offeror has failed to provide all of the required documents, as set forth in § 127.300(c).

§ 127.603 What are the requirements for filing an EDWOSB or WOSB protest?

(a) *Format.* Protests must be in writing and must specify all the grounds upon which the protest is based. A protest merely asserting that the protested concern is not an eligible EDWOSB or WOSB, without setting forth specific facts or allegations, is insufficient.

(b) *Filing.* Protestors may deliver their written protests in person, by facsimile, by express delivery service, e-mail, or by U.S. mail (received by the applicable date) to the following:

(1) To the contracting officer, if the protestor is an offeror for the specific contract; or

(2) To the D/GC, if the protest is initiated by the contracting officer or SBA.

(c) *Timeliness.*

(1) For negotiated acquisitions, a protest from an interested party must be received by the contracting officer prior to the close of business on the fifth business day after notification by the contracting officer of the apparent successful offeror or notification of award.

(2) For sealed bid acquisitions, a protest from an interested party must be received by close of business on the fifth business day after bid opening.

(3) Any protest received after the time limit is untimely, unless it is from SBA or the contracting officer. A contracting officer or SBA may file an EDWOSB or WOSB protest at any time after bid opening or notification of intended awardee, whichever applies.

(4) Any protest received prior to bid opening or notification of intended awardee, whichever applies, is premature.

(5) A timely filed protest applies to the procurement in question even if filed after award.

(d) *Referral to SBA.* The contracting officer must forward to SBA any protest received, notwithstanding whether he or she believes it is premature, sufficiently specific, or timely. The contracting officer must send all protests, along with a referral letter and documents, directly to the Director for Government Contracting, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416, or by fax to (202) 205–6390, Attn: Women-Owned Small Business Status Protest. The contracting officer's referral letter must include information pertaining to the solicitation that may be necessary for SBA to determine timeliness and standing, including: the solicitation number; the name, address, telephone number and facsimile number of the contracting officer; whether the protestor submitted an offer; whether the protested concern was the apparent successful offeror; when the protested concern submitted its offer; whether the procurement was conducted using sealed bid or negotiated procedures; the bid opening date, if applicable; when the protest was submitted to the contracting officer; when the protestor received notification about the apparent successful offeror, if applicable; and whether a contract has been awarded. In addition, the contracting officer must send copies of any documents provided to the contracting officer pursuant to § 127.300(c)(2) (if the repository is unavailable). The D/GC or designee will decide the merits of EDWOSB or WOSB status protests.

§ 127.604 How will SBA process an EDWOSB or WOSB status protest?

(a) *Notice of receipt of protest.* Upon receipt of the protest, SBA will notify the contracting officer and the protestor of the date SBA received the protest and whether SBA will process the protest or dismiss it under paragraph (b) of this section. The contracting officer may award the contract after receipt of a protest if the contracting officer determines in writing that an award must be made to prevent significant harm to the public interest.

(b) *Dismissal of protest.* If SBA determines that the protest is premature, untimely, nonspecific, or is based on nonprotestable allegations, SBA will dismiss the protest and will send the contracting officer and the protestor a notice of dismissal, citing the reason(s) for the dismissal. Notwithstanding SBA's dismissal of the protest, SBA may, in its sole discretion, consider the protest allegations in determining whether to conduct an examination of the protested concern pursuant to subpart D of this part or submit a protest itself.

(c) *Notice to protested concern.* If SBA determines that the protest is timely, sufficiently specific and is based upon protestable allegations, SBA will:

(1) Notify the protested concern of the protest and request information and documents responding to the protest within five (5) business days from the date of the notice. These documents will include those that verify the eligibility of the concern, respond to the protest allegations, and copies of proposals or bids submitted in response to an EDWOSB or WOSB solicitation. In addition, EDWOSBs will be required to submit a copy of SBA Form 413,

Personal Financial Statement, the two most recent personal income tax returns (including all schedules and W–2 forms) for the women claiming economic disadvantage and their spouses, unless the individuals and their spouses are legally separated, and SBA Form 4506–T, Request for Tax Transcript Form. SBA may draw an adverse inference where a concern fails to cooperate in providing the requested information and documents; and

(2) Forward a copy of the protest to the protested concern.

(d) *Time period for determination.* SBA will determine the EDWOSB or WOSB status of the protested concern within fifteen (15) business days after receipt of the protest, or within any extension of that time that the contracting officer may grant SBA. If SBA does not issue its determination within the fifteen (15)-day period, the contracting officer must contact SBA to ascertain when SBA estimates that it will issue its decision, and may award the contract if he or she determines in writing that there is an immediate need to award the contract and that waiting until SBA makes it determination will harm public interest.

(e) *Notification of determination.* SBA will notify the contracting officer, the protestor, and the protested concern in writing of its determination. If SBA sustains the protest, SBA will issue a decision explaining the basis of its determination and requiring that the concern remove its designation on the CCR and ORCA as an EDWOSB or WOSB, as appropriate. Regardless of a decision not to sustain the protest, SBA may, in its sole discretion, consider the protest allegations in determining whether to conduct an examination of the protested concern pursuant to subpart D of this part.

(f) *Effect of determination.* SBA's determination is effective immediately and is final unless overturned by SBA's Office of Hearings and Appeals on appeal pursuant to § 127.605.

(1) A contracting officer may award the contract to a protested concern after the D/GC either has determined that the protested concern is an eligible WOSB or EDWOSB or has dismissed all protests against it. If OHA subsequently overturns the D/GC's determination or dismissal, the contracting officer may apply the OHA decision to the procurement in question.

(2) A contracting officer may not award the contract to a protested concern that the D/GC has determined is not an EDWOSB or WOSB for the procurement in question.

(i) If a contracting officer receives such a determination after contract award, and no OHA appeal has been filed, the contracting officer shall terminate the award.

(ii) If a timely OHA appeal has been filed after contract award, the contracting officer must consider whether performance can be suspended until an appellate decision is rendered.

(iii) If OHA affirms the initial determination finding that the protested concern is ineligible, the contracting officer shall either terminate the contract or not exercise the next option.

(2) The contracting officer must update the Federal Procurement Data System–Next Generation (FPDS–NG) and other procurement reporting databases to reflect the final agency decision.

(3) A concern that has been found to be ineligible may not represent itself as a WOSB or EDWOSB on another procurement until it cures the reason for its ineligibility. A concern that believes in good faith that it has cured the reason(s) for its ineligibility may request an examination under the procedures set forth in § 127.405.

§ 127.605 What are the procedures for appealing an EDWOSB or WOSB status protest decision?

The protested concern, the protestor, or the contracting officer may file an appeal of a WOSB or EDWOSB status protest determination with SBA's Office of Hearings and Appeals (OHA) in accordance with part 134 of this chapter.

Subpart G—Penalties

§ 127.700 What penalties may be imposed under this part?

Persons or concerns that falsely self-certify or otherwise misrepresent a concern's status as an EDWOSB or WOSB for purposes of receiving Federal contract assistance under this part are subject to:

(a) Suspension and Debarment pursuant to the procedures set forth in the Federal Acquisition Regulations, 48 CFR 9.4;

(b) Administrative and civil remedies prescribed by the False Claims Act, 31 U.S.C. 3729–3733 and under the Program Fraud Civil Remedies Act, 31 U.S.C. 3801–3812;

(c) Administrative and criminal remedies as described at Sections 16(a) and (d) of the Small Business Act, 15 U.S.C. 645(a) and (d), as amended;

(d) Criminal penalties under 18 U.S.C. 1001; and

(e) Any other penalties as may be available under law.

PART 134—RULES OF PROCEDURE GOVERNING CASES BEFORE THE OFFICE OF HEARINGS AND APPEALS

6. The Authority citation for part 134 continues to read as follows:

Authority: 5 U.S.C. 504, 15 U.S.C. 632, 634(b)(6), 637(a), 637(m), 648(l), 656(i) and 687(c); E.O. 12549, 51 FR 6370, 3 CFR, 1986 Comp., p. 189.

Subpart A—General Rules

7. Section 134.102(s) is republished to read as follows:

§ 134.102 Jurisdiction of OHA

* * * * *

(s) Appeals from Women-Owned Small Business or Economically-Disadvantaged Women-Owned Small Business protest determinations under Part 127 of this chapter;

* * * * *

Subpart E—Rules of Practice for Appeals From Service-Disabled Veteran Owned Small Business Concern Protests

8. Section 134.515(b) is republished to read as follows:

§ 134.515 What are the effects of the Judge's decision?

* * * * *

(b) The Judge may reconsider an appeal decision within twenty (20) calendar days after issuance of the written decision. Any party who has appeared in the proceeding, or SBA, may request reconsideration by filing with the Judge and serving a petition for reconsideration on all the parties to the appeal within twenty (20) calendar days after service of the written decision. The request for reconsideration must clearly show an error of fact or law material to the decision. The Judge may also reconsider a decision on his or her own initiative.

* * * * *

9. Revise Subpart G to read as follows:

Subpart G—Rules of Practice for Appeals From Women-Owned Small Business Concern (WOSB) and Economically Disadvantaged WOSB Concern (EDWOSB) Protests

Sec.

Subpart G—Rules of Practice for Appeals From Women-Owned Small Business Concern (WOSB) and Economically Disadvantaged WOSB Concern (EDWOSB) Protests

§ 134.701 What is the scope of the rules in this subpart G?

(a) The rules of practice in this subpart G apply to all appeals to OHA from formal protest determinations made by the Director for Government Contracting (D/GC) in connection with a Women-Owned Small Business Concern (WOSB) or Economically Disadvantaged WOSB Concern (EDWOSB) protest. Appeals under this subpart include issues related to whether the concern is owned and controlled by one or more women who are United States citizens and, if the appeal is in connection with an EDWOSB contract, that the concern is at least 51 percent owned and controlled by one or more women who are economically disadvantaged. This includes appeals from determinations by the D/GC that the protest was premature, untimely, nonspecific, or not based upon protestable allegations.

(b) Except where inconsistent with this subpart, the provisions of subparts A and B of this part apply to appeals listed in paragraph (a) of this section.

(c) Appeals relating to formal size determinations and NAICS Code designations are governed by subpart C of this part.

§ 134.702 Who may appeal?

Appeals from WOSB or EDWOSB protest determinations may be filed with OHA by the protested concern, the protestor, or the contracting officer responsible for the procurement affected by the protest determination.

§ 134.703 When must a person file an appeal from an WOSB or EDWOSB protest determination?

Appeals from a WOSB or EDWOSB protest determination must be commenced by filing and serving an appeal petition within ten (10) business days after the appellant receives the WOSB or EDWOSB protest determination (see § 134.204 for filing and service requirements). An untimely appeal must be dismissed.

§ 134.704 What are the effects of the appeal on the procurement at issue?

Appellate decisions apply to the procurement in question. If the contracting officer awarded the contract to a concern that OHA finds to be ineligible, then the contracting officer shall terminate the contract, not exercise any options, or not award further task or delivery orders.

§ 134.705 What are the requirements for an appeal petition?

(a) *Format.* There is no required format for an appeal petition. However, it must include the following information:

(1) The solicitation or contract number, and the name, address, and telephone number of the contracting officer;

(2) A statement that the petitioner is appealing a WOSB or EDWOSB protest determination issued by the D/GC and the date that the petitioner received it;

(3) A full and specific statement as to why the WOSB or EDWOSB protest determination is alleged to be based on a clear error of fact or law, together with an argument supporting such allegation; and

(4) The name, address, telephone number, facsimile number, and signature of the appellant or its attorney.

(b) *Service of appeal.* The appellant must serve the appeal petition upon each of the following:

(1) The D/GC at U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416, facsimile (202) 205–6390;

(2) The contracting officer responsible for the procurement affected by a WOSB or EDWOSB determination;

(3) The protested concern (the business concern whose WOSB or EDWOSB status is at issue) or the protester; and

(4) SBA's Office of General Counsel, Associate General Counsel for Procurement Law, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416, facsimile number (202) 205–6873.

(c) *Certificate of Service.* The appellant must attach to the appeal petition a signed certificate of service meeting the requirements of § 134.204(d).

§ 134.706 What are the service and filing requirements?

The provisions of § 134.204 apply to the service and filing of all pleadings and other submissions permitted under this subpart unless otherwise indicated in this subpart.

§ 134.707 When does the D/GC transmit the protest file and to whom?

Upon receipt of an appeal petition, the D/GC will send to OHA a copy of the protest file relating to that determination. The D/GC will certify and authenticate that the protest file, to the best of his or her knowledge, is a true and correct copy of the protest file.

§ 134.708 What is the standard of review?

The standard of review for an appeal of a WOSB or EDWOSB protest determination is whether the D/GC's determination was based on clear error of fact or law.

§ 134.709 When will a Judge dismiss an appeal?

(a) The presiding Judge must dismiss the appeal if the appeal is untimely filed under § 134.703.

(b) The matter has been decided or is the subject of adjudication before a court of competent jurisdiction over such matters. However, once an appeal has been filed, initiation of litigation of the matter in a court of competent jurisdiction will not preclude the Judge from rendering a final decision on the matter.

§ 134.710 Who can file a response to an appeal petition and when must such a response be filed?

Although not required, any person served with an appeal petition may file and serve a response supporting or opposing the appeal if he or she wishes to do so. If a person decides to file a response, the response must be filed within seven (7) business days after service of the appeal petition. The response should present argument.

§ 134.711 Will the Judge permit discovery and oral hearings?

Discovery will not be permitted, and oral hearings will not be held.

§ 134.712 What are the limitations on new evidence?

The Judge may not admit evidence beyond the written protest file nor permit any form of discovery. All appeals under this subpart will be decided solely on a review of the evidence in the written protest file, arguments made in the appeal petition, and response(s) filed thereto.

§ 134.713 When is the record closed?

The record will close when the time to file a response to an appeal petition expires pursuant to § 134.710.

§ 134.714 When must the Judge issue his or her decision?

The Judge shall issue a decision, insofar as practicable, within fifteen (15) business days after close of the record.

§ 134.715 Can a Judge reconsider his decision?

(a) The Judge may reconsider an appeal decision within twenty (20) calendar days after issuance of the written decision. Any party who has appeared in the proceeding, or SBA, may request reconsideration by filing with the Judge and serving a petition for reconsideration on all the parties to the appeal within twenty (20) calendar days after service of the written decision. The request for reconsideration must clearly show an error of fact or law material to the decision. The Judge may also reconsider a decision on his or her own initiative.

(b) The Judge may remand a proceeding to the D/GC for a new WOSB or EDWOSB determination if the D/GC fails to address issues of decisional significance sufficiently, does not address all the relevant evidence, or does not identify specifically the evidence upon which it relied. Once remanded, OHA no longer has jurisdiction over the matter, unless a new appeal is filed as a result of the new WOSB or EDWOSB determination.

Dated: February 19, 2010.

Karen Gordon Mills,

Administrator.

[FR Doc. 2010–3887 Filed 3–2–10; 4:15 pm]

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Thursday,
March 4, 2010

Part III

Securities and Exchange Commission

17 CFR Parts 270 and 274
Money Market Fund Reform; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 270 and 274

[Release No. IC–29132; File Nos. S7–11–09, S7–20–09]

RIN 3235–AK33

Money Market Fund Reform

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission ("Commission" or "SEC") is adopting amendments to certain rules that govern money market funds under the Investment Company Act of 1940. The amendments will tighten the risk-limiting conditions of rule 2a–7 by, among other things, requiring funds to maintain a portion of their portfolios in instruments that can be readily converted to cash, reducing the maximum weighted average maturity of portfolio holdings, and improving the quality of portfolio securities; require money market funds to report their portfolio holdings monthly to the Commission; and permit a money market fund that has "broken the buck" (*i.e.*, re-priced its securities below $1.00 per share), or is at imminent risk of breaking the buck, to suspend redemptions to allow for the orderly liquidation of fund assets. The amendments are designed to make money market funds more resilient to certain short-term market risks, and to provide greater protections for investors in a money market fund that is unable to maintain a stable net asset value per share.

DATES: The rules, rule amendments, and form are effective May 5, 2010. The expiration date for 17 CFR 270.30b1–6T is extended from September 17, 2010 to December 1, 2010. Compliance dates are discussed in Section III of the **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Office of Regulatory Policy, at (202) 551–6792, Division of Investment Management, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–8549.

SUPPLEMENTARY INFORMATION: The Commission is adopting amendments to rules 2a–7 [17 CFR 270.2a–7], 17a–9 [17 CFR 270.17a–9] and 30b1–6T [17 CFR 270.30b1–6T], new rules 22e–3 [17 CFR 270.22e–3] and 30b1–7 [17 CFR 270.30b1–7], and new Form N–MFP [17 CFR 274.201] under the Investment Company Act of 1940 ("Investment Company Act" or "Act").[1]

Table of Contents

I. Background

On June 30, 2009, the Commission issued a release proposing new rules and rule amendments governing the operation of money market funds.[2] Money market funds are open-end management investment companies that are registered under the Investment Company Act. They invest in high-quality, short-term debt instruments such as commercial paper, Treasury bills and repurchase agreements. Money market funds pay dividends that reflect prevailing short-term interest rates and, unlike other investment companies, maintain a stable net asset value per share (or "NAV"), typically $1.00 per share. Money market funds have over $3.3 trillion dollars in assets under management, and comprise over 30 percent of the assets of registered investment companies.[3]

All money market funds are subject to rule 2a–7 under the Investment Company Act. Rule 2a–7, among other things, facilitates money market funds' ability to maintain a stable net asset value per share by permitting them to use the amortized cost method of valuation and the penny-rounding method of pricing.[4] But for rule 2a–7, the Investment Company Act and our rules would require a money market fund to calculate its current net asset value per share by valuing portfolio securities at their current value ("mark-to-market").[5]

Under the amortized cost method, portfolio securities generally are valued at cost plus any amortization of premium or accumulation of discount. The basic premise underlying money market funds' use of the amortized cost method of valuation is that high-quality, short-term debt securities held until maturity will eventually return to their amortized cost value, regardless of any current disparity between the amortized cost value and market value, and would not ordinarily be expected to fluctuate significantly in value.[6] Therefore, the rule permits money market funds to value portfolio securities at their amortized cost so long as the deviation between the portfolio's amortized cost

[1] 15 U.S.C. 80a. Unless otherwise noted, all references to statutory sections are to the Investment Company Act, and all references to rules under the Investment Company Act, including rule 2a–7, are to Title 17, Part 270 of the Code of Federal Regulations [17 CFR 270]. References to "current" rules relate to rules in their current form [17 CFR Part 270 (2009 version)], and references to "amended" rules relate to rules as they will be amended by this Release.

[2] Money Market Fund Reform, Investment Company Act Release No. 28807 (June 30, 2009) [74 FR 32688 (July 8, 2009)] ("Proposing Release"). All references to "proposed" rules relate to rules as proposed in the Proposing Release.

[3] *See* Investment Company Institute, *Trends in Mutual Fund Investing,* Nov. 2009, *available at http://www.ici.org/research/stats/trends/trends_11_09.*

[4] Current rule 2a–7(a)(2) defines the amortized cost method as the method of calculating an investment company's net asset value per share (or "NAV") whereby portfolio securities are valued at the fund's acquisition cost as adjusted for amortization of premium or accretion of discount rather than at their value based on current market factors. The penny-rounding method of pricing means the method of computing a fund's price per share for purposes of distribution, redemption, and repurchase whereby the current net asset value per share is rounded to the nearest one percent. *See* current rule 2a–7(a)(18).

[5] *See* section 2(a)(41) of the Act (defining "value" of fund assets); rule 2a–4 (defining "current net asset value" for use in computing the current price of a redeemable security); and rule 22c–1 (generally requiring open-end funds to sell and redeem their shares at a price based on the funds' current net asset value as next computed after receipt of a redemption, purchase, or sale order).

[6] *See* Valuation of Debt Instruments and Computation of Current Price Per Share by Certain Open-End Investment Companies (Money Market Funds), Investment Company Act Release No. 13380 (July 11, 1983) [48 FR 32555 (July 18, 1983)] ("1983 Adopting Release") at nn.3–7 and accompanying text; Valuation of Debt Instruments and Computation of Current Price Per Share by Certain Open-End Investment Companies (Money Market Funds), Investment Company Act Release No. 12206 (Feb. 1, 1982) [47 FR 5428 (Feb. 5, 1982)] at nn.3–4 and accompanying text.

and current market value *remains* minimal and results in the computation of a share price that represents fairly the current net asset value per share of the fund.[7]

To reduce the likelihood of a material deviation occurring between the amortized cost value of a portfolio and its market-based value, the rule contains several conditions (which we refer to as "risk-limiting conditions") that limit the fund's exposure to certain risks, such as credit, currency, and interest rate risks.[8] In addition, the rule includes certain procedural requirements overseen by the fund's board of directors. One of the most important is the requirement that the fund periodically "shadow price" the amortized cost net asset value of the fund's portfolio against the mark-to-market net asset value of the portfolio.[9] If there is a difference of more than one-half of one percent (or $0.005 per share), the fund's board of directors must consider promptly what action, if any, should be taken, including whether the fund should discontinue the use of the amortized cost method of valuation and re-price the securities of the fund below (or above) $1.00 per share, an event colloquially known as "breaking the buck." [10]

As discussed in significant detail in the Proposing Release, during 2007–2008 money market funds were exposed to substantial losses, first as a result of exposure to debt securities issued by structured investment vehicles ("SIVs"), and then as a result of the default of debt securities issued by Lehman Brothers Holdings Inc. ("Lehman Brothers"). All but one of the funds that were exposed to losses from SIV and Lehman Brothers securities obtained support of some type from their advisers or other affiliated persons, which absorbed the losses or provided a guarantee covering a sufficient amount of losses to prevent the fund from breaking the buck. The Reserve Primary Fund, which held a $785 million position in Lehman Brothers debt, ultimately did not have a sponsor with sufficient resources to support it, and on September 16, 2008 the fund announced that it would re-price its securities at $0.97 per share.[11] It subsequently suspended redemptions as of September 17, 2008.[12]

The cumulative effect of these events, when combined with general turbulence in the financial markets, led to a run primarily on institutional taxable prime money market funds, which contributed to severe dislocations in short-term credit markets and strains on the businesses and institutions that obtain funding in those markets.[13] During the week of September 15, 2008, investors withdrew approximately $300 billion from taxable prime money market funds, or 14 percent of the assets held in those funds.[14] In the final two weeks of September 2008, money market funds reduced their holdings of top-rated commercial paper by $200.3 billion, or 29 percent.[15]

On September 19, 2008, the U.S. Department of the Treasury ("Treasury Department") and the Board of Governors of the Federal Reserve System ("Federal Reserve Board") announced an unprecedented intervention in the short-term markets. The Treasury Department announced its Temporary Guarantee Program for Money Market Funds ("Guarantee Program"), which temporarily guaranteed certain investments in money market funds that decided to participate in the program.[16] This program has now expired.[17] The Federal Reserve Board announced the creation of its Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility ("AMLF"), through which it extended credit to U.S. banks and bank holding companies to finance their purchases of high-quality asset backed commercial paper from money market funds.[18] These programs were effective in containing the run on institutional prime money market funds and providing additional liquidity to money market funds.[19]

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[7] *See* amended rule 2a–7(c)(1), (c)(8)(ii)(B)–(C) (requiring, among other things, that the fund's board of directors promptly consider what action, if any, should be taken if the deviation between the money market fund's current market value and the fund's amortized cost price per share exceeds ½ of 1%).

[8] For example, the current rule requires, among other things, that a money market fund's portfolio securities meet certain credit quality requirements, such as being rated in the top one or two rating categories by nationally recognized statistical rating organizations ("NRSROs"). A fund, moreover, may only invest a limited portion of its portfolio in securities rated in the second highest rating category. *See* current rule 2a–7(c)(3). The current rule also places limits on the remaining maturity of securities in the fund's portfolio. A fund generally may not acquire, for example, any securities with a remaining maturity greater than 397 days, and the dollar-weighted average maturity of the securities owned by the fund may not exceed 90 days. *See* current rule 2a–7(c)(2).

[9] *See* current rule 2a–7(c)(7) (requiring that such shadow pricing be calculated at such intervals as the board of directors determines appropriate and reasonable in light of current market conditions).

[10] *See* current rule 2a–7(c)(7)(ii)(B). Regardless of the extent of the deviation, rule 2a–7 imposes on the board of a money market fund a duty to take appropriate action whenever the board believes the extent of any deviation may result in material dilution or other unfair results to investors or current shareholders. Current rule 2a–7(c)(7)(ii)(C). *See* 1983 Adopting Release, *supra* note 6, at nn.51–52 and accompanying text.

[11] *See* Proposing Release, *supra* note 2, at n.44 and accompanying text. The Reserve Primary Fund distributed the bulk of its assets, and investors have received more than $0.98 on the dollar. *See* Press Release, SEC, Reserve Primary Fund Distributes Assets to Investors (Jan. 29, 2010) *available at http://www.sec.gov/news/press/2010/2010-16.htm.*

[12] In response to a request by The Reserve Fund, the Commission issued an order permitting the suspension of redemptions in certain Reserve funds, to permit their orderly liquidation. *See* In the Matter of The Reserve Fund, Investment Company Act Release No. 28386 (Sept. 22, 2008) [73 FR 55572 (Sept. 25, 2008)] (order). Several other Reserve funds also obtained an order from the Commission on October 24, 2008 permitting them to suspend redemptions to allow for their orderly liquidation. *See* Reserve Municipal Money-Market Trust, et al., Investment Company Act Release No. 28466 (Oct. 24, 2008) [73 FR 64993 (Oct. 31, 2008)] (order).

[13] *See Minutes of the Federal Open Market Committee*, Federal Reserve Board, Oct. 28–29, 2008, at 5, *available at http://www.federalreserve.gov/monetarypolicy/files/fomcminutes20081029.pdf* ("*FRB Open Market Committee Oct. 28–29 Minutes*"). *See also* Press Release, Federal Reserve Board, Board Announces Creation of the Commercial Paper Funding Facility (CPFF) to Help Provide Liquidity *to Term Funding Markets (Oct. 7, 2008), available at http://www.federalreserve.gov/newsevents/press/monetary/20081007c.htm.*

[14] *See* Investment Company Institute, Report of the Money Market Working Group, at 62 (Mar. 17, 2009), *available at http://www.ici.org/pdf/ppr_09_mmwg.pdf* ("ICI Report") (analyzing data from iMoneyNet); *see also* Investment Company Institute, *Money Market Mutual Fund Assets Historical Data, available at http://www.ici.org/pdf/mm_data_2010.pdf* ("ICI Mutual Fund Historical Data").

[15] *See* Christopher Condon & Bryan Keogh, *Funds' Flight from Commercial Paper Forced Fed Move*, Bloomberg, Oct. 7, 2008, *available at http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a5hvnKFCC_pQ.*

[16] *See* Press Release, Treasury Department, Treasury Announces Guaranty Program for Money Market Funds (Sept. 19, 2008), *available at http://www.treas.gov/press/releases/hp1147.htm.* The Program insured investments in money market funds, to the extent of their shareholdings as of September 19, 2008, if the fund chose to participate in the Program. We adopted, on an interim final basis, a temporary rule, rule 22e–3T, to facilitate the ability of money market funds to participate in the Guarantee Program. The rule permitted a participating fund to suspend redemptions if it broke the buck and liquidated under the terms of the Program. *See* Temporary Exemption for Liquidation of Certain Money Market Funds, Investment Company Act Release No. 28487 (Nov. 20, 2008) [73 FR 71919 (Nov. 26, 2008)].

[17] *See* Press Release, U.S. Department of the Treasury, Treasury Announces Expiration of Guarantee Program for Money Market Funds (Sept. 18, 2009), *available at http://www.treas.gov/press/releases/tg293.htm.* The Program expired on September 19, 2009, and rule 22e–3T expired on October 18, 2009.

[18] *See* Press Release, Federal Reserve Board, Federal Reserve Board Announces Two Enhancements to its Programs to Provide Liquidity to Markets (Sept. 19, 2008), *available at http://www.federalreserve.gov/newsevents/press/monetary/20080919a.htm.* The AMLF expired on February 1, 2010. *See* Press Release, Federal Reserve Board, FOMC Statement (Jan. 27, 2010), *available at http://www.federalreserve.gov/newsevents/press/monetary/20100127a.htm.*

[19] During the week ending September 18, 2008, taxable institutional money market funds

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The severity of the problems experienced by money market funds during 2007 and 2008 prompted us to review our regulation of money market funds. We sought to better understand how we might revise rule 2a–7 to reduce the susceptibility of money market funds to runs and reduce the consequences of a run on fund shareholders. Our staff consulted extensively with staff from other members of the President's Working Group on Financial Markets. We talked to many market participants, and reviewed a report from a "Money Market Fund Working Group" assembled by the Investment Company Institute ("ICI Report"), which recommended a number of changes.[20]

Our June 2009 proposals were the product of that review and were, we explained, a first step to addressing regulatory concerns we identified. They were designed to make money market funds more resilient and less likely to break a buck as a result of disruptions such as those that occurred in the fall of 2008. They would give us better tools to oversee money market funds. If a money market fund did break a buck, they would facilitate an orderly liquidation in order to protect fund shareholders and help contain adverse effects on the capital markets and other money market funds. In addition, throughout the Proposing Release we requested comment on additional regulatory changes aimed at further strengthening the stability of money market funds.

We received approximately 120 comments on the rule, including approximately 45 comments from investment companies and their representatives, 22 from debt security issuers, and 30 from individuals, including investors and academics. The comment letters reflected a wide variety of views on most of the topics discussed in the Proposing Release. The investment companies generally supported those aspects of the proposal that were similar to those recommended in the ICI Report.[21] Most of them strongly objected to changes that would affect the stable net asset value that today is the principal characteristic of a money market fund.[22] Most debt security issuers who wrote to us objected to changes designed to increase the credit quality of money market fund portfolios by precluding funds from investing in second tier securities (as defined by the rule).[23] Many fund commenters pointed to the historical stability of funds and urged us to be modest in our changes to rule 2a–7.[24] Some others, however, pointed to the near-cataclysmic events of September 2008 in supporting more substantial changes.[25]

As we stated in the Proposing Release, we recognize that the events of 2007–2008 raise the question of whether further changes to the regulatory structure governing money market funds may be warranted. Accordingly, in the Proposing Release we requested comment on additional, more fundamental regulatory changes, some of which we recognized could transform the business and regulatory model on which money market funds have been operating for more than 30 years.[26] For example, we requested comment on whether money market funds should move to the "floating net asset value" used by other open-end investment companies.[27] We received over 75 comment letters addressing this issue. We have continued to explore possible more significant changes to the regulation of money market funds in light of these comments and through the staff's work with members of the President's Working Group. We expect to issue a release addressing these issues and proposing further reform to money market fund regulation.

II. Discussion

Today we are adopting the amendments we proposed last June to the rules governing money market funds, with several changes made in response to the comments we received. As described below in more detail, we believe these amendments will make money market funds more resilient and less likely to break the buck. They will further limit the risks money market funds may assume by, among other things, requiring them to increase the credit quality of fund portfolios and to reduce the maximum weighted average maturity of their portfolios, and by requiring for the first time that all money market funds maintain liquidity buffers that will help them withstand sudden demands for redemptions. The rule amendments require fund managers to stress test their portfolios against potential economic shocks such as sudden increases in interest rates, heavy redemptions, and potential defaults. They provide investors with more timely, relevant information about fund portfolios to hold fund managers more accountable for the risks they take. They will improve our ability to oversee money market funds. And finally, they provide a means to wind down the operations of a fund that does break the buck or suffers a run, in an orderly way that is fair to the fund's investors and reduces the risk of market losses that could spread to other funds. We believe that these reforms collectively will better protect money market fund investors in times of financial market turmoil and lessen the possibility that the money market fund industry will not be able to withstand stresses similar to those experienced in 2007–08. Thus, we believe that each of the rules and rule amendments we are adopting is necessary or appropriate in the public interest and consistent with the protection of investors and the policies and purposes of the Investment Company Act.[28]

A. Portfolio Quality

Rule 2a–7 limits a money market fund to investing in securities that are, at the time of their acquisition, "eligible securities," which means that securities must have been rated in either of the two highest short-term debt ratings categories from the relevant NRSROs or are comparable to securities that have

experienced net outflows of $165 billion. *See Money Fund Assets Fell to $3.4T in Latest Week,* Associated Press, Sept. 18, 2008. Almost $80 billion was withdrawn from prime money market funds even after the announcement of the Guarantee Program on September 19, 2008. *See* Diana B. Henriques, *As Cash Leaves Money Funds, Financial Firms Sign Up for U.S. Protection,* N.Y. Times, Oct. 2, 2008, at C10. By the end of the week after the announcement, however, net outflows from taxable institutional money market funds had ceased. *See Money Fund Assets Fell to $3.398T in Latest Week, Associated Press,* Sept. 25, 2008.

[20] ICI Report, *supra* note 14.

[21] *See, e.g.,* Comment Letter of T. Rowe Price Associates, Inc. (Sept. 8, 2009) ("T. Rowe Price Comment Letter"); Comment Letter of UBS Global Asset Management (Americas) Inc. (Sept. 8, 2009); Comment Letter of The Vanguard Group, Inc. (Aug. 19, 2009) ("Vanguard Comment Letter").

[22] *See, e.g.,* Comment Letter of BlackRock Inc. (Sept. 4, 2009) ("BlackRock Comment Letter"); Comment Letter of the Dreyfus Corporation (Sept. 8, 2009) ("Dreyfus Comment Letter"); Comment Letter of Goldman Sachs Asset Management, L.P. (Sept. 8, 2009) ("Goldman Sachs Comment Letter").

[23] *See, e.g.,* Comment Letter of American Electric Power Company, Inc. (Sept. 8, 2009) ("Am. Elec. P. Comment Letter"); Comment Letters of the U.S. Chamber of Commerce and Joint Treasurer Signatories (Sept. 3 & Sept. 24, 2009) ("Chamber/Tier 2 Issuers Comment Letter"); Comment Letter of Dominion Resources Services, Inc. (Sept. 8, 2009) ("Dominion Res. Comment Letter").

[24] *See, e.g.,* Comment Letter of Fidelity Investments (Aug. 24, 2009) ("Fidelity Comment Letter"); T. Rowe Price Comment Letter; Comment Letter of USAA Investment Management Company (Sept. 8, 2009) ("USAA Comment Letter").

[25] *See, e.g.,* Comment Letter of Deutsche Investment Management Americas Inc. (Aug. 31, 2009) ("Deutsche Comment Letter"); Comment Letter of Jeffrey N. Gordon, Professor of Law, Columbia Law School (Sept. 9, 2009); Comment Letter of John R. Jay, CFA (Sept. 8, 2009).

[26] *See* Proposing Release, *supra* note 2, at Section III.

[27] *See id.* at Section III.A.

[28] *See* section 6(c) of the Investment Company Act (under which rule 22e–3 and amendments to rules 2a–7 and 17a–9 are adopted).

been so rated in these categories.[29] Before a fund may invest in an "eligible security," a fund's board of directors (or its delegate) must also determine that the security presents minimal credit risks, which must be based on factors pertaining to credit quality in addition to any rating assigned to a security.[30]

We are amending rule 2a–7 to reduce the amount of credit risk a money market fund may assume by limiting the securities in which money market funds may invest. We are also amending provisions of rule 2a–7 that address how NRSRO ratings are used in the rule.

1. Second Tier Securities

We are amending rule 2a–7 to further limit money market funds' investments in "second tier securities." [31] Under the amendments, we are reducing permissible money market fund investments in second tier securities by (i) lowering the permitted percentage of a fund's "total assets" that may be invested in second tier securities from five percent to three percent and (ii) lowering the permitted concentration of its total assets in second tier securities of a single issuer from the greater of one percent or $1 million to one-half of one percent.[32] In addition, money market funds will not be permitted to acquire any second tier security with a remaining maturity in excess of 45 days.[33]

Last June, we proposed to prohibit money market funds from acquiring second tier securities, based on our analysis of the risks that these securities can pose to money market funds. We noted that second tier securities trade in thinner markets, generally have a weaker credit quality profile, and exhibited credit spreads that widened more dramatically than those of first tier securities during the 2008 financial turmoil.[34] During times of financial market stress, we understand that these securities tend to become illiquid and sell in the secondary market, if at all, only at prices substantially discounted from their amortized cost value.[35] This additional risk created by the credit and liquidity profile of second tier securities increases the possibility that a fund holding these securities could break the buck in times of financial market turmoil, with a detrimental impact on fund investors.

Commenters were evenly divided between those supporting our proposed elimination of money market funds' ability to acquire second tier securities and those against our proposal. In general, most money market fund sponsors who commented supported elimination,[36] while most issuers of second tier securities who commented opposed elimination.[37] Those supporting elimination argued that it would be an effective way to increase the safety of money market funds and would reduce the likelihood that a fund would break the buck. Some commenters noted that the money market funds they manage have not acquired second tier securities historically [38] because of second tier issuers' weaker credit profiles, smaller issuer program sizes, and lower market liquidity.[39] A few commenters noted that eliminating money market funds' ability to acquire second tier securities should result in minimal market disruption because money market funds currently hold small amounts of such securities.[40]

Commenters that opposed the proposal disagreed that second tier securities significantly increase risk at money market funds,[41] argued that a complete ban would not be justified on a cost-benefit basis,[42] and stated that a ban would have a material adverse impact on second tier security issuers.[43] Some commenters noted that in a report of default rates through 2006, second tier securities have default rates substantially similar to those of first tier securities.[44] These commenters also noted that rating agencies require that second tier security issuers establish backup liquidity lines of credit providing 100 percent coverage for any issuance.[45] Several commenters agreed

[29] Amended rule 2a–7(a)(12) (eligible security).

[30] Amended rule 2a–7(c)(3)(i) (portfolio quality).

[31] Second tier securities are eligible securities that, if rated, have received other than the highest short-term term debt rating from the requisite NRSROs or, if unrated, have been determined by the fund's board of directors to be of comparable quality. *See* amended rule 2a–7(a)(24) (defining "second tier security"); amended rule 2a–7(a)(23) (defining "requisite NRSROs").

[32] *See* amended rule 2a–7(c)(3)(ii) (portfolio quality—second tier securities); amended rule 2a–7(c)(4)(i)(C) (portfolio diversification—second tier securities); amended rule 2a–7(a)(27) (defining "total assets").

[33] *See* amended rule 2a–7(c)(3)(ii) (portfolio quality—second tier securities).

[34] *See* Proposing Release, *supra* note 2, at Section II.A.1. *See also* Thomas K. Hahn, *Commercial Paper* (Federal Reserve Bank of Richmond, Economic Quarterly Vol. 79/2, Spring 1993), at Fig. 4 (showing historical spreads between A–1/P–1 commercial paper and A–2/P–2 commercial paper between 1974 and 1992, including the tendency of such spreads to spike shortly before and during recessions); Comment Letter of the Investment Company Institute (Sept. 8, 2009) ("ICI Comment Letter") (noting that the market for Tier 2 commercial paper is less deep with fewer issuers than the Tier 1 market).

[35] *See, e.g.,* Comment Letter of Invesco AIM Advisors, Inc. (Sept. 4, 2009) ("Invesco Aim Comment Letter") (noting that it has historically avoided the second tier market due to, among other factors, the less overall market liquidity of second tier securities); ICI Comment Letter. *See also* Proposing Release, *supra* note 2, at Section II.A.1 for a discussion of the wider credit spreads of second tier securities during the fall of 2008, indicating the extent to which such securities traded at a discounted price.

[36] *See, e.g.,* Comment Letter of Bankers Trust Company, N.A. (Aug. 28, 2009) ("Bankers Trust Comment Letter"); BlackRock Comment Letter; Comment Letter of Charles Schwab Investment Management, Inc. (Sept. 4, 2009) ("Charles Schwab Comment Letter"); Dreyfus Comment Letter; Vanguard Comment Letter. *But see* Comment Letter of Federated Investors, Inc. (Sept. 8, 2009) ("Federated Comment Letter"); Fidelity Comment Letter (opposing elimination).

[37] *See, e.g.,* Comment Letter of the American Securitization Forum (Sept. 8, 2009) ("Am. Securit. Forum Comment Letter"); Comment Letter of the U.S. Chamber of Commerce, Center for Capital Markets Competitiveness (Sept. 8, 2009) ("Chamber Comment Letter"); Dominion Res. Comment Letter; Comment Letter of XTO Energy Inc. (Sept. 3, 2009) ("XTO Energy Comment Letter").

[38] *See, e.g.,* Dreyfus Comment Letter; Invesco Aim Comment Letter.

[39] *See, e.g.,* Invesco Aim Comment Letter.

[40] *See, e.g.,* ICI Comment Letter; Comment Letter of TD Asset Management (Sept. 8, 2009) ("TDAM Comment Letter").

[41] *See, e.g.,* Comment Letter of the Association for Financial Professionals (Sept. 8, 2009) ("Assoc. Fin. Professionals Comment Letter"); Chamber/Tier 2 Issuers Comment Letter; Dominion Res. Comment Letter.

[42] *See, e.g.,* Comment Letter of Fund Democracy and the Consumer Federation of America (Sept. 8, 2009) ("CFA/Fund Democracy Comment Letter"); Chamber Comment Letter; Dominion Res. Comment Letter. *But see* TDAM Comment Letter (stating that the benefits of eliminating second tier securities will far outweigh any disadvantages).

[43] *See, e.g.,* Chamber Comment Letter; Dominion Res. Comment Letter; Comment Letter of Treasury Strategies, Inc. (Sept. 8, 2009) ("Treasury Strategies Comment Letter").

[44] Chamber Comment Letter; Chamber/Tier 2 Issuers Comment Letter. These commenters were citing the following study: Moody's Investors Service, *Short-Term Corporate and Structured Finance Rating Transition Rates, 1972–2006* (June 2007), *available at http://www.moodys.com/cust/content/content.ashx?source=staticcontent/free%20pages/regulatory%20affairs/documents/st_corp_and_struc_transition_rates_06_07.pdf* (showing, for example, a default rate for P–1 rated commercial paper over a 365 day time horizon of 0.02% versus a default rate for P–2 rated commercial paper of 0.10% over the same time horizon).

[45] We note, however, that commenters did not discuss conditions under which those issuers would not be permitted to draw on those backup liquidity facilities. It is our understanding that such backup liquidity facilities typically do not provide a full backstop of liquidity support because they contain conditions limiting an issuer's ability to draw on the facility if the issuer has experienced a "material adverse change," which would often occur if the financial situation of the issuer had declined due to financial market or other economic turmoil. *See also* Hahn, *supra* note 34 (stating that backup lines of credit generally will not be useful for a firm whose operating and financial condition has deteriorated to the point where it is about to default on its short-term liabilities because credit agreements often contain "material adverse change" clauses that allow banks to cancel credit lines if the financial condition of the firm changes significantly); Pu Shen, *Why Has the Nonfinancial Commercial Paper Market Shrunk Recently?*, Federal Reserve Bank of Kansas City Economic Review, at 69 (First Quarter 2003) (stating that

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with our statement in the Proposing Release that second tier securities were not the direct cause of strains on money market funds during the 2007–2008 period.[46] A few stated that banning the acquisition of second tier securities would reduce diversification of money market fund portfolio holdings and thus increase risk, noting in particular that a greater percentage of second tier security issuers are not financial institutions, compared to first tier security issuers.[47]

Commenters also asserted that prohibiting the acquisition of second tier securities would have unintended consequences for the capital markets. They stated that it might discourage investors other than money market funds from investing in second tier securities, causing a more substantial reduction in the issuance of second tier securities.[48] Some argued that if second tier issuers are not able to issue sufficient commercial paper, they will be forced to borrow more from banks, which is a less flexible and more costly alternative that will increase borrowing costs.[49] Finally, two commenters stated that a complete ban on the acquisition of second tier securities by money market funds might have a negative effect on those issuers of first tier securities that are viewed as presenting a higher risk of being downgraded, because money market funds may elect not to invest in those securities out of concern that the securities might soon become second tier securities.[50]

The focus of our concerns is and must be on the risk to money market funds and their shareholders from their investments in second tier securities. While, as commenters noted,[51] second tier securities do not appear to be subject to substantially greater default risk than first tier securities they present greater credit spread risk and trade in thinner markets,[52] all of which can lead to greater price volatility and illiquidity in times of market stress.[53] While these characteristics may not pose the same degree of risk to money market funds as the likelihood that a security could default and become worthless, they can adversely affect money market funds' ability to maintain a stable net asset value. This is particularly the case given money market funds' narrow margin for deviation between the mark-to-market value of their assets and the amortized cost value of those assets, and the significant negative impact on money market funds and their investors if a fund breaks the buck.

Several commenters asserted that there are high-quality second tier securities available and that money market funds conducting a thorough credit risk analysis may conclude that certain second tier securities provide a higher yield than first tier securities while still maintaining a risk profile consistent with investment objectives for money market fund investment.[54] In these circumstances, investment in higher yielding second tier securities may benefit fund investors. These commenters suggested that, given these benefits, it may be more appropriate for

commercial paper backup facilities are only meant to provide emergency assistance for short-term liquidity difficulties and not to enhance the credit quality of issues); Standard & Poor's, *2008 Corporate Criteria: Commercial Paper,* at 3 (Apr. 15, 2008) ("Given the size of the CP market, backup facilities could not be relied on with a high degree of confidence in the event of widespread disruption.").

[46] *See, e.g.,* Chamber/Tier 2 Issuers Comment Letter; Federated Comment Letter; Fidelity Comment Letter.

[47] *See, e.g.,* Treasury Strategies Comment Letter; USAA Comment Letter; XTO Energy Comment Letter. We note that while a greater *percentage* of second tier security issuers do appear to be non-financial companies, there are a much greater *number* of non-financial first tier issuers and thus it is not clear that money market funds would not be able to achieve sufficient diversification in their portfolio holdings even if limited to acquiring first tier securities. The Chamber/Tier 2 Issuers Comment Letter also states that prohibiting money market funds from acquiring second tier securities would "cut the pool of *potential issuers* by 43%" (emphasis added). Any diversification is not driven only by the *number* of *potential* issuers, however. It is also determined by the amount of money market fund *assets* that can be *actually* allocated to different issuers. For example, while there are over 200 P–2 rated commercial paper programs, only approximately half of these programs are active in issuing *any* commercial paper and only 16 programs have an average quarterly outstanding issuance in excess of $500 million. *See* American Securit. Forum Comment Letter. In addition, during the market turmoil of 2007 and 2008, second tier securities did not exhibit less risky or countervailing economic metrics relevant to money market funds maintaining a stable net asset value compared to first tier securities. *See* Proposing Release, *supra* note 2, at Section II.A.1, at n.98 and accompanying text and chart. In fact, AA-rated non-financial commercial paper did exhibit significantly greater price stability than A2/P2-rated non-financial commercial paper during the fall of 2008. *See* Federal Reserve Board, Commercial Paper Data, *available at http://www.federalreserve.gov/DataDownload/Choose.aspx?rel=CP* ("Federal Reserve Commercial Paper Data"). *See also* V.V. Chari, L. Christiano & P. Kehoe, *Facts and Myths about the Financial Crisis of 2008,* Federal Reserve Bank of Minneapolis Working Paper 666, at Fig. 7B (Oct. 2008).

[48] *See, e.g.,* Chamber Comment Letter; Dominion Res. Comment Letter; Treasury Strategies Comment Letter. Commenters asserted that eliminating money market funds' ability to acquire second tier securities might have a substantially greater adverse impact on second tier issuers, and thus potentially on capital formation because other investors in second tier securities or lesser quality first tier securities might avoid investment in those securities as a result of our rule amendments. Investor behavior in this regard is difficult to predict. It is equally likely that investors in second tier paper would demand higher yields, increasing issuers' financing costs. As discussed below, however, we are not precluding money market funds from investing in second tier securities. Accordingly, we do not need to reach a conclusion on this matter.

[49] *See, e.g.,* Am. Elec. P. Comment Letter; Chamber/Tier 2 Issuers Comment Letter; Dominion Res. Comment Letter; XTO Energy Comment Letter. We note that money market funds hold a relatively low percentage of outstanding second tier commercial paper. *See* Bank of America Merrill Lynch, Tier-2 US Commercial Paper Market Update (Oct. 15, 2009) (attached to the Am. Securit. Forum Comment Letter) (indicating that over 75% of Tier-2 commercial paper is held by insurance firms, corporations and banks, and that only 11% is held by the asset management industry, which would include money market funds as well as other mutual funds and asset managers).

[50] Fidelity Comment Letter; USAA Comment Letter. Two other commenters suggested that the Commission should consider the effect of banning the acquisition of second tier securities on tax-exempt money market funds, and in particular single-State funds. *See* Dreyfus Comment Letter; Federated Comment Letter. As discussed further in the cost benefit analysis section of this Release, based on our review of money market fund portfolios in September 2008, very few money market funds, including tax-exempt funds, will be impacted by our amendments relating to second tier securities. The greatest potential impact on tax-exempt funds will be the 45-day maturity limitation for acquisition of second tier securities. Given the prevalence of variable rate demand notes among municipal securities, however, we believe that tax-exempt funds should be able to effectively manage the 45-day maturity limit without a substantial impact. Accordingly, we do not believe that a special accommodation for tax-exempt money market funds is required with respect to second tier securities.

[51] *See supra* note 44 and accompanying text.

[52] A few commenters argued that the increase in spreads of Tier 2 commercial paper over Tier 1 commercial paper during the fall of 2008 was due to the Federal Reserve Board's announcement of its creation of the Commercial Paper Funding Facility (CPFF) on October 7, 2008, which only supported issuance of 90-day Tier 1 commercial paper. *See* Chamber Comment Letter; Chamber/Tier 2 Issuers Comment Letter; Dominion Res. Comment Letter. We note, however, that spreads between Tier 1 and Tier 2 commercial paper widened significantly (by well over 300 basis points) immediately after the bankruptcy of Lehman Brothers was announced on September 14, 2008—well before the CPFF was announced on October 7. *See* Federal Reserve Commercial Paper Data, *supra* note 47 (comparing AA and A2/P2 rated 30-day and 60-day nonfinancial commercial paper rates).

[53] We note that second tier securities are also more likely to be downgraded than first tier securities. *See* Moody's Investors Service, *Short-Term Corporate and Structured Finance Rating Transition Rates, supra* note 44, cited in Chamber/Tier 2 Issuers Comment Letter (showing that for each time period, commercial paper with a P–2 rating had a greater percentage chance of being downgraded than commercial paper with a P–1 rating, and that this gap widened over time—for example, P–2 rated commercial paper had a 1.09% chance of being downgraded over a 60-day period compared to a 0.72% chance of P–1 commercial paper being downgraded (a 0.37% difference); P–2 rated commercial paper had a 2.07% chance of being downgraded over a 120-day period compared to a 1.46% chance of P–1 commercial paper being downgraded (a 0.61% difference); and P–2 rated commercial paper had a 4% chance of being downgraded over a 270-day period compared to a 3.18% chance of P–1 commercial paper being downgraded (a 0.82% difference)).

[54] *See, e.g.,* Fidelity Comment Letter; Comment Letter of Thrivent Mutual Funds (Sept. 8, 2009) ("Thrivent Comment Letter").

us to preserve money market funds' ability to invest in second tier securities, but to a reduced degree.[55]

In light of these considerations, we believe that it is not necessary to prohibit money market funds from acquiring second tier securities. Instead, we believe that a better approach is to further limit money market funds' exposure to the risks presented by second tier securities. We expect that this treatment will both satisfy our policy objectives, as further discussed below, while mitigating some of the possible negative consequences noted by commenters that could result from eliminating money market funds' ability to acquire second tier securities. This approach is reflected in three amendments we are adopting to rule 2a–7.

First, as suggested by some commenters,[56] we are reducing the amount of second tier securities that money market funds can acquire from five to three percent of their total assets, in order to reduce money market funds' aggregate exposure to the risks posed by second tier securities.[57] We are concerned that a limit of less than three percent could be equivalent to eliminating money market funds' ability to acquire second tier securities because we understand that investing in second tier securities requires an additional amount of credit analysis.[58] Accordingly, money market funds may not be willing to incur the costs of this additional credit analysis if they could only acquire second tier securities in amounts unlikely to make a meaningful contribution to fund yields.

Second, we are reducing the amount of second tier securities of any one issuer that a money market fund can acquire from one percent of the fund's total assets or $1 million (whichever is greater), to one-half of one percent of the fund's total assets.[59] We requested comment in the Proposing Release on whether the issuer diversification limitations under rule 2a–7 should be further reduced and, if so, to what level.[60] Most commenters focused their response on whether there should be a general increase in the diversification limits under rule 2a–7 for all eligible securities. Many argued against an increase because it would require funds to invest in securities of lower credit quality in order to increase the number of issuers of portfolio securities and satisfy the greater diversification requirement.[61] One commenter, however, recommended that funds not be able to acquire more than one-half of one percent of their assets in *second tier securities* of any particular issuer as a method of limiting money market funds' exposure to the risks of second tier securities.[62]

We are adopting this commenter's suggestion because we believe the limitation will enhance the resilience of money market funds. It should decrease the likelihood that the default of, or significant distress experienced by, any particular second tier issuer alone will cause a money market fund to break the buck. While a money market fund can break the buck due to simultaneous stresses across its portfolio, it also can break the buck due to a sudden decline in the market-based price of a particular security in its portfolio, as was the case with respect to securities of Lehman Brothers during September 2008.[63] In addition, unlike in the case of imposing a one-half of one percent diversification limitation on *all* issuers held in a money market fund's portfolio, given the other limitations on holdings of second tier securities that we are adopting today, a diversification limitation of one-half of one percent that applies only to second tier securities should not require money market funds to invest in a substantially greater number of issuers, and thus should not expose the fund to investing in securities of lower credit quality.[64] In sum, we believe this tightened limitation on exposure to any particular second tier security issuer will provide additional protection to the stability of money market funds.

Third, we are limiting money market funds to acquiring second tier securities with remaining maturities of 45 days or less.[65] Several commenters urged us to adopt this approach to limiting money market funds' exposure to risk from second tier securities.[66] The risks of

[55] *See, e.g.,* Federated Comment Letter (suggesting, as an alternative to eliminating money market funds' ability to acquire second tier securities, further limitations including reducing the percentage of fund assets permitted to be invested in second tier securities and limiting the final maturity of permissible second tier securities). *See also, e.g.,* Am. Elec. P. Comment Letter; Fidelity Comment Letter; USAA Comment Letter (each suggesting, as an alternative to eliminating money market funds' ability to acquire second tier securities, limiting the final maturity of permissible second tier securities to 90 days).

[56] *See* Federated Comment Letter; Comment Letter of the Sargent Shriver National Center on Poverty Law (Jul. 13, 2009) ("Shriver Poverty Law Ctr. Comment Letter"). These commenters did not suggest a particular percentage level to which the permissible aggregate amount of second tier securities that could be acquired should be reduced.

[57] The amendments apply the new limit on second tier securities holdings to all money market funds, including tax-exempt funds. *See* amended rule 2a–7(c)(3). Current rule 2a–7 limits tax-exempt funds' holdings of second tier securities only with respect to conduit securities (*i.e.,* securities issued by a municipal issuer involving an arrangement or agreement entered into with a person other than the issuer that provides for or secures repayment of the security). *See* current rule 2a–7(c)(3)(ii)(B).

[58] In light of our decision not to prohibit the acquisition of second tier securities and after review of comments we received, we are persuaded that the current requirements regarding the rating standards in rule 2a–7 for certain long-term securities with remaining maturities of less than 397 days ("stub securities") are sufficient. We proposed to permit money market funds to acquire only those stub securities that had received a long-term rating in the highest two categories rather than the highest three categories, as permitted under the current rule. *See* current rule 2a–7(a)(10(ii)A). Commenters largely opposed our proposal asserting that standards associated with long-term ratings referenced in the current rule generally are correlated with the standards associated with the highest categories of short-term ratings. *See* BlackRock Comment Letter; Charles Schwab Comment Letter; ICI Comment Letter.

[59] Amended rule 2a–7(c)(4)(i)(C). The limitation also applies to tax-exempt funds, which under the current rule are only subject to the issuer diversification requirement with respect to conduit securities that are second tier. We also are amending rule 2a–7(c)(4)(i)(B) to prohibit each "single State fund" from acquiring more than ½ of 1% of its total assets in second tier securities. We also discussed modification to the guarantor and demand feature diversification provisions under rule 2a–7 in Section II.D of the Proposing Release. In addition to the reduction in the ability of money market funds to acquire second tier securities of any particular issuer, we are proportionately reducing by half the ability of a money market fund to acquire "demand features" or "guarantees" of a single issuer that are second tier securities from 5% to 2.5% of the money market fund's total assets. *See* amended rule 2a–7(c)(4)(iii)(B). We believe that this reduction will provide appropriate protection to money market funds against exposure to any particular guarantor or demand feature provider. We do not believe that we need to reduce this limitation to ½ of 1%, as we are doing with other individual second tier issuer exposures, because in these cases a security holder has recourse to both the security issuer and the issuer of the demand feature or guarantee, and thus there is a lesser chance that an individual company's default or distress will adversely impact the security. We received no comments on this aspect of the Proposing Release.

[60] *See* Proposing Release, *supra* note 2, at Section II.D.

[61] *See, e.g.,* Charles Schwab Comment Letter; Invesco Aim Comment Letter.

[62] *See* Comment Letter of James J. Angel, Professor of Finance, Georgetown University (Sept. 8, 2009). Two other commenters also generally supported greater restrictions on money market funds' ability to acquire securities of any particular issuer. *See* Shriver Poverty Law Ctr. Comment Letter; Comment Letter of C. Stephen Wesselkamper (Sept. 3, 2009) ("C. Wesselkamper Comment Letter").

[63] *See supra* text accompanying note 11.

[64] Under the current rule, a taxable money market fund could invest the greater of 1% or $1 million of its assets in second tier securities of a single issuer. Under the amendments we are adopting today, a money market fund maximizing its investment ability in second tier securities and trying to concentrate its holdings in as few issuers as possible would hold securities of six different second tier security issuers, rather than five second tier issuers under the current rule.

[65] Amended rule 2a–7(c)(3)(ii). We requested comment on this approach in the Proposing Release. *See* Proposing Release, *supra* note 2, at Section II.A.1.

[66] *See, e.g.,* Am. Elec. P. Comment Letter; Fidelity Comment Letter; USAA Comment Letter (all

Continued

second tier securities discussed above can be substantially limited by restricting the length of time that a money market fund is exposed to the risks of that particular security. Securities of shorter maturity will pose less credit spread risk and liquidity risk to the fund because there is a shorter period of credit exposure and a shorter period until the security will mature and pay cash. Moreover, second tier securities with shorter maturities are less likely to be downgraded.[67] In recognition of the role that a shorter maturity can play in reducing second tier securities' risk, the market typically has demanded that such securities be issued at shorter maturities than first tier securities.[68] We believe that limiting the risk arising out of second tier securities through limiting their permissible maturity is appropriate and that a 45-day maturity limit will provide additional protection to investors without causing undue market disruption.[69]

We believe that the above combination of limitations on money market funds' ability to acquire second tier securities will achieve an appropriate balance between reducing the risk that money market funds will not be able to maintain a stable price per share and allowing fund investors to benefit from the higher returns that limited exposure to second tier securities can provide.

2. Eligible Securities

We are amending rule 2a–7 to require that the board of directors of each money market fund (i) designate four or more NRSROs, any one or more of whose short-term credit ratings the fund would look to under the rule in determining whether a security is an eligible security, and (ii) determine at least once each calendar year that the designated NRSROs issue credit ratings that are sufficiently reliable for that use.[70] In addition, funds must identify the designated NRSROs in the fund's statement of additional information ("SAI").[71] Under the amendments, funds may, but are not required to, consider (or monitor) the ratings of other NRSROs under other provisions of the rule.[72]

As we have stated on several occasions, we are concerned with the authority that references to NRSRO ratings in our rules have given certain rating agencies, and whether such references have inadvertently placed an "official seal of approval" on ratings that could adversely affect the quality of due diligence and investment analysis.[73] The debt crisis of 2007–2008 also has given us concern about the reliability of these ratings.[74] Accordingly, we asked in the Proposing Release and in 2008 in a separate release whether we should eliminate or alter our use of ratings by NRSROs in rule 2a–7.[75]

The Proposing Release requested comment on alternative approaches. One approach would have eliminated any references to ratings in rule 2a–7, the effect of which would be to eliminate the floor established by the "eligible security" requirement and rely entirely on fund boards (and their delegates) to determine whether investment in a security involved minimal credit risks. An alternative approach would have maintained references to credit ratings in the rule, but shifted responsibility to fund boards to determine at least annually which NRSROs were sufficiently reliable for the fund to use to determine whether a security is an eligible security that could be considered for investment. Among other things, we requested comment on the minimum number of credit rating agencies we should require that a board designate for this purpose.

Each time we have solicited comments, a substantial majority of commenters has strongly supported retaining the references to NRSRO ratings in the rule.[76] Among other reasons, commenters argued that using credit ratings as a floor for credit quality limits money market fund advisers from taking greater risks that could weaken the rule's risk limiting conditions and thus the protection of investors.[77] Many urged us instead to address the "root causes" of ratings failures rather than remove the safety net provided by the

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suggesting that permissible second tier security maturities be limited to a 90-day maximum); Thrivent Comment Letter (suggesting that permissible second tier security maturities be limited to a 45-day maximum). Given the need for money market funds to adjust quickly to changes in market risk to avoid breaking the buck (and given that based on historical experience second tier securities are unlikely to be issued with a 90-day maturity limit), we believe that a 45-day maturity limit is more prudent than a 90-day maturity limit.

[67] *See* Moody's Investors Service, *Short-Term Corporate and Structured Finance Rating Transition Rates, supra* note 44 (showing that P–2 rated commercial paper had a 98.79% chance of being rated P–2 or higher over a 30-day period, but a 96.31% chance of being rated P–2 or higher over a 90-day period, and a 92.75% chance of maintaining this rating level over a 180-day period).

[68] For example, the average maturity of outstanding non-asset backed second tier commercial paper as of November 20, 2009 was 25.6 days compared to 52.2 days for non-asset backed first tier commercial paper. *See* Federal Reserve Board, Average Maturity by Category for Outstanding Commercial Paper, *available at http://www.federalreserve.gov/releases/cp/maturity.htm* (last visited Dec. 2009). The Federal Reserve Board also has reported that during each of 2007, 2008, and 2009, on average over 96% of non-financial A2/P2 commercial paper had a maturity of 40 days or less at issuance. *See* Federal Reserve Board, Volume Statistics for Commercial Paper, A2/P2 Nonfinancial, *available at http://www.federalreserve.gov/releases/cp/volumestats.htm* (last visited Dec. 2009).

[69] One commenter asserted that because so little of second tier commercial paper currently is issued with a maturity of greater than 45 days, imposing a maturity limitation of 45 days on second tier securities eligible for money market fund investment would have little effect on a fund's overall exposure to credit risk. *See* ICI Comment Letter. We disagree. It is true that in recent years, second tier commercial paper has been issued largely at maturities of less than 45 days. *See supra* note 68. This fact may mean that there will be less cost impact from our amendments limiting money market funds to acquiring second tier securities with maturities of 45 days or less. It does not mean, however, that this historical maturity distribution will hold true in the future, and that money market funds will not seek in the future to invest in longer term second tier securities to achieve a higher yield, which would expose money market funds to the higher risks associated with longer term second tier securities.

[70] Amended rule 2a–7(a)(11)(i). As under the definition of "NRSRO" in current rule 2a–7, a designated NRSRO may not be an affiliated person of the issuer of, or any insurer or provider of credit support for, the security. Amended rule 2a–7(a)(11)(ii). The definition of "designated NRSRO" incorporates the definition of NRSRO in section 3(a)(62) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. 78c(a)(62)]. Amended rule 2a–7(a)(11).

[71] Amended rule 2a–7(a)(11)(iii) (requiring the fund to disclose in its SAI its designated NRSROs and any limitations with respect to the fund's use of such designation). *See* Part B of Form N–1A. In addition, funds must identify designated NRSROs in Form N–MFP with respect to each of the fund's portfolio securities. *See infra* Section II.E.2.

[72] *See infra* notes 116–118, 121 and accompanying text.

[73] *See, e.g.,* References to Ratings of Nationally Recognized Statistical Rating Organizations, Investment Company Act Release No. 28327 (July 1, 2008) [73 FR 40124 (July 11, 2008)] ("NRSRO References Proposing Release"); References to Ratings of Nationally Recognized Statistical Rating Organizations, Investment Company Act Release No. 28939 (Oct. 5, 2009) [74 FR 52358 (Oct. 9, 2009)] ("NRSRO References Adopting Release").

[74] *See* NRSRO References Proposing Release, *supra* note 73, at text following n.6.

[75] *See* Proposing Release, *supra* note 2, at text following n.110; NRSRO References Proposing Release, *supra* note 73, at Section III.A.

[76] *See, e.g.,* Comment Letter of Calvert Group, Ltd. (Sept. 8, 2009) ("Calvert Comment Letter"); Federated Comment Letter; ICI Comment Letter. *See also* Comment Letter of the American Bar Association (Committee on Federal Regulation of Securities and Committee on Securitization and Structured Finance) (Sept. 12, 2008) (available in File No. S7–19–08); Comment Letter of the Institutional Money Market Funds Association (Sept. 5, 2008) (available in File No. S7–19–08); Comment Letter of the Securities Industry and Financial Markets Association (Dec. 8, 2009) (available in File No. S7–19–08). Comment letters submitted in File No. S7–19–08 are available on the Commission's Web site at: *http://www.sec.gov/comments/s7-19-08/s71908.shtml.*

[77] *See, e.g.,* Dreyfus Comment Letter; ICI Comment Letter; Comment Letter of J.P. Morgan Asset Management (Sept. 8, 2009) ("J.P. Morgan Asset Mgt. Comment Letter"). *See also* Proposing Release, *supra* note 2, at nn.108–110 and accompanying text.

credit ratings requirements of the rule.[78] Some disputed suggestions that inclusion of ratings in rule 2a–7 encourages fund managers to over-rely on the ratings, pointing to provisions in the rule that specifically require independent analysis by fund managers.[79] One commenter argued that NRSRO ratings provide "an additional, independent check on the investment manager's judgment."[80] By acting as a floor, the commenter argued, these ratings keep all money market funds operating at or above the same level,[81] and they restrain any particular money market fund from taking (and exposing investors to) greater risks than other competing money market funds in order to gain a competitive advantage in a highly yield-sensitive market.[82]

Only a few commenters have supported removing references to NRSRO ratings.[83] These commenters principally asserted that removing credit ratings references would prevent fund boards and advisers from overreliance on NRSRO ratings and encourage advisers to make independent decisions about whether a security presents a credit risk.[84] Other commenters, however, countered that eliminating NRSRO ratings from the rule would do nothing to prevent a fund manager from being highly dependent upon NRSRO ratings in making its minimal credit risk determination.[85]

Commenters did, however, largely support the approach of allowing funds to designate a minimum number of NRSROs that the fund would look to under rule 2a–7 in determining whether a security is an eligible security. They asserted that NRSRO designation would encourage competition among NRSROs to achieve designation and reduce the cost of subscribing to all NRSROs' ratings.[86] They also noted that this approach would permit funds to focus better on standards, methods, and current ratings levels developed by designated NRSROs.[87] Several commenters expressed concern, however, that requiring designation of only three NRSROs would result in funds designating the three largest NRSROs, which could further entrench their market dominance.[88] Other commenters stated that designating NRSROs could disadvantage small NRSROs with well-developed capabilities regarding certain investments and suggested that the fund should have flexibility to rely on the particular NRSROs it determines have the best expertise to evaluate a particular security.[89] Some commenters, while supporting designation of NRSROs, asserted that fund boards are unprepared to make such determinations and urged that fund advisers be given the responsibility.[90]

The Commission is committed to reevaluating the use of NRSRO ratings in our rules. Recently we eliminated references to NRSRO ratings in several rules where we concluded that they were no longer warranted as serving their intended purposes and where the elimination was consistent with the protection of investors.[91] Today, as discussed in more detail below, we are eliminating the only provision in rule 2a–7 that limits money market funds to investing in a type of security *only* if it is rated.[92] We continue to work to further the goals of the Credit Rating Agency Reform Act in order to improve the quality and reliability of securities ratings.[93]

We have found no evidence that suggests that over-reliance on NRSRO ratings contributed to the problems that money market funds faced during the debt crisis. Our staff closely examined, for example, why some money market funds held securities issued by certain SIVs that became distressed in 2007. The staff exams appear to indicate that the minimal creditworthiness evaluations of SIVs made by advisers to funds that held those SIVs differed from the evaluations made by advisers to funds that did not invest in those SIVs in the emphasis the advisers gave to particular elements of the analysis.[94] Had fund managers relied too heavily on credit rating agencies, we would have expected to see far more funds

[78] *See, e.g.,* Comment Letter of the Northern Funds and Northern Institutional Funds—Independent Trustees (Sept. 8, 2009) ("Northern Funds Indep. Trustees Comment Letter"); Comment Letter of the Tamarack Funds Trust (Sept. 8, 2009) ("Tamarack Funds Comment Letter"). *See also* Comment Letter of Charles Schwab & Co., Inc. (Sept. 5, 2008) (available in File No. S7–19–08); Comment Letter of Dechert LLP (Sept. 5, 2008) (available in File No. S7–19–08); Comment Letter of Realpoint (Aug. 14, 2008) (available in File No. S7–19–08). We have recently adopted rule amendments designed to improve our regulation and oversight of NRSROs, which help address the integrity of their rating procedures and methodologies. *See* Amendments to Rules for Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 61050 (Nov. 23, 2009) [74 FR 63832 (Dec. 4, 2009)]; Amendments to Rules for Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 59342 (Feb. 2, 2009) [74 FR 6456 (Feb. 9, 2009)]; Oversight of Credit Rating Agencies Registered as Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 55857 (June 5, 2007) [72 FR 33564 (June 18, 2007)].

[79] *See* ICI Comment Letter; TDAM Comment Letter.

[80] *See* ICI Comment Letter.

[81] *See, e.g.,* Comment Letter of State Street Global Advisors (Sept. 8, 2009) ("State Street Comment Letter"); Vanguard Comment Letter.

[82] *See* ICI Comment Letter. *See also* J.P. Morgan Asset Mgt. Comment Letter; Comment Letter of Stradley Ronon Stevens & Young, LLP (Sept. 8, 2009) ("Stradley Ronon Comment Letter").

[83] *See* Comment Letter of James B. Burnham, Business School Professor, Duquesne University (Aug. 27, 2009) ("J. Burnham Comment Letter"); Comment Letter of Moody's Investors Service (Sept. 8, 2009) ("Moody's Comment Letter"); Comment Letter of James L. Nesfield (Jul. 4, 2009) ("J. Nesfield Comment Letter"); Comment Letter of the Shadow Financial Regulatory Committee (Sept. 14, 2009) ("Shadow FRC Comment Letter"); Comment Letter of John M. Winters, CFA (Jul. 23, 2009). *See also* Comment Letter of Professor Lawrence J. White (Sept. 5, 2008) (available in File No. S7–19–08); Comment Letter of Professor Frank Partnoy (Sept. 5, 2008) (available in File No. S7–19–08); Comment Letter of the Government Finance Officers Association (Sept. 5, 2008) (available in File No. S7–19–08); Comment Letter of the Financial Economists Roundtable (Dec. 1, 2008) (available in File No. S7–19–08).

[84] *See* J. Burnham Comment Letter; Moody's Comment Letter; J. Nesfield Comment Letter; Shadow FRC Comment Letter. One commenter asserted that transparency of portfolio holdings was a better approach than using references to NRSRO ratings. J. Nesfield Comment Letter. We note that we are amending rule 2a–7 to require money market funds to disclose information about their portfolio holdings each month on their Web sites. *See infra* Section II.E.1.

[85] Stradley Ronon Comment Letter (removing the references would not prevent advisers from relying too heavily on NRSRO ratings under their own internal credit risk analysis).

[86] *See, e.g.,* Federated Comment Letter; Fidelity Comment Letter; ICI Comment Letter.

[87] *See* Am. Securit. Forum Comment Letter.

[88] *See, e.g.,* Comment Letter of DBRS Limited (Sept. 8, 2009) ("DBRS Comment Letter"); Comment Letter of Wells Fargo Funds Management, LLC (Sept. 8, 2009) ("Wells Fargo Comment Letter"). Three of the 10 NRSROs registered with the Commission issued approximately 97% of all outstanding ratings across all categories reported to the Commission for 2008. *See* SEC, Annual Report on Nationally Recognized Statistical Rating Organizations (Sept. 2008) at 10.

[89] *See* Tamarack Funds Comment Letter; TDAM Comment Letter.

[90] *See* Comment Letter of the American Bar Association (Committee on Federal Regulation of Securities) (Sept. 9, 2009) ("ABA Comment Letter"); Comment Letter of the Mutual Fund Directors Forum (Sept. 8, 2009) ("MFDF Comment Letter"); Comment Letter of Northern Funds and Northern Institutional Funds (Sept. 8, 2009) ("Northern Funds Comment Letter").

[91] *See* NRSRO References Adopting Release, *supra* note 73.

[92] *Compare* amended rule 2a–7(a)(12) *with* current rule 2a–7(a)(10)(i)(B).

[93] *See, e.g.,* Proposed Rules for Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 61051 (Nov. 23, 2009) [74 FR 63866 (Dec. 4, 2009)] (proposing rule amendments and a new rule requiring each NRSRO to: (1) Furnish an annual report describing the steps taken by the firm's designated compliance officer during the fiscal year with respect to certain compliance matters; (2) disclose additional information about sources of revenues on Form NRSRO; and (3) make publicly available information about revenues of the NRSRO attributable to persons paying the NRSRO for the issuance or maintenance of a credit rating).

[94] *See* Proposing Release, *supra* note 2, at note 135.

holding Lehman Brothers commercial paper when it defaulted than we did.[95]

The current provisions of rule 2a–7 were designed to prevent excess reliance on credit rating agencies.[96] Under rule 2a–7, adequate ratings alone do not provide a basis for eligibility. As we have noted before, a determination that a security is an eligible security is a necessary but not sufficient finding in order for a fund to acquire the security.[97] The rule also requires fund boards (which typically rely on the fund's adviser) to determine that the security presents minimal credit risks, and specifically requires that determination "be based on factors pertaining to credit quality in addition to any ratings assigned to such securities by an NRSRO." [98] Thus, credit ratings provide an important *but not exclusive* input into the investment decision-making process, [99] and the unreliability or low quality of ratings issued by one or more NRSROs can (and should) be addressed by an investment adviser providing a thorough analysis of the security to determine if it involves minimal credit risks. The use of these ratings provides an independent perspective on the creditworthiness of short-term securities that we have considered, in part, when determining whether to exercise our exemptive authority to permit money market funds to use the amortized cost method of valuation.[100]

This is not to say, however, that we are content with the current approach of rule 2a–7. Any one of the growing number of NRSROs, regardless of its expertise in rating short-term securities of the type held by money market funds, could have deemed a security unfit for a money market fund to acquire or, conversely, deemed a security to be eligible for investment by a money market fund. To address this concern, we are adopting amendments to rule 2a–7 that shift responsibility to money market fund boards for deciding which NRSROs they will use in determining whether a security is an eligible security for purposes of the rule.

The amendments are designed, among other things, to foster greater competition among NRSROs to produce the most reliable ratings in order to obtain designation by money market fund boards. Accordingly, we believe this approach will improve the utility of the rule's use of NRSRO ratings as threshold investment criteria, and is consistent with the goals of Congress in passing the Credit Rating Agency Reform Act.[101]

a. Number of Designated NRSROs

Under amended rule 2a–7, each money market fund must designate in its registration statement [102] at least four NRSROs that the fund will use to determine, among other things, whether a security is an eligible security.[103] Several commenters expressed concern that permitting funds to designate only three NRSROs (which was recommended by the ICI Report) would simply embrace the current market for ratings, which is dominated by three rating agencies.[104] We share these commenters' concerns and thus are requiring funds to designate at least four NRSROs, an approach recommended by commenters as a way to foster competition among NRSROs to develop a specialized service of providing short-term ratings to money market funds and improve independent credit ratings for purposes of the rule.[105] We also believe that the designation of at least four NRSROs will allow funds to designate smaller NRSROs that specialize in rating particular investments.

Under the amendments, a fund could designate an NRSRO with respect to short-term credit ratings for only certain types of issuers or securities.[106] This

[95] *See Fitch: Market Challenges Offer 'Lessons' for Rated Money Market Funds,* Business Wire (Oct. 1, 2008) ("Most funds were able to eliminate or minimize their exposure to securities issued by SIVs and Lehman Brothers by limiting their absolute exposures and/or taking measures to scale back their risk as the credit picture deteriorated."). *See* Bloomberg Terminal Database, LEH (Equity) CRPR (historical short-term credit ratings for credit rating agencies, including Moody's and Fitch, indicate that these agencies did not downgrade their ratings of Lehman Brothers debt before the company filed for bankruptcy); Bob Ivry, Mark Pittman & Christine Harper, *Sleep-At-Night-Money Lost in Lehman Lesson Missing $63 Billion,* Bloomberg (Sept. 8, 2009), *available at http://www.bloomberg.com/apps/news?pid=email_en&sid=aLhi.S5xkemY* (historical short-term credit ratings for Moody's and Fitch indicate that these credit rating agencies did not downgrade their ratings of Lehman Brothers debt before the company filed for bankruptcy); David Segal, *The Silence of the Oracle,* New York Times (Mar. 18, 2009) (noting Moody's rated Lehman Brothers' debt A2 before the firm's bankruptcy).

[96] *See* Revisions to Rules Regulating Money Market Funds, Investment Company Act Release No. 18005 (Feb. 20, 1991) [56 FR 8113 (Feb. 27, 1991)] ("1991 Adopting Release") at Section II.A.

[97] *See, e.g., id.* at text accompanying n.18.

[98] Current rule 2a–7(c)(3)(i).

[99] *See* 1991 Adopting Release, *supra* note 96, at Section II.A.

[100] *See* 1983 Adopting Release, *supra* note 6, at paragraphs following n.31.

[101] *See* Senate Committee on Banking, Housing, and Urban Affairs, Credit Rating Agency Reform Act of 2006, S. Rep. 109–326, at 1 (2006) ("Senate Report No. 109–326") ("The purpose of the 'Credit Rating Agency Reform Act' * * * is to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry."). In 2007, pursuant to the Credit Rating Agency Reform Act, we adopted rules to implement a program for registration and Commission oversight of NRSROs ("NRSRO Rules"). Oversight of Credit Rating Agencies Registered as Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 55857 (June 5, 2007) [72 FR 33564 (June 18, 2007)] ("NRSRO Rules Adopting Release"). Our rule amendments regarding NRSROs have been designed, among other things, to foster greater competition among NRSROs and to encourage more of them to enter the market. *See, e.g.,* Amendments to Rules for Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 61050 (Nov. 23, 2009) [74 FR 63832 (Dec. 4, 2009)], at nn.1–3 and accompanying text (*citing* Senate Report No. 109–326, at 1).

[102] The fund must disclose the designated NRSROs, including any limitations with respect to the fund's use of such designation, in the fund's SAI. Amended rule 2a–7(a)(11)(iii). In response to our request for comment on whether to require disclosure of designated NRSROs in money market funds' SAI, *see* Proposing Release, *supra* note 2, at text accompanying n.115, several commenters suggested we require disclosure of designated NRSROs in the fund's registration statement. *See, e.g.,* Fidelity Comment Letter (recommending disclosure in the fund's SAI); Invesco Aim Comment Letter (same); ICI Comment Letter (recommending disclosure in the fund's prospectus or Web site). In contrast, one commenter objected to disclosure of designated NRSROs in the fund's registration statement on the grounds that investors do not consider this information to be material and stickering the fund's prospectus for each change in designation would be too costly. *See* Federated Comment Letter. We believe that the identity of each designated NRSRO is not essential information for investors, but that some investors may find it useful, and therefore are requiring it in the SAI. *See generally* Form N–1A at General Instruction C.2(b) (noting that the purpose of the SAI is to provide additional information about a fund that is not necessary to be in the prospectus but that some investors may find useful).

[103] Amended rule 2a–7(a)(11). A fund may designate only credit rating agencies that are registered as NRSROs with the Commission under the Exchange Act and the rules adopted under those provisions. *See* section 15E of the Exchange Act [15 U.S.C. 78o–7]; 17 CFR 240.17g–1. In response to our request for comment, one commenter recommended permitting designation of unregistered credit rating agencies on the grounds that this could promote competition. *See* Moody's Comment Letter. Two commenters opposed designation of an unregistered credit rating agency, and one of these commenters argued that the potential for introducing under-researched data into the marketplace could disrupt the orderly functioning of markets. *See* DBRS Comment Letter; Invesco Aim Comment Letter. In light of the enhanced disclosure obligations and ongoing rulemaking initiatives designed to improve the quality and reliability of ratings issued by registered NRSROs, we are maintaining the requirement that only credit rating agencies registered as NRSROs with the Commission may be designated under the rule. *See, e.g., supra* note 93.

[104] *See, e.g.,* DBRS Comment Letter; Wells Fargo Comment Letter; C. Wesselkamper Comment Letter.

[105] *See* DBRS Comment Letter; Fidelity Comment Letter. In response to our request for comment on the appropriate number of NRSROs a board should designate, another commenter requested we require funds to designate at least five NRSROs as a way to encourage new entrants to the market. *See* Federated Comment Letter. *See also* Proposing Release, *supra* note 2, at text following n.113 and at n.117 and accompanying text (requesting comment).

[106] Amended rule 2a–7(a)(11)(i)(A) (providing that a money market fund's board of directors may designate an NRSRO whose short-term credit ratings with respect to any obligor or security or

would allow a fund, for example, to designate an NRSRO that specializes in securities issued by insurance companies or banks.[107] This approach, which was supported by several of the commenters,[108] may further encourage new entrants among NRSROs that fund managers might not otherwise consider designating due to lack of confidence in ratings outside the NRSROs' areas of expertise.

b. Board Designation and Annual Determination

The amendments require each money market fund's board of directors to designate the NRSROs on which the fund will rely for purposes of the rule. In addition, the board must determine at least once each calendar year that each designated NRSRO issues credit ratings that are sufficiently reliable for such use.[109] Before designating an NRSRO and before making its annual determination, a board should have the benefit of the adviser's evaluation regarding the quality of the NRSRO's short-term ratings.[110] We would anticipate that the board's designations and annual determinations would be based on recommendations of the fund adviser and its credit analysts, who would have evaluated each NRSRO based on their experiences in addition to any information provided by the NRSRO. We would expect the adviser's annual evaluation to be based, among other things, on an examination of the methodology an NRSRO uses to rate securities, including the risks they measure, and the NRSRO's record with respect to the types of securities in which the fund invests, including asset backed securities.[111] The reliability of a newly registered NRSRO could be evaluated based upon the quality and relevant experience of the personnel conducting the rating. Even with the recommendations of the fund adviser, we recognize that ultimately, a board's determination whether an NRSRO's ratings are "sufficiently reliable" for use in determining whether a security is an eligible security will be a matter of judgment.

Many commenters expressed concern that a money market fund's board of directors does not have the necessary expertise to designate NRSROs, and urged that we delegate the authority to fund advisers to make the designation.[112] A number of these commenters seem to assume that we would require fund boards to engage in the type of analysis that we expect the adviser will provide the board for its consideration. We believe that it will be useful for boards to consider the designation of NRSROs, a role not unlike the role that many boards play in approving other matters of substantial significance to the operation of the fund.[113] Board designation and determination (at least once a calendar year) will serve as a check on fund managers that may have conflicts of interest in selecting an NRSRO from which the manager seeks a rating for the fund (in order to facilitate marketing the fund),[114] or an NRSRO that may accommodate the fund's investment in higher yielding, riskier securities.[115]

c. Operation of the Rule

Once a board has designated the NRSROs, the fund could look to the designated NRSROs whenever it has to consider credit ratings under rule 2a–7 unless and until the board changes the designation.[116] A fund must look to only the designated NRSROs to determine whether the security is an eligible security, a rated security,[117] and whether it is a first tier or a second tier

particular obligors or securities will be used by the fund to determine whether a security is an eligible security).

[107] A fund that has designated an NRSRO to use in determining the eligibility of insurance company-issued securities need not review or monitor any class of ratings that the NRSRO issued with respect to other securities or their issuers in which the fund may invest. A fund adviser (under delegated authority) would be free (but not required) to consider these ratings in determining whether the non-insurance company-issued security (or its issuer) presents minimal credit risks. Amended rule 2a–7(c)(3)(i).

[108] *See* DBRS Comment Letter; Moody's Comment Letter; Wells Fargo Comment Letter.

[109] Amended rule 2a–7(a)(11)(i). We are requiring funds to perform the annual determination once each calendar year to simplify compliance so that a fund is not in violation of the rule if the board's determination occurs soon after the year anniversary of the previous determination.

[110] Fund boards may, however, also find an NRSRO's record with respect to long-term securities to be helpful in evaluating the overall quality of the organization.

[111] *See* Moody's Comment Letter (advocating that any board designation be "based on the board's assessment of ratings' attributes, such as quality, comparability and historical performance."). We have recently adopted rule amendments relating to NRSROs that should help fund advisers and their credit analysts in performing their evaluations. Our amendments require NRSROs, among other things, to disclose information about their ratings methodology, experience and performance. For example, NRSROs must disclose in their applications their ratings experience, performance in assessing the creditworthiness of securities and obligors, procedures and methodologies used in determining credit ratings, the types of conflicts NRSROs face and how they manage those conflicts, and the qualifications of the NRSRO's credit analysts. *See* Items 6, 7 and Exhibits 1, 2, 6, 7, 8 of Form NRSRO. In addition, NRSROs currently are required to disclose on a public Web site a random sample of 10% of the ratings histories of issuer paid ratings in each class of credit ratings for which the NRSRO is registered and has issued 500 or more issuer paid credit ratings. Rule 17g–2(a)(8) and (d) [17 CFR 240.17g–2(a)(8) and (d)]. In June of this year, these public disclosures will have to include ratings action histories for *all* credit ratings initially determined on or after June 26, 2007. *See* Amendments to Rules for Nationally Recognized Statistical Ratings Organizations, Exchange Act Release No. 61050 (Nov. 23, 2009) [74 FR 63832 (Dec. 4, 2009)] at text following n.19 and compliance date.

[112] *See, e.g.,* ABA Comment Letter; MFDF Comment Letter; Northern Funds Comment Letter. These commenters responded to our discussion of this approach in the Proposing Release. *See* Proposing Release, *supra* note 2, at text following n. 118.

[113] *See, e.g.,* amended rule 2a–7(c)(8) (requiring the fund's board of directors to establish procedures to stabilize the fund's NAV, including procedures providing for, among other things, the board's periodic review of the fund's shadow price, the methods used for calculating shadow price, and what action, if any, the board should initiate if the fund's shadow price exceeds amortized cost by more than ½ of 1%).

[114] *See* Wells Fargo Comment Letter.

[115] *See* Moody's Comment Letter (noting that the more narrowly defined the categories of ratings for which a designation can be obtained, the "easier it could be for mutual funds to game the system, *e.g.,* by dropping an NRSRO from its list of designated NRSROs for a particular class of ratings because the NRSRO has introduced a more conservative ratings methodology.").

[116] We have changed the term from "NRSRO" to "designated NRSRO" throughout the rule each time it is used. As a consequence, changes in the fund's designated NRSROs may affect the ability of the fund to purchase a new security or roll over a current holding, and may require the fund to reassess promptly whether the security continues to present minimal creditworthiness and dispose of a current holding. This is because a new designation of an NRSRO (or a removal of a designated NRSRO) is now treated under the rule as the equivalent of a credit event requiring the fund board or adviser to consider the rating of the newly designated NRSRO (or preclude the consideration of a formerly designated NRSRO). For example, if a fund acquires an unrated security (*i.e.,* a security (or its issuer) that does not have a short-term rating from a designated NRSRO) that the fund considered to be equivalent to a first tier security and the fund thereafter designates a new NRSRO that has rated the security as a second tier security, the fund must then treat the security as a second tier security. The fund would not be required to dispose of the security (although it would be required to perform a credit assessment, which might prompt it to dispose of the security) even if the position in the security exceeds the fund's limits on second tier securities, because compliance with the limits on second tier securities is determined immediately after the fund acquires the security. *See* amended rule 2a–7(c)(3)(ii); 2a–7(c)(4)(i)(C). The fund could only roll over the position to the extent that immediately after the rollover the fund would meet the rule's limits on second tier securities. *See* amended rule 2a–7(a)(1) (defining "acquisition" to include a rollover of a position in security).

[117] Amended rule 2a–7(a)(23) (defining the term "requisite NRSROs"). For purposes of determining whether a rated security is an eligible security and a first tier security, rule 2a–7 requires the fund to determine whether the security (or its issuer) has received a short-term rating from the requisite NRSROs. Amended rule 2a–7(a)(12)(i). Under the amended rule, the requisite NRSROs must be drawn from the designated NRSROs. Amended rule 2a–7(a)(23). Thus, for example, a security that is rated as a first tier security by two NRSROs, only one of which is a designated NRSRO, and as a second tier security by another designated NRSRO, is a split-rated security and thus a second tier security. *Id.*

security.[118] Under the amendments, a security is an unrated security if neither the security nor its issuer has received a short-term rating from any of the designated NRSROs.[119] Accordingly, before investing in the security, the fund adviser must make a determination that the security is of comparable quality to a rated security.[120] After a money market fund acquires a security, the fund manager must monitor only the ratings of designated NRSROs to determine whether a change in those ratings requires the board to reassess promptly whether the security continues to present minimal credit risks or to dispose of a portfolio security that is no longer an eligible security.[121]

3. Asset Backed Securities

We are amending rule 2a–7 to eliminate a requirement that an asset backed security ("ABS") be rated by at least one NRSRO in order to be an eligible security that a money market fund may acquire.[122] As a consequence, funds may acquire an unrated asset backed security that otherwise meets the requirements of rule 2a–7, including those requirements that apply to unrated securities.[123]

In 1996, we limited funds to investing in rated ABSs because we thought that NRSROs played a beneficial role in assuring that assets underlying an ABS were properly valued and would support the cash flows required to fund the ABS, and we were concerned that fund advisers may not be in as good a position to perform the legal, structural, and credit analysis that the rating agencies performed.[124] As discussed in the Proposing Release, NRSROs rapidly downgraded ABSs from their status as first tier securities over a short time period during 2007–2008.[125] The NRSROs thus did not seem to play a role in buttressing the minimal credit risk analysis of fund management sufficient to warrant a requirement that *all* ABSs be rated to be eligible for money market fund investment. We would otherwise have expected a slower, more orderly downgrading process for these ABSs, which would have permitted money market funds to gradually roll off the paper.

We received only a few comments on this approach.[126] One NRSRO commenter supported removing this requirement.[127] Two urged us to keep the ratings requirement for ABSs,[128] and one of those asserted that ratings "under appropriate criteria" enhance the liquidity of ABSs and provide credit and structural expertise and research that benefit investors.[129] As noted above, we do not believe that NRSRO ratings of ABSs served this function during the 2007–2008 turmoil in the ABS marketplace, and we no longer believe that the provision of rule 2a–7 that has required such ratings for *all* ABSs is warranted as serving its intended purpose, and thus we are eliminating this requirement.[130]

We do note, however, that as part of the minimal credit risk analysis that any money market fund must conduct before investing in an ABS, the board of directors (or its delegate) should: (i) Analyze the underlying ABS assets to ensure that they are properly valued and provide adequate asset coverage for the cash flows required to fund the ABS under various market conditions; (ii) analyze the terms of any liquidity or other support provided by the sponsor of the ABS; and (iii) otherwise perform the legal, structural, and credit analyses required to determine that the particular ABS involves appropriate risks for the money market fund.[131]

B. Portfolio Maturity

We are adopting amendments to rule 2a–7 to further restrict the maturity limitations on a money market fund's portfolio in order to reduce the exposure of money market fund investors to certain risks, including interest rate risk, spread risk, and liquidity risk. First, we are reducing the maximum weighted average portfolio maturity permitted by the rule from 90 days to 60 days. Second, we are adopting a 120-day limit on the weighted average life of a money market fund's portfolio, which will limit the portion of a fund's portfolio that could be held in longer term adjustable-rate securities. Finally, we are deleting a provision in the rule that permitted certain money market funds to acquire Government securities with extended maturities of up to 762 calendar days.

1. Weighted Average Maturity

We are amending rule 2a–7 to require that each money market fund maintain a dollar-weighted average portfolio maturity (WAM) appropriate to its objective of maintaining a stable net asset value or price per share, but in no case greater than 60 days.[132] We believe that such a limit on the maximum WAM will result in money market funds that are more resilient to changes in interest rates that may be accompanied by other market shocks, and thus reduce the likelihood of a run and better protect money market fund investors. As we explained in the Proposing Release, a portfolio weighted towards securities with longer maturities increases the fund's exposure to interest rate risk, amplifies spread risk, and decreases the

[118] Amended rule 2a–7(a)(12) (defining "eligible security"); amended rule 2a–7(a)(14) (defining "first tier security"); and amended rule 2a–7(a)(24) (defining "second tier security").

[119] Amended rule 2a–7(a)(30) (defining "unrated security" by reference to amended rule 2a–7(a)(21), which defines a "rated security" as, among other things, a security that has received or been issued by an issuer that has received a short-term rating by a designated NRSRO).

[120] Amended rule 2a–7(a)(12) (defining "eligible security").

[121] Amended rule 2a–7(c)(7)(i)(A) (requiring a fund's board of directors to reassess promptly whether the security continues to present minimal credit risks and cause the fund to take action if: (i) The security ceases to be a first tier security because it no longer has the highest rating from the requisite NRSROs or, in the case of an unrated security, the board determines it is no longer of comparable quality to a first tier security, or (ii) the security is an unrated security or second tier security and the fund's investment adviser (or portfolio manager) becomes aware since acquisition of the security that any designated NRSRO has given it a rating below the designated NRSRO's second highest short-term rating); amended rule 2a–7(c)(7)(ii)(B) (requiring a fund to dispose of a security that ceases to be an eligible security as soon as practicable consistent with achieving an orderly disposition of the security, absent a finding by the board of directors that disposal of the portfolio security would not be in the best interests of the money market fund).

[122] We are thus amending current rule 2a–7(a)(10)(ii) to eliminate paragraph (B) and renumber paragraph 2a–7(a)(10)(ii)(A) as 2a–7(a)(12)(ii).

[123] *See, e.g.,* amended rule 2a–7(a)(12)(ii); (c)(3)(iv)(C); (c)(7)(i)(A)(*1*). As under the current rule, if an asset backed security is a rated security, it will be required to satisfy the rule's ratings criteria. Amended rule 2a–7(a)(12)(i).

[124] Revisions to Rules Regulating Money Market Funds, Investment Company Act Release No. 21837 (Mar. 21, 1996) [61 FR 13956 (Mar. 28, 1996)] at Section II.E.4; Revisions to Rules Regulating Money Market Funds, Investment Company Act Release No. 19959 (Dec. 17, 1993) [58 FR 68585 (Dec. 28, 1993)] ("1993 Proposing Release") at nn.110–112 and accompanying text.

[125] *See* Proposing Release, *supra* note 2, at Section II.A.4. *See also* Standard & Poor's, *Global Structured Finance Default and Transition Study—1978–2008: Credit Quality of Global Structured Securities Fell Sharply in 2008 Amid Capital Market Turmoil* (Feb. 25, 2009), *available at http://www2.standardandpoors.com/portal/site/sp/en/ca/page.article/3,3,3,0,1204847668460.html* (showing greater default rate and significantly greater downgrades in structured finance securities).

[126] We also solicited comment generally on whether, and if so how, we should amend rule 2a–7 to generally address the risks presented by ABSs. We received a number of comments in response to this request, and will consider them in developing further amendments to rule 2a–7.

[127] *See* Moody's Comment Letter.

[128] *See* Am. Securit. Forum Comment Letter; Shriver Poverty Law Ctr. Comment Letter.

[129] *See* Am. Securit. Forum Comment Letter.

[130] *See* Statement of Lawrence J. White, SEC Roundtable to Examine Oversight of Credit Rating Agencies at 2 (Apr. 15, 2009) (initial ratings on bonds securitized from subprime residential mortgages "proved to be excessively optimistic"—especially for the bonds based on mortgages originated in 2005 and 2006).

[131] *See* 1993 Proposing Release, *supra* note 124, at nn.108–111 and preceding and accompanying text.

[132] *See* amended rule 2a–7(c)(2).

ability of a fund to pay redeeming shareholders.[133]

Most commenters that addressed this proposal supported further reducing the maximum WAM of fund portfolios in order to reduce the funds' exposure to related risk. Those commenters were divided between those supporting the 60-day maximum WAM that we proposed[134] and those supporting a reduction to 75 days.[135] Other commenters argued for no reduction at all (*i.e.,* leaving the limit at 90 days).[136] Commenters supporting a maximum WAM limitation of 60 days believed that such a reduction would be appropriate to increase the stability and liquidity of money market funds[137] and would reduce funds' exposure to interest rate risk.[138] One asserted that a 60-day limitation is appropriate as it prioritizes a money market fund's safety and liquidity over yield.[139]

Commenters supporting a maximum WAM of 75 days argued that such a limitation would achieve the Commission's goal of reducing funds' exposure to interest rate risk while providing funds with sufficient flexibility to invest in high quality securities when shorter term investments are scarce.[140] Some expressed concern about whether a 60-day WAM would reduce a money market fund's ability to generate sufficient yield.[141] Still others argued that a shorter WAM could make some money market funds more risky because of the alternative investment strategies they might employ as a result.[142] Finally, two commenters opposing any change in the maximum WAM permitted by rule 2a–7 argued that liquidity risk to funds is more appropriately limited by other aspects of our amendments to rule 2a–7, and that the resulting reduction in yield would "homogenize" money market funds to such an extent that investors may be driven to invest in unregulated funds, thus increasing systemic risk.[143]

We believe that the maximum WAM permissible for money market funds should be reduced to 60 days in order to reduce the likelihood of funds breaking the buck. The increased resilience to simultaneous stresses from interest rate and other risks that a money market fund would achieve through a maximum WAM of 60 days is significant. A fund with a 90-day WAM could withstand an instantaneous change in interest rates of 200 basis points before breaking the buck.[144] In contrast, a fund with a WAM of 60 days could withstand an interest rate change of 300 basis points without breaking the buck.[145] Although an interest rate change of such a magnitude may be unlikely to occur,[146] funds must also be able to withstand multiple shocks occurring simultaneously, such as those that occurred in September 2008 when there was a simultaneous increase in LIBOR rates and widening spreads due to credit deterioration and liquidity pressures, together with extraordinary redemptions.[147]

A fund with a lower WAM has significantly greater protection in the circumstances described above. For example, a fund with a 90-day WAM facing a change in credit spreads of 50 basis points and redemptions of 10 percent would break the buck with an interest rate change of a little more than 100 basis points.[148] Greater shocks from an even larger increase in spreads or redemptions would only lessen that interest rate cushion—last fall increases in spreads and redemptions were considerably above this level.[149] A fund with a 60-day WAM would be in a better position to withstand multiple shocks without breaking the buck than if it maintained a 90-day or 75-day WAM.[150]

We disagree with those commenters that asserted that a reduction of maximum permissible WAM would have a significant adverse effect on money market funds' investment strategies or yield. We have not observed such adverse effect in funds with WAMs below 60 days or a greater tendency to invest in riskier short-term

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[133] *See* Proposing Release, *supra* note 2, at Section II.B.1.

[134] *See, e.g.,* Goldman Sachs Comment Letter; Comment Letter of the Institutional Money Market Funds Association (Sept. 8, 2009) ("IMMFA Comment Letter"); Northern Funds Indep. Trustees Comment Letter.

[135] *See, e.g.,* Charles Schwab Comment Letter; Comment Letter of GE Asset Management Incorporated (Sept. 8, 2009) ("GE Asset Mgt. Comment Letter"); T. Rowe Price Comment Letter.

[136] *See, e.g.,* State Street Comment Letter; Comment Letter of Victory Capital Management (Sept. 8, 2009) ("Victory Cap. Mgt. Comment Letter"); Wells Fargo Comment Letter.

[137] *See* Tamarack Funds Comment Letter.

[138] *See* TDAM Comment Letter.

[139] *See* Invesco Aim Comment Letter.

[140] *See, e.g.,* Charles Schwab Comment Letter; GE Asset Mgt. Comment Letter; ICI Comment Letter.

[141] *See, e.g.,* Charles Schwab Comment Letter; Comment Letter of Crane Data LLC and Money Fund Intelligence (Aug. 31, 2009) ("Crane Data Comment Letter"); T. Rowe Price Comment Letter.

[142] One commenter noted that a WAM limitation longer than 60 days would allow a fund to improve the credit profile of its portfolio by substituting longer term Government securities for shorter term corporate securities. *See* BlackRock Comment Letter. Another commenter argued that a reduction would lead to fund portfolios with a "barbelled" maturity structure in which the fund balanced the low yield offered by the large amount of very short-term securities it would be required to hold with an offsetting amount of riskier longer term securities, which could increase the riskiness of fund portfolios. *See* Comment Letter of Waddell & Reed/Ivy Fund Portfolio Managers (Sept. 8, 2009) ("Waddell & Reed Comment Letter"). Another stated that higher risk issuers tend to be limited to issuing shorter maturity securities, so a shorter WAM limitation could increase a fund's credit risk profile. *See* Wells Fargo Comment Letter.

[143] *See* Fidelity Comment Letter; State Street Comment Letter. Several commenters also asserted that any reduction in WAM would increase issuers' reliance on short-term funding, also increasing systemic risk. *See, e.g.,* Am. Securit. Forum Comment Letter; State Street Comment Letter; Wells Fargo Comment Letter.

[144] *See* Fidelity Comment Letter.

[145] Our staff supplemented stress test analysis conducted by commenters with more data points and stress scenarios to illustrate the impact on a money market fund's net asset value per share from multiple stresses on that fund's portfolio. A fund with a 75-day WAM could withstand an interest rate change of less than 250 basis points without breaking the buck. We note that these scenarios also represent the most conservative scenarios because they assume that the money market fund started with a market-based net asset value of $1.00. It is our understanding that at any point in time, a large number of money market funds will not start from a market-based net asset value of $1.00—many will start with a market-based net asset value of less than a dollar and thus a smaller interest rate change will cause the funds to break the buck.

[146] Interest rate shocks of a 300 basis point magnitude over a relatively short period of time have occurred, although not since the late 1970s. *See* Federal Reserve Bank of New York, Historical Changes of the Target Federal Funds and Discount Rates, 1971 to present, *available at http://www.newyorkfed.org/markets/statistics/dlyrates/fedrate.html.* In low interest rate environments (such as today), a shock in interest rates could occur if the Federal Reserve determines to raise interest rates quickly, for example, to stave off inflation as the economy recovers or to strengthen the U.S. dollar.

[147] *See* Proposing Release, *supra* note 2, at nn.47–48, 53, 63, 66–67 and accompanying text. *See also infra* note 178 (discussing the increase in LIBOR during the financial crisis). Many money market fund portfolio holdings at the time were tied to LIBOR.

[148] This assumes a weighted average life limitation of 120 days. A fund with a 75-day WAM could withstand a 50 basis point increase in credit spreads across its portfolio, 10% redemptions, and an increase in interest rates of 125 basis points before breaking the buck, assuming a 120-day weighted average life.

[149] In addition, we note that spreads have widened to significant degrees in the past. *See, e.g.,* Benjamin N. Friedman & Kenneth N. Kuttner, *Why Does the Paper-Bill Spread Predict Real Economic Activity?,* NBER Working Paper No. 3879, at Fig.1 (Oct. 1991) (showing historical spreads for 6-month commercial paper over 6-month Treasury bill rates from 1959 to 1990).

[150] Based on staff review of various stress test scenarios, a fund with a 60-day WAM could withstand a 50 basis point increase in credit spreads across its portfolio, 10% redemptions, and an increase in interest rates of over 150 basis points before breaking the buck, again assuming a weighted average life limitation of 120 days. Others have recognized that exposure to multiple stresses may call for a lower WAM. *See, e.g.,* Standard & Poor's, *Fund Ratings Criteria: Market Price Exposure,* at 3 (2007), *available at http://www2.standardandpoors.com/spf/pdf/events/MMX709.pdf* (stating that money market funds with a greater liquidity risk due to a smaller asset size or shareholder composition may need to maintain a lower WAM than 60 days).

securities or to follow riskier portfolio strategies to increase yield. These funds do not appear to have had great difficulties in creating portfolios that generated competitive yields and attracted investors.[151] Indeed, many domestic money market funds currently limit their WAM to a maximum of 60 days voluntarily, a limit they likely would have discontinued if they had experienced the management or competitive difficulties suggested by commenters.[152] No commenter reported to us that any of these funds were doing so. We acknowledge that one consequence of our amendments may be to further "homogenize" fund portfolios as managers have fewer avenues to acquire yield by exposing the funds to risk, but we believe that the level of potential homogenization is justified to reduce the risk to investors that a money market fund will break the buck. In addition, we are not persuaded by comments that a likely consequence of a shortened maximum WAM will be riskier portfolios. Accordingly, we are adopting the 60-day WAM limitation as proposed.

2. Weighted Average Life

We are adopting, as proposed, a requirement that limits the dollar-weighted average life to maturity of a money market fund's portfolio to 120 calendar days.[153] Unlike weighted average maturity, the weighted average life (or "WAL") of a portfolio is measured without reference to any rule 2a–7 provision that otherwise permits a fund to shorten the maturity of an adjustable-rate security by reference to its interest rate reset dates.[154] The WAL limitation thus restricts the extent to which a fund can invest in longer term securities that may expose a fund to spread risk.[155]

We proposed the WAL limitation because we were concerned that the traditional WAM limitation of rule 2a–7 does not require that a manager of a money market fund limit the spread risk associated with longer term adjustable-rate securities.[156] These securities are more sensitive to credit spreads than short-term securities with final maturities equal to the reset date of the longer term security.[157] The WAL limitation will provide an extra layer of protection for funds and their shareholders against spread risk, particularly in volatile markets. We proposed a 120-day limit as a prudent limit recommended to us in the ICI Report and one that we understand is currently used by some money market fund managers.[158] We requested comment on whether a higher or lower WAL limitation would be more appropriate.

Twenty-one commenters supported adding a WAL limit to the rule.[159] One large money market fund manager, for example, described the WAL as "a very prudent addition to the rule that, combined with the minimum liquidity requirements * * * represents an important and substantive risk reduction in the permissible construction of a money fund portfolio."[160] Another acknowledged that "the risk that such a security will begin to deviate significantly from its Amortized Cost increases with its maturity," and agreed that "the new 120-day WAL limit should control this risk."[161]

Two commenters generally opposed a WAL limitation.[162] One urged us to consider, instead, revising the maturity-shortening provisions of rule 2a–7 to require money market funds to measure the maturity of adjustable-rate securities by reference to their final legal maturity date rather than the date at which the interest rate resets.[163] Such a change

[151] Similarly, European stable value money market funds do not appear to have had these difficulties. As the Institutional Money Market Fund Association (IMMFA) notes in its comment letter, IMMFA funds (which manage a significant amount of stable value money market fund assets in Europe) have been required to maintain a maximum WAM of 60 days since 2002. The recent proposals by the European Union's Committee of European Securities Regulators to create common requirements for European money market funds would impose a maximum 60-day WAM for short-term money market funds. *See* Committee of European Securities Regulators Consultation Paper, *A Common Definition of European Money Market Funds,* CESR/09–850 (Oct. 20, 2009), *available at http://www.cesr.eu/index.php?page=consultation_details&id=151.*

[152] For some time and through various interest rate and market environments a large portion of domestic money market funds have maintained a maximum WAM of less than 60 days. According to data provided by the ICI, from January 1998 through April 2009, even the 75th percentile of prime money market funds has maintained an average WAM of 53 days and the 90th percentile of prime money market funds has maintained an average WAM of 65 days. Investment Company Institute, Average Maturity of Taxable Prime Money Market Funds, 1998–2009, *available at http://www.sec.gov/comments/s7-11-09/s71109-14.htm.* The 75th percentile of these funds only reported a WAM in excess of 60 days on 8 monthly occasions out of the 136 monthly time periods reported. We also note that to obtain a top rating from an NRSRO, money market funds must maintain a WAM of no greater than 60 days. According to the iMoneyNet Money Market Fund Analyzer Database, as of November 17, 2009, 61% of money market fund assets were held in funds that were top rated by at least one NRSRO and 34% of money market funds had a top rating from at least one NRSRO.

[153] *See* amended rule 2a–7(c)(2)(iii). This limitation will apply to all money market funds (including taxable and tax-exempt funds).

[154] The Fidelity Comment Letter, the Comment Letter of HighMark Capital Management, Inc. (Sept. 8, 2009) ("HighMark Capital Comment Letter"), and the ICI Comment Letter requested that the Commission amend rule 2a–7 to specify how cash balances held by money market funds would be treated under the WAM and WAL limitations. For purposes of the WAM and WAL limitations, cash balances have a maturity of one day. The Tamarack Funds Comment Letter also suggested that the Commission address extendible notes. For purposes of the WAM and WAL limitations, in calculating the final legal maturity of a security extendible at the option of the issuer the security should be deemed fully extended. *See* amended rule 2a–7(d) (final maturity is determined with reference to the time at which a fund will unconditionally receive payment); *see also* Revisions to Rules Regulating Money Market Funds, Investment Company Act Release No. 21837 (Mar. 21, 1996) [61 FR 13956 (Mar. 28, 1996)] at n. 151 and accompanying text (discussing the unconditional right to receive payment with respect to demand features).

[155] *See* Morgan Stanley, Weighted Average Life: Enhancing Money Market Fund Transparency (2009), *available at http://www.morganstanley.com/msamg/msimintl/docs/en_US/common/comm/200907_mm_update.pdf* ("[Morgan Stanley Investment Management is] introducing WAL to supplement our WAM reporting. The WAL calculation is based on a security's stated final maturity date or, when relevant, the date of the next demand feature when the fund may receive payment of principal and interest (such as a put feature). Accordingly, WAL reflects how a portfolio would react to deteriorating credit (widening spreads) or tightening liquidity conditions. We believe that when viewed alongside WAM, the supplemental WAL disclosure will provide investors with a further degree of insight into our portfolios' structure.").

[156] For example, if the market perceived an issuer's credit risk as deteriorating, the spreads on that issuer's 30-day floating-rate securities would likely widen to a lesser extent than the spreads on that issuer's 397-day floating-rate securities because the longer term securities have a much longer exposure to the issuer's credit risk (assuming neither security had a Demand Feature). Because the WAM limitation allows the use of interest rate reset dates to shorten the maturity of a security, each of the 397-day floating-rate securities and the 30-day floating-rate securities would be considered to have a maturity of one day. In contrast, under the WAL limitation we are today adopting each adjustable-rate security without a Demand Feature would have a maturity equal to its final legal maturity. As a result, if spreads on these securities widen to different degrees due to changing market perceptions of credit risk or liquidity, the WAL limitation will capture these different risk exposures.

[157] *See* Proposing Release, *supra* note 2, at Section II.B.2.

[158] *See, e.g.,* HighMark Capital Comment Letter ("We have been calculating a WAL for years and believe it will more appropriately reflect the total interest rate and spread risk of a portfolio."). *See also* JPMorgan Prime Money Market Fund Quarterly Fact Sheet (Dec. 31, 2009), *available at https://www.jpmorganfunds.com/cm/BlobServer/FS-PMM-P.PDF?blobcol=urldata&blobtable=MungoBlobs&blobkey=id&blobwhere=1158572105887&blobheader=application%2FPDF&blobheadername1=Content-Disposition&ssbinary=true&blobheadervalue1=inline;filename=FS-PMM-P.PDF* (showing the fund's WAL over the previous year).

[159] *See, e.g.,* Bankers Trust Comment Letter; Goldman Sachs Comment Letter; Northern Funds Trustees Comment Letter.

[160] *See* BlackRock Comment Letter.

[161] *See* Federated Comment Letter.

[162] *See* Thrivent Comment Letter; USAA Comment Letter.

[163] *See* USAA Comment Letter. Amended rule 2a–7(d) allows money market funds to shorten the

would dramatically reduce the ability of money market funds to invest in floating rate securities, and as we discuss below, such a reduction may be unnecessary.[164] Another commenter asserted that the WAL limitation was unnecessarily restrictive of prime retail funds and disagreed with our assessment of the spread risk posed by floating-rate Government securities.[165] The commenter, however, offered no explanation of why the exposure to spread risk would have less harmful consequences for a prime retail fund than for other types of funds and thus be of less concern.

Most commenters supported the proposed WAL limit of 120 days,[166] which the ICI comment letter described as "flexible enough even during 'normal' market conditions to not unduly restrict a fund's ability to offer a diversified portfolio of short-term, high quality debt securities."[167] Four commenters supported a WAL with a longer term, with two of these commenters suggesting a longer WAL for government money market funds than for other money market funds.[168] One of these commenters argued that the spread risk associated with Government floating-rate securities is different from the spread risk associated with non-Government securities.[169] Another commenter only supported a WAL limitation applicable to Government securities with maturities of more than two years, arguing that applying a 120-day WAL to all adjustable-rate Government securities would disrupt the short-term debt markets and hinder the ability of Government security issuers to meet internal funding needs.[170]

On balance, we conclude that 120 days is an appropriate length of time for the WAL limitation. A WAL limitation of, for example, 90 days appears to be unnecessarily restrictive to money market funds because it could significantly constrain the range of high-quality, short-term debt securities in which money market funds may invest, particularly when combined with our new minimum liquidity requirements.[171] Such a short WAL limitation also may provide spread risk protection beyond what is reasonably necessary to enhance the stability of money market funds. For a money market fund to break the buck while maintaining a WAL of 90 days, average spreads on *all* securities in the fund's portfolio would have to widen beyond 200 basis points.[172] Other securities held by money market funds may not simultaneously face such spread widening even if the commercial paper market is under stress.[173] Accordingly, protection across an *entire* money market fund portfolio against spread widening of the magnitude experienced in the commercial paper market during the fall of 2008 may be unnecessary.

On the other hand, we are not convinced that a WAL significantly longer than 120 days would be appropriate for a money market fund that is seeking to maintain a stable net asset value. For example, with a 150-day WAL, a money market fund would break the buck with a spread widening of just over 120 basis points (assuming no other simultaneous stresses on the fund's portfolio).[174] Historically, commercial paper spreads, for example, have widened to that extent fairly frequently.[175] Given this limited resilience to spread widening, and given that a money market fund would break the buck even earlier if any other shocks to the fund's portfolio occurred simultaneously, we have determined not to adopt a longer WAL, such as a 150- or 180-day WAL. We note that the European Union's Committee of European Securities Regulators has also recently proposed requiring that short-term money market funds adhere to a maximum 120-day WAL.[176]

Finally, we are not providing for a longer WAL for money market funds that primarily invest in Government securities. While some commenters asserted that adjustable-rate Government securities have a more benign credit risk profile,[177] they are still exposed to widening interest rate spreads to the same extent as non-Government securities and, as we noted in the Proposing Release, spreads on certain adjustable-rate Government securities did widen during the fall of

maturity of an adjustable-rate portfolio security for purposes of the WAM limitation by referring to the security's interest rate reset date, rather than the final legal maturity of the security, if the security has a final maturity of 397 days or less (for corporate securities) or an interest rate that adjusts no less frequently than every 397 days for Government securities.

[164] This comment also implies that rule 2a–7 should only have a WAL limitation (and not a separate WAM limitation). We believe that the WAM and WAL limitations address different risks (with the WAM primarily aimed at limiting interest rate risk and the WAL primarily aimed at limiting spread risk) and thus believe having both limitations in rule 2a–7 protects money market funds and their investors.

[165] *See* Thrivent Comment Letter.

[166] *See, e.g.,* BlackRock Comment Letter; Invesco Aim Comment Letter; Comment Letter of Ridge Worth Capital Management, Inc. ("RidgeWorth Comment Letter").

[167] ICI Comment Letter.

[168] *See* Fidelity Comment Letter (supporting a 150-day WAL for government money market funds and a 120-day WAL for all other money market funds); Victory Cap. Mgt. Comment Letter (supporting a 150-day WAL); C. Wesselkamper Comment Letter (supporting a 180-day WAL for government money market funds and a 150-day WAL for all other money market funds); Wells Fargo Comment Letter (supporting a 180-day WAL).

[169] *See* Fidelity Comment Letter.

[170] *See* Comment Letter of Fannie Mae (Sept. 3, 2009) ("Fannie Mae Comment Letter"). One commenter also argued that a 120-day WAL would limit Government security issuers' ability to meet their funding needs. *See* Fidelity Comment Letter.

[171] One commenter stated that the Commission should not impose a WAL shorter than 120 days, asserting that a shorter limitation would be unnecessarily restrictive and limit a fund's ability to maintain a diversified portfolio of high quality short-term debt securities. *See* Charles Schwab Comment Letter. No commenters supported a shorter WAL than 120 days.

[172] This assumes that there are no other simultaneous shocks to the fund's portfolio from redemption pressures or otherwise. In order to evaluate commenters' discussion about the appropriate length of time for a WAL limitation in the context of the shocks a money market fund might face, we again referred to stress test scenarios.

[173] Such spread widening even in commercial paper has been rare and commercial paper typically only comprises a portion of money market funds' portfolios. Spreads between 3-month commercial paper and the 3-month Treasury bill widened to approximately 300 basis points at the height of the financial crisis in the fall of 2008 and widened similarly in the mid-1970s, but otherwise have rarely widened by 200 basis points in the last 50 years. This analysis is based on commercial paper spread data contained in Bradley T. Ewing, Gerald J. Lynch & James E. Payne, *Monetary Volatility and the Paper-Bill Spread*, in Progress in Economics Research (2006), at p. 58, supplemented with data from Bloomberg on spreads between yields of 3-month commercial paper and the 3-month Treasury bill.

[174] This is based on our staff's analysis of stress test scenarios.

[175] *See* Ewing *et al., supra* note 173, at 58.

[176] *See* Committee of European Securities Regulators Consultation Paper, *A Common Definition of European Money Market Funds,* CESR/09–850 (Oct. 20, 2009), *available at http://www.cesr.eu/index.php?page=consultation_details&id=151.* In addition, Europe's Institutional Money Market Fund Association (IMMFA) recently has adopted changes to its code of conduct that will require IMMFA money market funds to adhere to a maximum 120-day WAL. *See* IMMFA Code of Practice, at Section 40, *available at http://www.immfa.org/About/Codefinal.pdf.*

We also note that the rating agencies have taken varied approaches to limiting the WAL of rated money market funds. Fitch has adopted revised ratings requirements limiting top-rated money market funds to a WAL of 120 days, but allowing longer WALs for lesser rated money market funds. *See* Fitch Ratings, *Global Money Market Fund Rating Criteria* (Oct. 5, 2009), *available at http://www.fitchratings.com/creditdesk/reports/report_frame.cfm?rpt_id=470368.* Standard & Poor's has proposed more restrictive requirements that would limit top-rated money market funds to a WAL of 90 days, subject to upward adjustment to no more than 120 days depending on the extent of Government securities in the money market fund's portfolio. *See* Standard & Poor's, *Principal Stability Fund Rating Criteria* (Jan. 5, 2010), *available at http://www2.standardandpoors.com/spf/pdf/events/FITcon11410RFC.pdf.*

[177] *See, e.g.,* Fidelity Comment Letter. *But see* BlackRock Comment Letter (recent events have shown that spread relationships can be variable for agency securities); Wells Fargo Comment Letter (credit spreads on Government securities widened to a significant degree in 2008).

2008.[178] In addition, many prime money market funds also hold a sizeable portion of Government securities (and may hold even more Government securities after the adoption of rule 2a–7's new liquidity requirements). Given this fact, allowing government money market funds to have a longer WAL solely because they hold more Government securities than prime funds do, does not appear to us to be an approach that treats the risks attendant to longer term, adjustable-rate Government securities equally, and thus appears inappropriate.

3. Maturity Limit for Government Securities

The Commission is deleting a provision of rule 2a–7 that has permitted a fund that relied exclusively on the penny-rounding method of pricing to acquire Government securities with remaining maturities of up to 762 days, rather than the 397-day limit otherwise provided by the rule.[179] As we noted in the Proposing Release,[180] we are unaware of any money market fund that currently relies solely on the penny-rounding method of pricing, and none that holds *fixed-rate* Government securities with remaining maturities of two years, which would involve the assumption of a substantial amount of interest rate risk. We received one comment on this topic, which supported the change.[181] Accordingly, we are adopting this change as proposed.[182]

[178] *See* Proposing Release, *supra* note 2, at Section II.B.2. We understand that many floating-rate securities issued by Federal agencies and outstanding during the financial crisis had rates tied to LIBOR. As noted in the Proposing Release, the "TED" spread (the difference between the U.S. Treasury Bill rate and LIBOR) reached a high of 463 basis points on October 10, 2008. *See id.,* at n.67. We understand that most adjustable-rate Government securities held by money market funds had a final maturity of two years or less and thus limiting the WAL limitation to adjustable-rate Government securities with final maturities greater than two years would not address these securities' spread risk.

[179] *See* current rule 2a–7(c)(2)(ii). In a conforming change, we also are amending as proposed the maturity-shortening provision of the rule for variable-rate Government securities to require that the variable rate of interest is readjusted no less frequently than every 397 days, instead of 762 days as the rule has permitted. *See* amended rule 2a–7(d)(1).

[180] *See* Proposing Release, *supra* note 2, at Section II.B.3.

[181] *See* BlackRock Comment Letter.

[182] We also requested comment in the Proposing Release on whether we should impose a limitation on the maximum final legal maturity of adjustable-rate Government securities that money market funds are permitted to acquire. We received only two comments on this proposal. One commenter encouraged us to constrain any limitation on adjustable-rate Government securities with a final legal maturity in excess of two years. *See* Fannie Mae Comment Letter. Another asserted that the WAL limitation provided a sufficient limitation on the risks posed by long-term adjustable-rate Government securities. *See* Federated Comment Letter. We are aware that WAL creates some limitation of this risk, but that even with a 120-day WAL limitation, a fund would still have some ability to acquire longer term adjustable-rate Government securities. No commenters provided us with any data on the extent of adjustable-rate Government securities outstanding from time to time. Two commenters indicated that these securities experienced variable spreads during the financial crisis. *See* BlackRock Comment Letter; Wells Fargo Comment Letter. In the future, we may reconsider whether to limit the maximum maturity of adjustable-rate Government securities that can be held by money market funds after obtaining additional data.

C. Portfolio Liquidity

We are amending rule 2a–7 to require that money market funds maintain a sufficient degree of liquidity necessary to meet reasonably foreseeable redemption requests and reduce the likelihood that a fund will have to meet redemptions by selling portfolio securities into a declining market. As discussed in the Proposing Release, money market funds generally have a higher and less predictable volume of redemptions than other open-end investment companies.[183] Their ability to maintain a stable net asset value will depend, in part, on their ability to convert portfolio holdings to cash to pay redeeming shareholders without having to sell them at a loss. The liquidity of fund portfolios became a critical factor in permitting them to absorb very heavy redemption demands in the fall of 2008 when the secondary markets for many short-term securities seized up.

Commenters generally agreed with our analysis of the liquidity needs of money market funds. They emphasized the importance of liquidity for money market funds and their ability to meet shareholder redemptions.[184] Several also acknowledged the need to place outside limits on the risks money market funds may take.[185] Most commenters supported amending the rule to impose more robust liquidity requirements, but many disagreed with our specific proposals.[186] Some asserted that the proposed requirements might negatively affect funds' ability to manage their portfolios, place excessive burdens on the board of directors, and affect the markets of some portfolio securities.[187] Others argued that the proposals are not sufficient to meet money market funds' liquidity concerns.[188]

[183] *See* Proposing Release, *supra* note 2, at n.172 and accompanying text.

[184] *See, e.g.,* Comment Letter of the Securities Industry and Financial Markets Association (Sept. 8, 2009) ("SIFMA Comment Letter"); State Street Comment Letter.

[185] *See, e.g.,* Federated Comment Letter; Comment Letter of the Independent Directors Council (Sept. 8, 2009) ("IDC Comment Letter").

[186] *See, e.g.,* State Street Comment Letter (opposing a general liquidity standard and different minimum liquidity thresholds for retail and institutional funds); Invesco Aim Comment Letter (same).

After reviewing the comments, and based on our analysis of redemption activity during the 2008 run on money market funds, we are amending rule 2a–7 to add three new provisions, substantially as proposed, which address different aspects of portfolio liquidity.[189] Together, we believe they will result in money market funds that are better able to absorb large amounts of redemptions.

1. General Liquidity Requirement

We are amending rule 2a–7, as proposed, to require that each money market fund hold securities that are sufficiently liquid to meet reasonably foreseeable shareholder redemptions in light of its obligations under section 22(e) of the Act and any commitments the fund has made to shareholders (the "general liquidity requirement").[190] Depending upon the volatility of its cash flows (particularly shareholder redemptions), this new provision may require a fund to maintain greater liquidity than would be required by the daily and weekly minimum liquidity requirements set forth in the rule and discussed below.

Most commenters who addressed this proposal supported the addition of a general liquidity requirement.[191] They agreed that funds should be required to assess appropriate levels of liquidity above the minimums set forth in the rule.[192] Some commenters, however, expressed concerns that the proposed requirement was too vague,[193] or was

[187] *See, e.g.,* Fidelity Comment Letter; ICI Comment Letter; Shadow FRC Comment Letter.

[188] *See, e.g.,* Fund Democracy/CFA Comment Letter (requesting that the Commission mandate private liquidity insurance for money market funds); HighMark Capital Comment Letter (suggesting a private liquidity bank or that Treasury continue to provide emergency liquidity as possible solutions to address liquidity concerns); Vanguard Comment Letter (asserting that the proposed rule does not address liquidity risk arising from factors other than size of accounts, such as geographical concentration of the shareholders); Waddell & Reed Comment Letter (recommending some type of permanent backstop be available to money market funds); Wells Fargo Comment Letter (suggesting the Federal Reserve set up a secured lending facility to serve as a lender of last resort).

[189] *See* Proposing Release, *supra* note 2, at Section II.C.1–2.

[190] Amended rule 2a–7(c)(5).

[191] *See, e.g.,* ICI Comment Letter; Northern Funds Indep. Trustees Comment Letter; Tamarack Funds Comment Letter.

[192] *See, e.g.,* Federated Comment Letter; ICI Comment Letter.

[193] *See, e.g.,* Charles Schwab Comment Letter; Dreyfus Comment Letter. We note, however, that

unnecessary in light of the minimum daily and weekly liquidity requirements.[194] We disagree. Funds will have different liquidity needs that we cannot sufficiently anticipate and codify in a rule beyond the minimums we are adopting today.[195] Therefore, we believe it is incumbent upon the management of each fund and its board of directors to evaluate the fund's liquidity needs and to protect the fund and its shareholders from the harm that can occur from failure to properly anticipate and provide for those needs.

To comply with this general liquidity requirement, we would expect money market fund managers to consider factors that could affect the fund's liquidity needs, including characteristics of a money market fund's investors and their likely redemptions.[196] For example, some shareholders may have regularly recurring liquidity needs, such as to meet monthly or more frequent payroll requirements. Others may have liquidity needs that are associated with particular annual events, such as holidays or tax payment deadlines. A fund also would need to consider the extent to which it may require greater liquidity at certain times when investors' liquidity needs may coincide. In addition, a volatile or more concentrated shareholder base would require a fund to maintain greater liquidity than a stable shareholder base consisting of thousands of retail investors.[197]

Thus, to comply with rule 2a–7, as amended, money market funds should adopt policies and procedures designed to assure that appropriate efforts are undertaken to identify risk characteristics of shareholders.[198] In other words, fund boards should make sure that the adviser is monitoring and planning for "hot money." In their consideration of these procedures and in the oversight of their implementation, fund boards should appreciate that, in some cases, fund managers' interests in attracting additional fund assets may be in conflict with their overall duty to manage the fund in a manner consistent with maintaining a stable net asset value.[199] We urge directors to consider the need for establishing guidelines that address this conflict.

As some commenters noted, identification of these risks may be more challenging when share ownership is less transparent because the shares are held in omnibus accounts.[200] Funds may seek access to information about the investors who hold their interests through omnibus accounts in addition to considering information about the omnibus accounts, including their aggregate historical redemption patterns and the account recordholder's ability to redeem the entire account.[201]

2. Limitation on Acquisition of Illiquid Securities

We are amending rule 2a–7 to further limit a money market fund's investments in illiquid securities (*i.e.,* securities that cannot be sold or disposed of in the ordinary course of business within seven days at approximately the value ascribed to them by the money market fund).[202] Under the amended rule, a money market fund cannot acquire illiquid securities if, immediately after the acquisition, the fund would have invested more than five percent of its total assets in illiquid securities.[203]

In light of the risk that liquid assets would become illiquid thereby impairing the ability of a money market fund to meet redemption demands, we proposed to prohibit funds from acquiring securities that were, at the time of their acquisition, already illiquid. Many fund commenters objected, arguing such a limitation could preclude them from investing in certain high quality illiquid securities in which money market funds have historically invested,[204] make it more difficult for tax-exempt funds to construct a well-diversified, high quality portfolio,[205] and prevent funds from investing in new types of securities that are illiquid until a market for them has been established.[206] Others asserted that a ban may be unnecessary in light

similar general requirements in rule 2a–7 have not hampered fund managers. *See, e.g.,* current rule 2a–7(c)(2) (requiring a money market fund to maintain a dollar-weighted average portfolio maturity appropriate to its objective of maintaining a stable net asset value per share or price per share). Thus, we do not share commenters' concerns that the general liquidity standard could expose a money market fund to liability based on hindsight review of the fund's subjective determinations and market events.

[194] *See, e.g.,* TDAM Comment Letter. Another commenter asserted that money market funds are already subject to this requirement under section 22(e) of the Act. *See* State Street Comment Letter. The general liquidity requirement, together with rule 2a–7's specific obligations related to illiquid securities and daily and weekly liquid assets, identifies the liquidity obligations that are specific to money market funds.

[195] For example, suggestions that we require each fund to maintain sufficient liquidity to meet redemptions by the largest shareholders seem inadequate because they assume that only those shareholders will redeem. *See* Stradley Ronon Comment Letter; SIFMA Comment Letter.

[196] *See* Proposing Release, *supra* note 2, at text following n.205.

[197] *See* Thrivent Comment Letter (suggesting that we approach portfolio liquidity on the basis of concentration among a fund's shareholders). In determining the amount of liquidity available to meet the requirements of rule 2a–7, funds should not consider the fund's ability to access overdraft protection, lines of credit, and inter-fund borrowing arrangements. *See* Federated Comment Letter (suggesting that we adopt the opposite approach). A fund that borrowed to satisfy redemptions would leverage its holdings, thus amplifying the risk of shareholder losses if the fund eventually broke the buck.

[198] Upon adoption of these amendments, such policies and procedures are, we believe, required under rule 38a–1 under the Investment Company Act (the "compliance rule"). Although two commenters suggested that the requirement to adopt the policies and procedures should be incorporated in rule 2a–7, we do not see a reason to duplicate the requirements for policies and procedures encompassed in the compliance rule. *See* Dreyfus Comment Letter; Comment Letter of Fifth Third Asset Management, Inc. (Sept. 8, 2009) ("Fifth Third Comment Letter"). One commenter recommended that "know your customer" policies apply only to shareholders whose redemptions (in their entirety) would have a material impact on the fund's ability to satisfy redemptions. Stradley Ronon Comment Letter. *See also* SIFMA Comment Letter. Another commenter argued that the relevant shareholder characteristics should be limited to clearly defined parameters such as historical net flows. *See* RidgeWorth Comment Letter. We are not identifying specific characteristics that should be addressed in a fund's policies and procedures because we believe that money market funds are in a better position to do so. For example, concurrent redemptions of several shareholders may have a material effect on a fund's ability to satisfy redemptions even if the shareholders' individual redemptions alone would not have such an effect. Nor are we setting limits as to the scope of the policies and procedures because different money market funds may have different needs in this regard.

[199] *See* Proposing Release, *supra* note 2, at n.180 and accompanying text.

[200] *See, e.g.,* Comment Letter of the Coalition of Mutual Fund Investors (Sept. 10, 2009) ("CMFI Comment Letter"); HighMark Capital Comment Letter.

[201] Some commenters argued that we should require greater transparency of investments held through financial intermediaries to allow funds to better monitor client profiles. *See, e.g.,* BlackRock Comment Letter; CMFI Comment Letter. Funds may seek to access this information in contractual arrangements with their financial intermediaries.

[202] We have construed section 22(e) of the Investment Company Act, which requires registered investment companies to satisfy redemption requests within seven days, to restrict a money market fund from investing more than 10% of its assets in illiquid securities. *See* 1983 Adopting Release, *supra* note 6, at nn.37–38 and accompanying text; Acquisition and Valuation of Certain Portfolio Instruments by Registered Investment Companies (Mar. 12, 1986) [51 FR 9773 (Mar. 21, 1986)], at n.21 and accompanying text; Proposing Release, *supra* note 2, at n.171 and accompanying text.

[203] Amended rule 2a–7(c)(5)(i).

[204] These include, among other securities, term repurchase agreements, some time deposits, and insurance company funding agreements. *See, e.g.,* Am. Bankers Assoc. Comment Letter; Comment Letter of New York Life Investments (Sept. 14, 2009); Comment Letter of Promontory Interfinancial Network, LLC (Sept. 8, 2009); Wells Fargo Comment Letter.

[205] *See* Stradley Ronon Comment Letter; Wells Fargo Comment Letter.

[206] *See, e.g.,* Deutsche Comment Letter; Stradley Ronon Comment Letter; USAA Comment Letter.

of the new daily and weekly liquidity standards.[207]

These comments persuaded us that prohibiting funds from acquiring *any* illiquid securities may have undesirable consequences for money market funds. Instead, we are further limiting the circumstances under which a money market fund may acquire illiquid securities. Under the amended rule, a fund cannot acquire an illiquid security if, after the purchase, more than five percent of the fund's total assets would consist of illiquid securities.[208] Several commenters suggested that we lower the existing 10 percent limit as an alternative to our proposal.[209] We are reducing by half the existing limit in order to strike a balance between our concern regarding liquidity risk, *i.e.,* a fund's ability to satisfy redemption demands if it is holding illiquid securities, and funds' concerns that they retain some ability to make investments in high quality illiquid securities.

We are also amending the rule to define the term "illiquid security" as a security that cannot be sold or disposed of in the ordinary course of business within seven days at approximately the value ascribed to it by the money market fund. At the suggestion of commenters, we would not treat as illiquid a security that could not be sold at amortized cost.[210]

3. Minimum Daily and Weekly Liquidity Requirements

The Commission is adopting new liquidity requirements that mandate each money market fund maintain a portion of its portfolio in cash and securities that can readily be converted into cash. More specifically, we are amending rule 2a–7 to require all *taxable* money market funds to hold at least 10 percent of their total assets in "daily liquid assets" and *all* money market funds to hold at least 30 percent of their total assets in "weekly liquid assets."[211] A money market fund must comply with the daily and weekly liquidity standards at the time each security is acquired.[212]

As we explained in the Proposing Release, current liquidity standards applicable to money market funds presume that a fund is able to find a buyer of its securities.[213] Our new approach would include as a "daily liquid asset" or "weekly liquid asset" only cash or securities that can readily be converted to cash (as discussed below). Thus, a fund should be able to use those assets to pay redeeming shareholders even in market conditions (such as those that occurred in September and October 2008) in which money market funds cannot rely on a secondary or dealer market to provide immediate liquidity.

Commenters who addressed the issue largely supported the introduction of daily and weekly liquidity standards.[214] One large sponsor of money market funds asserted that it "recognize[d] that a meaningful and sustained level of liquidity has the potential to ease concerns of investors and may be useful for unforeseen events."[215] Another agreed that "mandating liquidity requirements will bolster investor confidence in the ability of money market funds to sustain prolonged redemption pressures with increased levels of immediate cash on hand, both on a daily and weekly basis."[216] One commenter, however, urged us to rely solely on the general liquidity requirement, arguing that requiring a minimum requirement would require unnecessary levels of liquidity at times that will not be sufficient during a severe market crisis.[217]

Markets can become illiquid very rapidly in response to events that money market fund managers may not anticipate. The failure of a single fund to anticipate such conditions may lead to a run of the sort we saw in September 2008 affecting all or many funds. We think it would be ill-advised to rely solely on the ability of managers to anticipate liquidity needs, which may arise from events the money market fund manager cannot anticipate or control. We acknowledge our minimum standards alone may not establish sufficient liquidity to allow funds to meet every liquidity crisis, which is why we also are adopting a general liquidity requirement (discussed above) to supplement the minimum requirements.

Distinguishing between Retail and Institutional Funds. In the Proposing Release, we observed that institutional money market funds need (and typically maintain) greater portfolio liquidity. These funds had substantially greater redemption pressure on them in the fall of 2008. During the four-week period ending October 8, 2008, prime institutional funds (or share classes) experienced 30 percent net outflows compared to only 4.6 percent outflows of prime retail funds, according to data compiled by the ICI.[218] Consequently, we proposed to impose substantially lower liquidity requirements on retail funds because the higher thresholds appeared unnecessary and would have resulted in higher costs on them in terms of lower yields. For example, instead of 30 percent "weekly liquid assets," we proposed to require that

[207] *See, e.g.,* Charles Schwab Comment Letter; TDAM Comment Letter.

[208] Amended rule 2a–7(c)(5)(i).

[209] *See* Federated Comment Letter; J.P. Morgan Asset Mgt. Comment Letter; Vanguard Comment Letter; Wells Fargo Comment Letter (all recommending a 5% percent limit). *See also* TDAM Comment Letter (recommending that we reduce the existing limit). Other commenters argued that we should maintain the 10% limit. *See, e.g.,* Charles Schwab Comment Letter; Deutsche Comment Letter.

[210] *See* amended rule 2a–7(a)(19). *See, e.g.,* Charles Schwab Comment Letter; Wells Fargo Comment Letter. The proposed rule defined "liquid security" with reference to the security's "amortized cost value." *See* proposed rule 2a–7(a)(18). Under the amended rule, a money market fund using the amortized cost method will be able to treat as liquid a security that the fund can sell at a price that deviates from the security's amortized cost value, as long as the price approximates the market-based value that the fund has ascribed to the security for purposes of determining its shadow price. Because the market-based value assigned by a money market fund to its securities is the measure that ultimately justifies the fund's use of a stable net asset value, a money market fund should treat as illiquid any security that cannot be sold at a price approximating such market-based value. *See* 1983 Adopting Release, *supra* note 6, at n.37 and paragraphs following n.39.

[211] *See* amended rule 2a–7(c)(5)(ii)-(iii). *See also* amended rule 2a–7(a)(8) (defining "daily liquid assets"); 2a–7(a)(32) (defining "weekly liquid assets"); *infra* notes 229–243 and accompanying text. "Total assets" means with respect to a money market fund using the amortized cost method, the total amortized cost of its assets and, with respect to any other money market fund, the total market-based value of its assets. *See* amended rule 2a–7(a)(27).

[212] *See* amended rule 2a–7(a)(8); 2a–7(a)(32). One commenter recommended that the minimum liquidity standards apply on an ongoing basis, which could require money market funds with holdings that fall below the requirements to sell securities in order to meet the requisite daily and weekly liquid asset thresholds. *See* Fund Democracy/CFA Comment Letter. We do not agree with such an approach. A money market fund whose portfolio does not meet the minimum daily or weekly liquidity standards is not in violation of the rule, but may not acquire any assets other than daily or weekly liquid assets. *See* Dreyfus Comment Letter (requesting that the standards incorporate some flexibility to allow funds not to comply with them under unforeseeable circumstances).

[213] *See* Proposing Release, *supra* note 2, at Section II.C.2.

[214] *See, e.g.,* Calvert Comment Letter; Vanguard Comment Letter.

[215] J.P. Morgan Asset Mgmt. Comment Letter.

[216] Invesco Aim Comment Letter.

[217] *See* Wells Fargo Comment Letter. *See also* T. Rowe Price Comment Letter (the weekly liquidity standard is overly restrictive in light of the daily liquidity standard and other proposed changes to rule 2a–7).

[218] *See* ICI, *Money Market Mutual Fund Assets Historical Data, available at http://www.ici.org/pdf/mm_data_2010.pdf. See also* Proposing Release, *supra* note 2, at n.63 and accompanying text. The Proposing Release also noted that on September 17, 2008, approximately 4% of prime retail money market funds (or share classes) and 25% of prime institutional money market funds had outflows greater than 5%; on September 18, 2008, approximately 5% of prime retail funds and 30% of prime institutional funds had outflows greater than 5%; and on September 19, 2008, approximately 5% of prime retail funds and 22% of prime institutional funds had outflows greater than 5%. Proposing Release, *supra* note 2, at n.185.

retail prime money market funds maintain 15 percent "weekly liquid assets." We proposed to require that each money market fund's board make an annual determination whether a fund was an institutional fund (and thus subject to the higher liquidity requirements) based on the nature of record owners of shares, minimum initial investment requirements, and cash flows from purchases and redemptions.[219]

Most commenters representing money market funds argued against drawing such a regulatory distinction, asserting that there are inherent difficulties in determining the difference between the two types of funds within a generally applicable definition.[220] Commenters asserted that many money market funds include both types of shareholders, and even if one could distinguish a fund with an institutional rather than a retail shareholder base, not all shareholders behave in the same manner and present the same liquidity challenges as their peers.[221] Others expressed concern that the fund's board is not in the best position to make these determinations.[222] The difficulty in drawing bright lines led some commenters to express concern with the competitive consequences that might result when fund boards of directors come to different conclusions.[223]

We anticipated these concerns and requested comment on alternative approaches. One commenter suggested that we treat as institutional a fund that has any class which offers same day liquidity to shareholders.[224] We are uncertain, however, whether institutional investors will be willing to migrate to funds that offer next day liquidity in order to obtain additional yield, and if they did our purpose in drawing the distinction would be defeated. We have similar concerns that institutional investors might invest in retail funds that are defined with respect to minimum initial account sizes or maximum expense ratios, as suggested by other commenters.[225] The suggestion that the distinction be based on average account size raises different concerns, including the appropriate size for this measure and whether it should be based on total assets in omnibus accounts or in the accounts of the underlying shareholders.[226]

Taking into account the comments and after further consideration, we have not identified an effective way at this time to distinguish between types of money market funds to achieve our purpose. Therefore, we have determined to apply the same minimum liquidity standards to both institutional and retail money market funds.[227] We believe the compelling need to limit the liquidity risk of money market funds before another run occurs is reason not to further distinguish retail from institutional money market funds. We intend, however, to consider revisiting our determination to apply the same minimum liquidity standards to all money market funds and reevaluate whether there is a workable objective definition that would accurately identify funds with lower liquidity needs and thus justify applying lower minimum standards to them.[228]

New Daily and Weekly Minimum Liquidity Requirements. We are adopting the higher minimum liquidity thresholds we proposed for all money market funds. Under the final rule, (i) no *taxable* money market fund can acquire any security other than a daily liquid asset if, immediately after the acquisition, the fund would have invested less than 10 percent of its total assets in daily liquid assets, and (ii) no money market fund can acquire any security other than a weekly liquid asset if, immediately after the acquisition, the fund would have invested less than 30 percent of its total assets in weekly liquid assets.[229] We proposed these liquidity levels based on the levels of cash and overnight repurchase agreements that we believe reflect the liquidity needs of money market funds with institutional investors or other investors with similar liquidity needs.[230]

A few commenters supported our proposed levels for daily and weekly liquid assets, but most supported the lower levels recommended in the ICI Report of five percent of portfolios in daily liquid assets and 20 percent of portfolios in weekly liquid assets.[231] Commenters argued that when combined with our other proposals, these thresholds would provide sufficient protection to investors.[232] They also suggested that the lower levels strike an appropriate balance of improving funds' liquidity while providing sufficient flexibility to allow portfolio managers to meet the challenges of different market conditions.[233]

[219] See proposed rule 2a–7(a)(17) (defining "institutional fund"); Proposing Release, *supra* note 2, at Section II.C.2.a-b.

[220] *See, e.g.,* BlackRock Comment Letter; Goldman Sachs Comment Letter; ICI Comment Letter; Comment Letter of TCW Investment Management Company (Sept. 4, 2009); Vanguard Comment Letter. A few commenters expressed support for the distinction. *See, e.g.,* Dreyfus Comment Letter; Fidelity Comment Letter; USAA Comment Letter.

[221] *See, e.g.,* GE Asset Mgt. Comment Letter; SIFMA Comment Letter; State Street Comment Letter. Many also argued that the nature of the financial intermediary record owner does not always correspond to the behavior of the ultimate investor. *See, e.g.,* T. Rowe Price Comment Letter; Vanguard Comment Letter. A few commenters objected for other reasons. *See* Comment Letter of the Committee of Annuity Insurers (Sept. 8, 2009) ("Committee Ann. Insur. Comment Letter") (the characterization as retail or institutional would be confusing for investors); J.P. Morgan Asset Mgt. Comment Letter (retail investors would suffer if they invested in an institutional fund through an omnibus account or a money market fund lost its retail status because of institutional investments in the fund); Comment Letter of Russell Investment Management Company (Sept. 8, 2009) ("Russell Inv. Comment Letter") (money market funds would incur substantial costs to monitor and enforce the distinction); Waddell & Reed Comment Letter (the distinction is punitive for retail money market funds, which have a less concentrated shareholder base).

[222] *See, e.g.,* IDC Comment Letter; Comment Letter of the New York City Bar Association (Sept. 8, 2009) ("NYC Bar Assoc. Comment Letter").

[223] *See, e.g.,* Comment Letter of FAF Advisors (Sept. 9, 2009) ("FAF Advisors Comment Letter") (in the absence of clear guidelines, boards would likely characterize funds with largely the same shareholder base differently); Goldman Sachs Comment Letter (the distinction would create an incentive to characterize a fund as retail so that the fund would be subject to the lower standard); IDC Comment Letter (a board might take a conservative approach and identify more funds as institutional at the expense of the funds' shareholders).

[224] *See* Fidelity Comment Letter. *See also* Charles Schwab Comment Letter; Waddell & Reed Comment Letter.

[225] *See* HighMark Capital Comment Letter; T. Rowe Price Comment Letter.

[226] *See* Waddell & Reed Comment Letter. Similar concerns would arise if we used the definition the ICI uses for its analysis of retail money market share classes, *i.e.,* those "offered primarily to individuals with moderate-sized accounts." *See http://www.ici.org/my_ici/mmf_developments/faqs_money_funds.*

[227] *See* amended rule 2a–7(c)(5)(ii)–(iii).

[228] One commenter suggested that we impose different minimum liquidity standards for government and non-government money market funds. *See* C. Wesselkamper Comment Letter. We believe this is unnecessary, however, given that most Government money market funds have sufficient holdings of Treasury securities and Government agency discount notes to satisfy the rule's requirements for daily and weekly liquid assets. *See* amended rule 2a–7(a)(8) (defining "daily liquid assets"); 2a–7(a)(32) (defining "weekly liquid assets").

[229] Amended rule 2a–7(c)(5)(ii)–(iii).

[230] *See* Proposing Release, *supra* note 2, at n.191 and accompanying and following text.

[231] *See, e.g.,* FAF Advisors Comment Letter; Invesco Aim Comment Letter. Others recommended different standards. *See* Crane Data Comment Letter (5% daily and 15% weekly liquidity for all money market funds); Fifth Third Comment Letter (10% daily liquidity and 25% weekly liquidity for all money market funds); J.P. Morgan Asset Mgt. Comment Letter (5% daily liquidity for taxable money market funds and 20% weekly liquidity for all money market funds); Vanguard Comment Letter (weekly liquidity requirement for institutional funds should not exceed 25%).

[232] *See* Dreyfus Comment Letter ($119 billion redeemed in institutional funds during the week of September 17, 2008 represented 5% of institutional fund assets as reported by iMoneyNet on August 5, 2009); FAF Advisors Comment Letter; Goldman Sachs Comment Letter.

[233] *See* Invesco Aim Comment Letter.

We are concerned that the lower minimum liquidity levels suggested by commenters would be insufficient to establish an adequate liquidity floor for money market funds in the event of a crisis such as we experienced in September 2008. The five percent daily liquidity level would have been insufficient to satisfy redemptions in one-fifth of prime institutional funds (or share classes) on each of three days during the week of September 15, and the 20 percent weekly liquidity level would have been insufficient to address outflows in more than a quarter of those funds during that week.[234] We would be concerned if such a large portion of money market funds had to increase their liquidity quickly in response to sudden market turmoil at the same time the overall market experiences a flight to liquidity.[235] As we noted above, one fund's inability to satisfy redemption requests may lead to a run on other money market funds.[236] Accordingly, we believe that the floor we establish for minimum liquidity requirements must be sufficiently high to allow most money market funds to manage their liquidity risk in a crisis, particularly when they may experience significant redemption requests on successive days.[237] For this reason, we have adopted the higher liquidity thresholds, under which we estimate that approximately 90 percent of retail and institutional funds would have been able to satisfy the level of redemption demands during individual days as well as the week of greatest redemption pressure in the fall of 2008 (September 15–19).[238] At the same time, we appreciate commenters' concerns that the proposed liquidity thresholds would limit funds' flexibility to meet the challenges of different market conditions. In order to address those concerns as well as our concerns regarding liquidity risk, the amendments preserve funds' ability to invest in a limited amount of illiquid securities, which is designed to permit funds some flexibility in dealing with varying market conditions.[239]

Tax-Exempt Money Market Funds. As proposed, the final rule excludes tax-exempt money market funds from the daily liquidity requirements.[240] Several commenters supported the proposal, noting that these funds cannot engage in repurchase agreements and the supply of tax-exempt securities with daily demand features is extremely limited.[241] One commenter, however, argued that tax-exempt funds are subject to daily redemptions and should be subject to the required minimum.[242] Based on the comments we received, we continue to believe that the different nature of the markets for tax-exempt securities justifies exempting tax-exempt money market funds from the daily liquidity requirements.[243]

Definition of Daily and Weekly Liquid Assets. As discussed above, the new daily and weekly liquidity requirements are designed to ensure that a money market fund has the legal right to receive cash within one or five business days so that a fund may more easily satisfy redemption requests during times of market stress.[244] Like our proposal, the final definition of "daily liquid assets" includes cash (including demand deposits), Treasury securities, and securities (including repurchase agreements) for which a money market fund has a legal right to receive cash in one business day.[245] Our proposed definition of "weekly liquid assets" included the same assets (except that the fund would have had to have the right to receive cash in five business days rather than one).[246] We proposed to include Treasury securities regardless of their maturity in the liquidity baskets because they have been the most liquid assets during times of market stress.[247] Indeed, we understand that the "flight to liquidity" that happens during times of uncertainty makes it easy to sell Treasury securities in even large quantities.[248]

Commenters supported our inclusion of Treasury securities, but many argued that we should include additional securities.[249] In particular, a number of

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[234] On September 17, 2008, approximately 25% of prime institutional money market funds experienced outflows greater than 5% of total assets; on September 18, 2008, approximately 30% of prime institutional money market funds experienced outflows greater than 5%; and on September 19, 2008, approximately 22% of prime institutional money market funds experienced outflows greater than 5%. As noted in the Proposing Release, during that week, approximately 27% of prime institutional money market funds experienced redemptions of more than 20% of assets, and 22% had outflows greater than 25%. This is based on analysis of data from the iMoneyNet Money Fund Analyzer Database. Proposing Release, *supra* note 2, at n.185.

[235] As of January 20, 2010, assets in taxable institutional share classes represented approximately 63% of the total assets of money market funds, and assets in prime institutional share classes represented approximately 37% of the total assets of money market assets. *See* ICI, *Money Market Mutual Fund Assets, available at http://www.ici.org/research/stats/mmf/mm_01_21_10.*

[236] *See supra* text following note 217.

[237] In support of its proposed lower liquidity levels, the ICI stated that the 5% daily and 20% weekly thresholds "would have met the demands of a large majority of the prime funds with at least one institutional share class" and noted that between September 10 through 24, 52% of these funds had outflows of less than 5 percent, and 22 percent experienced outflows of between 5% and 20% of assets, which would have been covered by the thresholds recommended by the ICI Report. Under the ICI's analysis, however, one quarter of prime money market funds would *not* have been covered by the thresholds recommended by the ICI Report, which as discussed above, we believe is too large a proportion that might have to increase liquidity quickly in response to sudden severe economic stress. We are not considering the redemption levels of the week following September 19, when the Treasury Department adopted the Guarantee Program, because we have no basis to estimate what the redemptions would have been had the Treasury not adopted the Program. We also note that another commenter that provided specific information on redemption flows, a large sponsor of money market funds, reported in its comment letter that on September 17, redemptions in its money market funds exceeded 5% and during the week of September 15, redemptions in the funds exceeded 20%. Federated Comment Letter.

[238] *See* Proposing Release, *supra* note 2, at n.201 and accompanying text. The 9% of institutional money market funds that had redemptions exceeding 30% of assets in the week after The Reserve Fund broke the buck accounted for 10.9% of all institutional funds' total assets as of September 15, 2008. We estimate that under the minimum liquidity standards we are adopting more retail funds would have been able to satisfy the level of redemption demands than would have institutional funds. During the week ending September 19, 2008, 3% of retail funds experienced outflows greater than 30%. This is based on analysis of data from the iMoneyNet Money Fund Analyzer Database.

[239] *See supra* Section II.C.2 (limitations on illiquid securities).

[240] *See* Proposing Release, *supra* note 2, at nn.198–99 and accompanying text.

[241] *See, e.g.,* Federated Comment Letter; ICI Comment Letter.

[242] *See* Fidelity Comment Letter.

[243] We understand that most of the portfolios consist of longer term floating and variable-rate securities with seven-day demand features from which the fund obtains much of its liquidity, and that they are unlikely to have investment alternatives that would permit them to meet a daily liquidity requirement. *See* Proposing Release, *supra* note 2, at n.199 and accompanying text.

[244] *See supra* note 213 and accompanying and following text.

[245] Amended rule 2a–7(a)(8) (defining "daily liquid asset" to mean (i) cash; (ii) direct obligations of the U.S. Government; and (iii) securities that will mature or are subject to a demand feature that is exercisable and payable within one business day).

[246] Proposed rule 2a–7(a)(32).

[247] U.S. Treasury securities were highly liquid during the market turmoil in 2008. *See, e.g., FRB Open Market Committee Oct. 28–29 Minutes, supra* note 13, at 5; *Minutes of the Federal Open Market Committee*, Federal Reserve Board, Dec. 15–16, 2008, at 4, *available at http://www.federalreserve.gov/monetarypolicy/files/fomcminutes20081216.pdf.*

[248] *See, e.g.,* Francis A. Longstaff, *The Flight-to-Liquidity Premium in U.S. Treasury Bond Prices,* 77 J. Bus. 511 (July 2004).

[249] *See, e.g.,* Comment Letter of the Federal Home Loan Banks (Sept. 8, 2009) ("FHLB Comment Letter") (include Federal Home Loan Bank discount notes); RidgeWorth Comment Letter (include fixed-rate agency discount notes with maturities of 95 days or less); Victory Cap. Mgmt. Comment Letter (include fixed-rate agency discount notes with maturities of 397 days or less). *See also* Dreyfus Comment Letter (include bank time deposits); Fidelity Comment Letter (include shares of other money market funds). Both shares of money market funds and bank time deposits, which some

commenters argued that we should also include agency notes (*i.e.,* direct obligations of Federal government agencies and government-sponsored enterprises) as daily or weekly liquid assets or in both liquid asset baskets.[250] We are persuaded, based on the comments we received, that the market for very short-term agency notes is likely to be sufficiently liquid under stressful market conditions to treat them as weekly liquid assets. Therefore, amended rule 2a–7 includes agency discount notes with remaining maturities of 60 days or less in the definition of weekly liquid assets.[251]

Our decision to include these securities is based on our consideration of the relative liquidity of agency discount notes during times of extreme market stress.[252] We compared average daily yields for the two weeks before and the two weeks after the Lehman Brothers bankruptcy on September 15, 2008. Between these periods, the yields for 30-day Treasury bills fell 75 percent while yields for 30-day and 60-day agency discount notes remained essentially the same.[253] The yields for other money market assets increased over the same periods. For example, the average daily yield for 90-day agency discount notes increased four percent; while the yield for 30-day first tier financial securities increased 23 percent.[254] Transaction volume in agency discount notes increased over this time period,[255] which suggests to us that money market funds were able to sell their shorter maturity agency discount notes at amortized cost or higher prices.

4. Stress Testing

We are adopting amendments to rule 2a–7 to require the board of directors of each money market fund to adopt procedures providing for periodic stress testing of the money market fund's portfolio.[256] Almost all of the commenters who addressed this matter supported requiring stress testing of fund portfolios,[257] although several suggested changes from our proposal.[258]

Under the amended rule, a fund must adopt procedures that provide for the periodic testing of the fund's ability to maintain a stable net asset value per share based upon certain hypothetical events. These include an increase in short-term interest rates, an increase in shareholder redemptions, a downgrade of or default on portfolio securities, and widening or narrowing of spreads between yields on an appropriate benchmark selected by the fund for overnight interest rates and commercial paper and other types of securities held by the fund.[259] Commenters differed on whether we should specify details for stress testing in addition to these hypothetical events.[260] Because different tests may be appropriate for different market conditions and different money market funds, we believe that the funds are better positioned to design and modify their stress testing systems and have not included more specific criteria in the rule.[261]

The amendment requires the testing to be done at such intervals as the fund board of directors determines appropriate and reasonable in light of current market conditions.[262] This is the same approach that rule 2a–7 takes with respect to the frequency of shadow pricing.[263] The rule does not, however, specifically require the board to design the portfolio stress testing, as may have been suggested by our proposing

commenters advocated we specifically include in the rule text, fall within the definitions of daily and weekly liquid assets if they satisfy the applicable maturity terms.

[250] *See, e.g.,* Comment Letter of the Capital Management of the Carolinas (Sept. 4, 2009) ("Cap. Mgt. Carolinas Comment Letter") (include discount notes with maturity of 397 days or less as daily liquid assets); Fidelity Comment Letter (include discount notes with maturity of 397 days or less as both daily and weekly liquid assets); ICI Comment Letter (include fixed-rate agency discount notes with maturity of 397 days or less as weekly liquid assets); C. Wesselkamper Comment Letter (include in daily and weekly liquid assets Government securities with fixed rates or fixed rate Government securities maturing in no more than 60 days). One commenter also expressed concern about the supply of assets that would qualify as daily or weekly liquid assets. *See* Fidelity Comment Letter.

[251] Amended rule 2a–7(a)(32) (defining "weekly liquid assets" to mean (i) cash; (ii) direct obligations of the U.S. Government; (iii) Government securities issued by a person controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States, that are issued at a discount to the principal amount to be repaid at maturity and have a remaining maturity of 60 days or less; and (iv) securities that will mature or are subject to a demand feature that is exercisable and payable within five business days).

[252] Commenters who advocated including agency discount notes in the liquid asset baskets stressed the depth of liquidity in the secondary markets for these securities. *See, e.g.,* Charles Schwab Comment Letter; ICI Comment Letter; SIFMA Comment Letter; FHLB Comment Letter (comment limited to Federal Home Loan Bank discount notes).

[253] Between these periods, 30-day Treasury bill average daily yields fell from 1.53% to 0.39%; 30-day agency discount note average daily yields held constant at 2.14%; and 60-day agency discount note average daily yields increased from 2.25% to 2.27%. *See* Bloomberg Terminal Database, US 30–Day T–Bill USGB030Y (Index); Agency Discount Note 30 Day Yield AGDN030Y (Index); Agency Discount Note 60 Day Yield AGDN060Y (Index). We note that in September 2008, the Federal Reserve's Open Market Trading Desk purchased discount notes issued by Fannie Mae, Freddie Mac, and the Federal Home Loan Banks in order to support market functioning. *See* Press Release, Federal Reserve Bank of New York, Statement Regarding Planned Purchases of Agency Debt (Sept. 19, 2008), *available at http://www.newyorkfed.org/markets/operating_policy_080919.html.* Data concerning the purchases are available at the Federal Reserve Bank of New York's Permanent Open Market Operations Historical Search webpage, *available at http://www.newyorkfed.org/markets/pomo/display/index.cfm?fuseaction=showSearchForm.*

[254] Average daily yields on 90-day agency discount notes increased from 2.35% to 2.45%. *See* Bloomberg, Agency Discount Note 90 Day Yield AGDN090Y (Index). In addition, average daily yields on 30-day first tier financial securities increased from 2.40% to 2.96% and average daily yields on 30-day first tier non-financial securities increased from 2.03% to 2.16%. *See* Federal Reserve Commercial Paper Data, *supra* note 47 (select rates from the preformatted data package menu and follow the instructions to reformat the date range and download). Average daily yields on 60-day first tier financial securities increased from 2.57% to 2.99% and average daily yields on 60-day first tier non-financial securities increased from 2.03% to 2.19%. *See id.*

[255] *See* Federal Reserve Bank of New York, Primary Dealer Statistics, *available at http://www.newyorkfed.org/markets/gsds/search.cfm.*

[256] *See* amended rule 2a–7(c)(10)(v).

[257] *See, e.g.,* J.P. Morgan Asset Mgt. Comment Letter; Tamarack Funds Comment Letter. *But see* C. Wesselkamper Comment Letter (stress testing should be an adviser's best practice).

[258] At the suggestions of some commenters, we have made the stress testing requirement applicable to all money market funds that employ either the amortized cost method of valuing portfolio securities or the penny-rounding method of pricing fund shares. *See* Federated Comment Letter; TDAM Comment Letter. We believe that few, if any, money market funds will be affected by this change.

[259] Amended rule 2a–7(c)(10)(v)(A).

[260] *See, e.g.,* Charles Schwab Comment Letter (opposing more specific tests in the rule); State Street Comment Letter (same); RidgeWorth Comment Letter (requesting that the Commission more clearly define feasible stress testing requirements); TDAM Comment Letter (same).

[261] *See* Federated Comment Letter (different types of money market funds should have different stress testing procedures); Invesco Aim Comment Letter ("each investment adviser should have the discretion to determine the appropriate assumptions and hypothetical events for which to test."). As discussed above, amended rule 2a–7's new liquidity requirements require money market funds to evaluate their liquidity needs based on their shareholder base. *See supra* note 195 and preceding and accompanying text. Money market funds should also incorporate this element in their stress testing procedures as appropriate. *See* Thrivent Comment Letter.

[262] Amended rule 2a–7(c)(10)(v)(A). Commenters differed in their views on the appropriate intervals for testing. *See, e.g.,* J.P. Morgan Asset Mgt. Comment Letter (monthly or even more frequently); HighMark Comment Letter (quarterly under normal market conditions); Shriver Poverty Law Ctr. Comment Letter (same). We believe that a fund's board of directors is best positioned to choose the appropriate frequency under different conditions. We urge funds to adopt thresholds for testing frequency based, in part, on the amount of the deviation of the funds market-based net asset value per share from its amortized cost value per share similar to many funds' thresholds for more frequent shadow pricing. Thus, we would expect that if a fund's shadow net asset value per share decreased to less than $0.9975, the fund would conduct stress tests at least every week, even if the fund stress tests less frequently under normal conditions. More frequent testing would likely allow the fund to better understand and manage the risks to which the fund and its shareholders are exposed.

[263] Amended rule 2a–7(c)(8)(ii)(A)*(1).*

release.[264] We agree with the many commenters that asserted that the board may not have sufficient expertise to construct appropriate stress tests for a fund.[265] Each board may, of course, consider the extent to which it wishes to become involved in design of the stress tests.

The rule also requires that the board receive a report of the results of the stress testing at its next regularly scheduled meeting, as proposed, and more frequently, if appropriate, in light of the results.[266] We have added the requirement for more frequent reporting in light of results because we believe that the board should be apprised of test results when they indicate that the magnitude of hypothetical events required to cause the fund to break a buck (such as changes in interest rates or shareholder redemptions or a combination of factors) is slight when compared with actual conditions.

As proposed, the report must include: (i) The date(s) on which the fund portfolio was tested; and (ii) the magnitude of each hypothetical event that would cause the money market fund to break the buck.[267] The report also must include an assessment by the fund's adviser of the fund's ability to withstand the events (and concurrent occurrences of those events) that are reasonably likely to occur within the following year.[268] Finally, as proposed, funds are required to maintain records of the stress testing for six years, the first two years in an easily accessible place.[269]

D. Repurchase Agreements

Money market funds typically invest a significant portion of their assets in repurchase agreements, many of which mature the following day and provide an immediate source of liquidity. We are adopting, as proposed, two amendments to rule 2a–7 that affect fund investments in repurchase agreements for purposes of rule 2a–7's diversification provisions.[270]

First, we are limiting money market funds to investing in repurchase agreements collateralized by cash items or Government securities in order to obtain special treatment of those investments under the diversification provisions of rule 2a–7.[271] This change is designed to reduce the risk that a money market fund would experience losses upon the sale of collateral in the event of a counterparty's default.[272] Most commenters who addressed our proposal supported it.[273] Commenters also confirmed our understanding that many managers of money market funds already look through only those repurchase agreements that are collateralized by Government securities or cash instruments.[274]

Second, we are reinstating the requirement that the money market fund's board of directors or its delegate evaluate the creditworthiness of the repurchase agreement's counterparty in order for the fund to take advantage of the special look-through treatment under rule 2a–7's diversification provisions.[275] The effect of this amendment is to require a fund adviser to determine that the counterparty is a creditworthy institution, separate and apart from the value of the collateral supporting the counterparty's obligation under the repurchase agreement.[276]

We are not adopting an approach suggested by some of the commenters that the evaluation of a repurchase agreement should be limited to the credit risk determination already required by rule 2a–7(c)(3) with regard to the purchase of any security.[277] That

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[264] *See* Proposing Release, *supra* note 2, at text following n.209.

[265] *See, e.g.,* ABA Comment Letter; HighMark Capital Comment Letter; IDC Comment Letter.

[266] Amended rule 2a–7(c)(10)(v)(B). We disagree with commenters that recommended that the adviser report to the board only annually and on an exception basis. *See, e.g.,* Stradley Ronon Comment Letter; Tamarack Funds Comment Letter; T. Rowe Price Comment Letter. We believe that regular reports will allow the board more effectively to monitor the fund's ability to withstand hypothetical events that alone or in combination would cause the fund to break the buck. In the Proposing Release, we asked whether we should impose minimum liquidity requirements based on the results of a particular stress test. *See* Proposing Release, *supra* note 2, at text following n.216. Commenters were divided on this issue. *See* Fidelity Comment Letter (against); Bankers Trust Comment Letter (in favor); Shriver Poverty Law Ctr. (same). As discussed above, we expect that money market funds take into consideration the results of their stress testing in assessing their liquidity needs under the general liquidity requirement of rule 2a–7(c)(5). *See supra* note 261.

[267] Amended rule 2a–7(c)(10)(v)(B)(*1*).

[268] Amended rule 2a–7(c)(10)(v)(B)(*2*). We do not agree with commenters who argued that advisers should not be required to provide an assessment of a fund's ability to withstand events that are reasonably likely to occur within the following year. *See* Charles Schwab Comment Letter; Federated Comment Letter; Stradley Ronon Comment Letter; Vanguard Comment Letter. The rule does not require advisers to predict the future in order to determine which hypothetical events to use in stress testing (and we recognize that advisers will not always be correct in their assessments of which events are reasonably likely to occur within the following year). Instead, the provision is designed to provide to the board some context within which to evaluate the assessment on the magnitude of each hypothetical event that would cause the fund to break the buck. *See* Proposing Release, *supra* note 2, at text following n.211.

[269] Amended rule 2a–7(c)(11)(vii).

[270] Amended rule 2a–7(c)(4)(ii)(A); Proposing Release, *supra* note 2, at Section II.E.

[271] Amended rule 2a–7(a)(5) (defining the term "collateralized fully"). The special treatment allows money market funds to consider the acquisition of the repurchase agreement as an acquisition of the underlying collateral for diversification purposes. *See* Proposing Release, *supra* note 2, at n.228 and accompanying text. Under the new rule, securities with the highest rating, or unrated securities of comparable credit quality, will no longer be acceptable collateral. *Compare* amended rule 2a–7(a)(5) *with* current rule 2a–7(a)(5).

[272] *See* Proposing Release, *supra* note 2, at n.229 and accompanying text.

[273] *See* Bankers Trust Comment Letter; BlackRock Comment Letter; HighMark Capital Comment Letter; RidgeWorth Comment Letter. Two commenters opposed the proposal. Wells Fargo made a number of arguments based on the premise that the change will prevent money market funds from investing in repurchase agreements collateralized by non-government securities. The rule, however, does not restrict funds from investing in repurchase agreements. Instead, it limits the circumstances under which a fund may look through the repurchase agreement to the underlying collateral for diversification purposes. A money market fund will continue to be able to invest in repurchase agreements collateralized by other types of assets, although the securities will not be eligible for special treatment under the diversification provisions. Another commenter asserted that the limitation is unnecessary if a fund evaluates the creditworthiness of the counterparty *or* if it adequately values the collateral in light of rule 2a–7(c)'s minimal credit risk determination. *See* Am. Securit. Forum Comment Letter. As discussed above and in the Proposing Release, we are adopting this provision to protect against circumstances in which the fund may be unable to obtain its collateral or the full value of that collateral.

[274] *See* Federated Comment Letter (Federated has never relied on the diversification look-through approach for repurchase agreements collateralized by non-government securities); ICI Comment Letter (ICI members typically adopt the look-through approach only for repurchase agreements collateralized by cash items and government securities). *See also Fitch Ratings, Money Market Funds Special Report, U.S. Prime Money Market Funds: Managing Portfolio Composition to Address Credit and Liquidity Risks* (Aug. 14, 2009) ("Fitch Report"), at 6 *available at http://www.fitchratings.com/creditdesk/reports/report_frame.cfm?rpt_id=462366* (reporting that after the end of 2008 "a number of advisors to Fitch-rated U.S. prime money market funds * * * significantly amended their investment policies with respect to repurchase agreements counterparties and collateral schedules"; the amendments include, among others, "[r]educed acceptance of repurchase agreement collateral other than U.S. Treasury and agency securities").

[275] *See* amended rule 2a–7(c)(4)(ii)(A). We eliminated the requirement in 2001. *See* Proposing Release, *supra* note 2, at nn.230–33 and accompanying text. Three commenters specifically supported the change. *See* BlackRock Comment Letter; HighMark Capital Comment Letter; Shriver Poverty Law Ctr. Comment Letter.

[276] A number of commenters argued that the evaluation should not be the board's responsibility. *See, e.g.,* IDC Comment Letter; Comment Letter of the North Carolina Capital Management Trust—Independent Trustees (Sept. 8, 2009). We note that rule 2a–7(e) allows a board to delegate the creditworthiness evaluation to the fund's investment adviser or officers, under guidelines and procedures that the board establishes and reviews.

[277] Three commenters argued that the proposed creditworthiness evaluation is unnecessary because it is already an element of the minimal credit risk determination that a fund makes pursuant to rule 2a–7(c)(3). *See* Federated Comment Letter; ICI Comment Letter; IDC Comment Letter. Two other commenters recommended that the applicable standard be the minimal credit risk evaluation. *See*

approach would not require a fund to evaluate separately the creditworthiness of the counterparty in order to take advantage of the special look-through treatment for diversification purposes. Under that approach, the fund's evaluation of a repurchase agreement could be based primarily or exclusively on the quality of the *collateral.* As we explained in the Proposing Release, in the midst of a market disruption caused by the default of a *counterparty,* a money market fund may find it difficult to protect fully its collateral without incurring losses.[278] The amendment is designed to avoid such losses by requiring money market funds to evaluate the creditworthiness of the counterparty in order to limit exposure to less creditworthy institutions.

E. Disclosure of Portfolio Information

1. Public Web Site Posting

We are amending rule 2a–7 to require money market funds to disclose information about their portfolio holdings each month on their Web sites. The disclosure will provide greater transparency of portfolio information in a manner convenient for most investors. The amendment is designed to give investors a better understanding of the current risks to which the fund is exposed, strengthening their ability to exert influence on risk-taking by fund advisers.

Commenters generally supported requiring money market funds to post portfolio information monthly, although several urged us to revise the amendments in certain ways.[279] The amendments we are today adopting are substantially similar to those we proposed, with modifications to (i) The information required to be disclosed, (ii) the time within which a fund must post its portfolio holdings information, and (iii) the length of time a fund must maintain the information on its Web site. We discuss each of these modifications below.

Information Required to be Disclosed. As proposed, the amendments to rule 2a–7 would have required a fund to disclose the fund's schedule of investments, as prescribed by rules 12–12 through 12–14 of Regulation S–X,[280] identifying, among other things, the issuer, the title of the issue, the principal amount, the interest rate, the maturity date, and the current amortized cost of the security.[281] Several commenters asserted that requiring the information specified in rules 12–12 through 12–14 of Regulation S–X would include information that would not be helpful to investors. They urged us instead to require information about money market fund portfolios that would better fit the needs of investors seeking information relevant to their investment decisions.[282] For example, some commenters noted that under the proposed amendments a fund would be required to classify and subtotal securities by industry, provide detailed restricted securities disclosures, and provide detailed information regarding repurchase agreement counterparties and collateral. One also noted that under the proposal funds may be required to provide certain notes required by generally accepted accounting principles ("GAAP"), as many funds do for filings on Form N–Q.[283] Commenters asserted that these requirements would unnecessarily complicate the disclosure, be of little interest or benefit to investors, be difficult to comply with, and would impose a significant additional burden on money market funds. They suggested modifying the disclosure requirements to exclude some of the detail.[284]

We are revising the information about portfolio holdings that funds must disclose on their Web sites. Instead of referring to Regulation S–X as we proposed, we are listing in rule 2a–7(c)(12) the information that funds must disclose.[285] These revisions more closely tailor the required information to the needs of money market fund investors and others who seek information about fund holdings through Internet Web sites. For example, rule 12–12 of Regulation S–X requires funds to disclose the *subtotal* of each category of investments, *subdivided* by business grouping or investment type. We agree with commenters who argued that this level of detail, although appropriate for financial statements, is unnecessary in a fund's Web site disclosures to investors.[286] For investors who may prefer to obtain the more detailed information, it will continue to be available in money market funds' quarterly Form N–CSR and Form N–Q filings.[287] As discussed below, detailed information also will be available on a fund's filings on Form N–MFP.[288]

As amended, rule 2a–7(c)(12) will require funds to disclose monthly with respect to each security held: (i) The name of the issuer; (ii) the category of investment (*e.g.,* Treasury debt, government agency debt, asset backed commercial paper, structured investment vehicle note); (iii) the CUSIP number (if any); (iv) the principal amount; (v) the maturity date as determined under rule 2a–7 for purposes of calculating weighted average maturity; (vi) the final maturity date, if different from the maturity date previously described; (vii) coupon or yield; and (viii) the amortized cost value.[289] In addition, the amendments require funds to disclose their overall weighted average maturity and weighted

Fidelity Comment Letter; Stradley Ronon Comment Letter.

[278] Proposing Release, *supra* note 2, at n.233 and accompanying text.

[279] *See, e.g.,* Assoc. for Fin. Professionals Comment Letter; SIFMA Comment Letter; Vanguard Comment Letter.

[280] 17 CFR 210.12–12—12–14.

[281] Proposed rule 2a–7(c)(12). As discussed below, all of these enumerated items are required under amended rule 2a–7(c)(12).

[282] *See, e.g.,* BlackRock Comment Letter; GE Asset Mgt. Comment Letter; Invesco Aim Comment Letter.

[283] *See* ICI Comment Letter.

[284] *See, e.g.,* BlackRock Comment Letter; Fidelity Comment Letter; ICI Comment Letter.

[285] Rules 12–12 through 12–14 of Regulation S–X require, and the proposed rule amendments would have required, in addition to the information required by rule 2a –7(c)(12), the following information, which we believe is not critical to be made available to investors on money market fund Web sites: (i) The subtotals for each category of investments, subdivided by business grouping or investment type, with their percentage value compared to net assets; (ii) for repurchase agreements, showing for each, among other things, the date of the agreement, the total amount to be received upon repurchase, the repurchase date, and a description of the securities that are subject to the repurchase agreement; (iii) for restricted securities (1) as to each such issue (a) The acquisition date, (b) the carrying value per unit of investment at date of related balance sheet, and (c) the cost of such securities, (2) as to each issue acquired during the year preceding the date of the related balance sheet, the carrying value per unit of investment of unrestricted securities of the same issuer at (a) The day the purchase price was agreed to, (b) the day on which an enforceable right to acquire such securities was obtained, and (c) the aggregate value of all restricted securities and the percentage which the aggregate value bears to net assets; (iv) the aggregate gross unrealized appreciation for all securities in which there is an excess of value over tax cost; (v) the aggregate gross unrealized depreciation for all securities in which there is an excess of tax cost over value; (vi) the net unrealized appreciation or depreciation; (vii) the aggregate cost of securities for Federal income tax purposes; (viii) disclosure of investments in non-securities; (ix) the amount of equity in net profit and loss for the period; and (x) the dollar amount of dividends or interest in investments in affiliates.

[286] *See supra* note 282.

[287] Money market funds must provide a full schedule of their portfolio holdings in quarterly filings to the Commission, within 60 days after the end of the quarter. *See* Form N–CSR [17 CFR 274.128] (form used by registered management investment companies to file shareholder reports); Form N–Q [17 CFR 274.130] (form used by registered management investment companies to file quarterly reports of portfolio holdings after the first and third quarters).

[288] *See infra* Section II.E.2.

[289] Amended rule 2a–7(c)(12)(ii). We have added disclosure of the security's CUSIP number as an item of the web disclosure, which is designed to help users identify the securities in the fund's portfolio. We proposed and are adopting CUSIP number reporting on Form N–MFP, and commenters did not object to this reporting. *See infra* note 306 and accompanying text.

average life maturity of their portfolios.[290] The information required is substantially the same as was proposed but eliminates some of the details required by Regulation S–X, to which investors will continue to have access in the fund's quarterly filings.[291]

Time of Posting Information on Web site. The amended rule requires funds to post the portfolio information, current as of the last business day of the previous month, no later than the *fifth* business day of the month.[292] Under the proposed amendments, a fund would have been required to post the portfolio information on its Web site no later than the *second* business day of the month.[293] We have extended the time in response to commenters that asserted that the second business day deadline would not provide funds with enough time to compile, review, and post the required portfolio information accurately.[294]

Maintenance of Information on the Web site. Portfolio information must be maintained on the fund's Web site for no less than six months after posting.[295] We have reduced the maintenance period from the proposed twelve months in response to commenters.[296] Many commenters stated that the proposed twelve-month maintenance period was too long.[297] Half of these commenters recommended a six-month period, asserting that historical portfolio holdings information could be obtained from publicly available semi-annual filings with the Commission.[298] Other commenters recommended that no historical data be maintained on a fund's Web site at all.[299] We believe that it is important for investors to be able to compare current holdings information with previous holdings information from which they (or others analyzing the data) may discern trends. However, because historical portfolio holdings information is available to investors in semi-annual filings to the Commission, we have determined to reduce the maintenance period to six months.[300]

2. Reporting to the Commission

We are adopting a new rule requiring money market funds to provide the Commission a monthly electronic filing of more detailed portfolio holdings information. The information will permit us to create a central database of money market fund portfolio holdings, which will enhance our oversight of money market funds and our ability to respond to market events.[301] As discussed further below, the information will also be made public on a delayed basis.

New rule 30b1–7 requires money market funds to report portfolio information on new Form N–MFP. We received 49 comment letters on the proposed rule and form, most of which supported enhancing our oversight capabilities. Many of these commenters suggested technical modifications, a number of which we are adopting, as discussed below.[302] The rule and form that we are adopting today are substantially similar to what we proposed.[303]

Information. Money market funds must report on Form N–MFP, with respect to each portfolio security held on the last business day of the prior month, the following items: [304] (i) The name of the issuer; (ii) the title of the issue, including the coupon or yield; [305] (iii) the CUSIP number; [306] (iv) the category of investment (*e.g.,* Treasury debt, government agency debt, asset backed commercial paper, structured investment vehicle note, repurchase agreement [307]); (v) the NRSROs

[290] Amended rule 2a–7(c)(12)(i). We proposed to require that funds disclose this information on Form N–MFP, which we indicated we intended to make public. Some commenters also recommended we include these disclosure items in funds' Web site disclosures. *See* Assoc. Fin. Professionals Comment Letter; BlackRock Comment Letter; Fidelity Comment Letter.

[291] As discussed above, the proposed amendments to rule 2a–7 would have required money market funds to disclose on their Web sites their monthly schedule of investments in accordance with rules 12–12 to 12–14 of Regulation S–X. To avoid unnecessarily duplicative disclosure obligations, we also proposed to amend rule 30b1–5 to exempt money market funds from Item 1 of Form N–Q, which similarly requires funds to disclose their schedule of investments in accordance with rules 12–12 to 12–14 of Regulation S–X in quarterly filings with the Commission. Because we have revised the Web site disclosure requirement not to include certain items in rules 12–12 to 12–14 of Regulation S–X, the disclosure requirements of rule 2a–7 and Item 1 of Form N–Q are no longer duplicative. As a result, we are not adopting the proposed amendments to rule 30b1–5.

[292] Amended rule 2a–7(c)(12).

[293] Proposed rule 2a–7(c)(12).

[294] *See, e.g.,* BlackRock Comment Letter; Charles Schwab Comment Letter; T. Rowe Price Comment Letter; Vanguard Comment Letter. One commenter estimated that compliance with the proposed second business day deadline would cost $1.5 million initially and $220,000 annually. *See* Fidelity Comment Letter. The recommended deadlines submitted by commenters ranged from 5 business days to 15 or 30 business days after the end of each month. In light of the modifications we are making to the information that must be posted on the fund's Web site, as discussed above, we believe that lengthening the deadline to five business days should provide funds sufficient time to compile, review, and post the portfolio holding information accurately. We also note that a five business day deadline will typically mean seven calendar days and, when holidays intervene, eight calendar days.

[295] Amended rule 2a–7(c)(12). The amended rule also requires funds to provide a link to a Securities and Exchange Commission Web page where a user may obtain access to the fund's most recent 12 months of publicly available filings on Form N–MFP. Amended rule 2a–7(c)(12)(iii).

[296] Proposed rule 2a–7(c)(12).

[297] *See* Comment Letter of Clearwater Analytics, LLC (Sept. 7, 2009) ("Clearwater Comment Letter"); Comment Letter of Data Communiqué (Sept. 8, 2009) ("Data Communiqué Comment Letter"); Dreyfus Comment Letter; Fidelity Comment Letter; Fifth Third Comment Letter; GE Asset Mgt. Comment Letter; SIFMA Comment Letter; T. Rowe Price Comment Letter.

[298] *See* Dreyfus Comment Letter; Fifth Third Comment Letter; SIFMA Comment Letter; T. Rowe Price Comment Letter.

[299] *See* Clearwater Comment Letter; Data Communiqué Comment Letter (investors "only interested in the most recent data"); Fidelity Comment Letter; GE Asset Mgt. Comment Letter.

[300] Two commenters stated that retaining portfolio holdings information on a fund's Web site for no more than six months would be consistent with the current requirements for portfolio holdings of open-end management investment companies. *See* Fifth Third Comment Letter; T. Rowe Price Comment Letter.

[301] As we explained in the Proposing Release, our current information on money market portfolio holdings is limited to quarterly reports filed with us which, due to the high turnover rate of portfolio securities, quickly become stale. *See* Proposing Release, *supra* note 2, at Section II.F.2.

[302] *See, e.g.,* Charles Schwab Comment Letter; Stradley Ronon Comment Letter; Tamarack Funds Comment Letter.

[303] In September 2009, we adopted interim final temporary rule 30b1–6T. Disclosure of Certain Money Market Fund Portfolio Holdings, Investment Company Act Release No. 28903 (Sept. 18, 2009) [74 FR 48376 (Sept. 23, 2009)] ("Rule 30b1–6T Release"). We therefore have adopted proposed rule 30b1–6 as rule 30b1–7. The portfolio securities information that money market funds currently must report each quarter (pursuant to rule 30b1–5) is less timely and more limited in scope, and includes information about the issuer, the title of the issue, the balance held at the close of the period, and the value of each item at the close of the period. *See* Item 1 of Form N–Q [17 CFR 274.130] and Item 6 of Form N–CSR [17 CFR 274.128] (requiring funds to include a schedule of investments as set forth in rule 12–12 through 12–14 of Regulation S–X [17 CFR 210.12–12—12–14]).

[304] We have revised the form's general instructions to clarify that a filer may amend the form at any time. *See* Form N–MFP at General Instruction A.

[305] We understand that the title of an issue typically includes the coupon or yield of the instrument, and we have revised Item 27 to require this information, if applicable.

[306] Item 20 of proposed Form N–MFP would have required a fund to disclose the CIK of the issuer. Several commenters suggested that the form not require the issuer's CIK because the CIK is not a widely used identifier for money market instruments and is not generally maintained by money market funds. *See, e.g.,* Dreyfus Comment Letter; Federated Comment Letter; SIFMA Comment Letter. Form N–MFP, as adopted, only requires the issuer's CIK number if the security does not have a CUSIP number and the issuer has a CIK. Item 28 and Item 30 of Form N–MFP. If the security does not have a CUSIP number, the fund must provide a unique identifier for the security if there is one. Item 29 of Form N–MFP.

[307] For repurchase agreements we are also requiring funds to provide additional information regarding the underlying collateral. Item 32 of Form N–MFP. This information would have been required under our proposed amendments to rule 2a–7 regarding the Web site disclosure of portfolio holdings. Although we continue to believe that the

designated by the fund, the credit ratings given by each NRSRO, and whether each security is first tier, second tier, unrated, or no longer eligible; (vi) the maturity date as determined under rule 2a–7, taking into account the maturity shortening provisions of rule 2a–7(d); (vii) the final legal maturity date, taking into account any maturity date extensions that may be effected at the option of the issuer; (viii) whether the instrument has certain enhancement features; [308] (ix) the principal amount; (x) the current amortized cost value; [309] (xi) the percentage of the money market fund's assets invested in the security; [310] (xii) whether the security is an illiquid security (as defined in amended rule 2a–7(a)(19)); [311] and (xiii) "Explanatory notes." [312] Form N–MFP also requires funds to report to us information about the fund,[313] including information about the fund's risk characteristics such as the dollar weighted average maturity of the fund's portfolio and its seven-day gross yield.[314]

Money market funds also must report on Form N–MFP the market-based values of each portfolio security [315] and the fund's market-based net asset value per share, with separate entries for values that do and do not take into account any capital support agreements into which the fund may have entered.[316] When we proposed Form N–MFP, we solicited comment on requiring funds to report market-based values, including the value of any capital support agreement, on the form.[317] Two commenters supported requiring money market funds to report market-based values to the Commission.[318] Other commenters objected to the *public disclosure* of market-based values.[319] We have decided to require market-based information in the monthly reports, because it will assist us in our understanding of fund portfolio valuation practices as well as the potential risks associated with a fund, *e.g.,* a fund that has a market-based net asset value that suggests that it may be at risk of breaking the buck. The information regarding capital support agreements will help show the extent to which the funds' valuations depend on external support agreements.

Public availability. Under rule 30b1–7, the information contained in the portfolio reports that money market funds file with the Commission on Form N–MFP will be available to the public 60 days after the end of the month to which the information pertains.[320] Although the portfolio information and other information reported to the Commission on Form N–MFP is not

information is important to understanding the risks associated with a repurchase agreement and should be readily available to investors who seek it, we agree with commenters who asserted that that level of detail may not be necessary on the Web site disclosure. Fidelity Comment Letter ("detailed information regarding repurchase agreement counterparties and collateral" is contained across multiple systems); ICI Comment Letter. Accordingly, we have added the disclosure requirement to Form N–MFP.

[308] At the suggestion of one commenter, we are incorporating defined terms from amended rule 2a–7 into Form N–MFP. *See* Federated Comment Letter. The form requires a fund to report: (i) Whether the instrument has a "demand feature" (as defined in amended rule 2a–7(a)(9)); (ii) the identity of the issuer of the demand feature; (iii) the designated NRSRO(s) for the demand feature or its provider; (iv) the credit rating provided by each designated NRSRO, if any; (v) whether the instrument has a "guarantee" (as defined in amended rule 2a–7(a)(17)); (vi) the identity of the guarantor; (vii) the designated NRSRO(s) for the guarantee or guarantor; (viii) the credit rating provided by each designated NRSRO, if any; (ix) whether the instrument has any other enhancements (*i.e.,* other than a demand feature or guarantee); (x) the type of enhancement; (xi) the identity of the enhancement provider; (xii) the designated NRSRO(s) for the enhancement or enhancement provider; and (xiii) the credit rating provided by each designated NRSRO, if any. *See* Items 37–39 of Form N–MFP.

[309] Under Item 37 of proposed Form N–MFP, a fund would have had to provide the amortized cost of a security to the nearest hundredth of a cent. Commenters pointed out that fund accounting systems carry costs of securities in whole cents, and recommended that funds therefore be required to report the amortized cost to the nearest cent. *See, e.g.,* Dreyfus Comment Letter; ICI Comment Letter; State Street Comment Letter. We therefore have revised the form to require the amortized cost of each portfolio security to the nearest cent. Item 41 of Form N–MFP.

[310] Under Item 39 of proposed Form N–MFP, a fund would have had to disclose the percentage of gross assets invested in the security. We have revised the form to require that funds disclose the percentage of net assets invested in the security (Item 42 of Form N–MFP) to conform to existing disclosure requirements. *See* rule 12–12 of Regulation S–X.

[311] *See* Item 44 of Form N–MFP. We have added this disclosure requirement at the suggestion of one commenter who believed that it would be useful for us to know if different funds have taken different positions regarding the liquidity of a commonly held security. *See* Federated Comment Letter. Conversely, we are not adopting proposed Item 38, which would have required funds to disclose whether the inputs used in determining the value of the securities are Level 1, Level 2, or Level 3, if applicable. *See* Financial Accounting Standards Board, *Statement of Financial Accounting Standards No. 157,* "*Fair Value Measurement,*" *available at http://www.fasb.org/cs/BlobServer?blobcol=urldata&blobtable=MungoBlobs&blobkey=id&blobwhere=1175818754924&blobheader=application%2Fpdf.* Commenters explained that industry practice is to categorize all securities valued through reference to amortized cost as Level 2. *See, e.g.,* Dreyfus Comment Letter; ICI Comment Letter. We understand that industry practice is to determine the value of an illiquid security using Level 3 inputs. Requiring funds to disclose whether a security is illiquid will provide comparable information regarding the classification of the security.

[312] *See* Item 43 of Form N–MFP. This item permits funds to add miscellaneous information that may be material to other disclosure in the form.

[313] As proposed, many of the items would have been disclosed with regard to each *series* of the fund. As adopted, however, we are requiring that funds provide some of this information with regard to each *class* of the fund, where relevant (*e.g.,* minimum initial investment and flow activity). We believe that class-specific information about these items will be more useful for analysis. We also understand that funds typically maintain this information with regard to each class of the fund. For example, funds are required to disclose class-specific information about net assets and flow activities in financial statements. *See* Rules 6–04 and 6–09 of Regulation S–X. Therefore we do not believe that requiring certain information on a class basis will be any more burdensome than what we proposed. *See also* Clearwater Comment Letter (suggesting that total net asset value should be disclosed on a class-level basis).

[314] We also have revised or augmented some of the disclosure items of Form N–MFP. In addition to the seven-day gross yield, the form as adopted requires the fund's seven-day net yield for each class as calculated under Item 26(a)(1) of Form N–1A. Item 24 of Form N–MFP. Item 15 of proposed Form N–MFP would have required that a fund provide its net shareholder flow activity for the month ended. As adopted, Form N–MFP requires the net shareholder flow information for each class and also requires the fund to provide the gross subscriptions and redemptions for the month from which the net shareholder flow is calculated. Item 23 of Form N–MFP. Item 9 of proposed Form N–MFP would have required a fund to indicate if the fund was primarily used to invest cash collateral. One commenter stated that the term "cash collateral" is ambiguous (it could include corporate trust accounts and escrows as well as collateral for securities loans or over-the-counter derivatives) and that it would be difficult for a fund to know when it is being used "primarily" for these investments. *See* Federated Comment Letter. As adopted, Form N–MFP does not require this information. Items 12–14 of proposed Form N–MFP would have required certain assets and liabilities information to the nearest hundredth of a cent. We have slightly revised these items to conform to accounting conventions and added an item for the net assets of the class. Items 13–16 and 21–22 of Form N–MFP. In addition, in response to commenters' assertion that fund accounting systems only carry costs in whole cents, Form N–MFP as adopted requires this information to the nearest cent. *Id.*

[315] *See* Items 45–46 of Form N–MFP. It should be noted that Form N–MFP requires the total market-based value of each portfolio security, not the per-unit price of the security.

[316] *See* Item 18 (shadow NAV of the series) and Item 25 of Form N–MFP (shadow NAV of each class).

[317] *See* Proposing Release, *supra* note 2, at paragraph accompanying n.253.

[318] *See* Fund Democracy/CFA Comment Letter ("We strongly support the SEC's proposal to require that additional information be filed with the Commission on a temporarily confidential basis. It is critical that the Commission be able to gauge the stability of the MMF industry on an ongoing basis. * * * We believe strongly that the values at which MMFs are carrying portfolio securities is the most important piece of information for monitoring potential liquidity problems."); Tamarack Funds Comment Letter.

[319] *See, e.g.,* ABA Comment Letter; Dreyfus Comment Letter; Goldman Sachs Comment Letter; Tamarack Funds Comment Letter.

[320] Rule 30b1–7(b). As discussed above, money market fund portfolio information will be required to be posted on fund Web sites within five business days after the end of the month. *See supra* notes 292–294 and accompanying text.

primarily designed for individual investors, we anticipate that many investors, as well as academic researchers, financial analysts, and economic research firms, will use this information to study money market fund holdings and evaluate their risk. Their analyses may help other investors and regulators better understand risks in money market fund portfolios.[321] Therefore we believe that it is important to make this information publicly available.

In the Proposing Release, we stated that we expected to make the information filed on Form N–MFP available to the public on a delayed basis, and we also requested comment on whether the rule should require funds to report, and therefore disclose to the public, the market-based valuations of the portfolio securities and of the net asset value of the fund.[322] As discussed further below, commenters' objections to public availability of the information collected on Form N–MFP generally fell into two categories—the competitive effects of portfolio information and the potentially de-stabilizing effects of market-based value information. We address each objection in turn.

First, some commenters objected to the disclosure of information filed on Form N–MFP because of its competitive effects on funds or fund managers. Three commenters argued that the information to be provided on the form is proprietary, sensitive, or confidential in nature.[323] Others expressed concern that making the information public could result in "investor confusion."[324] Two other commenters, however, supported making Form N–MFP information available to the public on a delayed basis.[325] One of them emphasized the positive effect that public disclosure can have on portfolio management practices.[326]

We believe commenters overstated the *competitive* risks for money market funds of public access to the fund's information. As we discussed in the Proposing Release, the risks of trading ahead of funds are severely curtailed in the context of money market funds, because of the short-term nature of money market fund investments and the restricted universe of eligible portfolio securities.[327] For similar reasons, we believe that the potential for "free riding" on a money market fund's investment strategies, *i.e.,* obtaining for free the benefits of fund research and investment strategies, is minimal. Because shares of money market funds are ordinarily purchased and redeemed at the stable price per share, we believe that there would be relatively few opportunities for profitable arbitrage by investors. Moreover, most funds currently disclose their *current* portfolios on their Web sites, and much of the information contained in Form N–MFP is already available through other publicly available filings with the Commission, albeit on a less frequent basis.[328]

Second, many commenters objected to the disclosure of the *market-based* values of portfolio securities and of fund net asset value per share, because of the possible destabilizing effects on money market funds. These commenters stated that disclosure of market-based values would result in investor confusion and alarm that could result in redemption requests that exacerbate pricing deviations.[329] One commenter supported the disclosure of market-based net asset values, stating that the disclosure could provide discipline to managers operating their funds near the level of breaking the buck, and would level the informational playing field for less sophisticated investors.[330] Another commenter supported only the public disclosure of market-based *portfolio securities* values.[331]

We appreciate the risks that are involved with the real-time public disclosure of a fund's market-based portfolio and net asset values. Money market funds normally pay redeeming shareholders $1.00 per share even if their market-based net asset value is less than $1.00. These redemptions can hurt the fund's remaining shareholders because the realized and unrealized losses are spread across fewer shares, further depressing the fund's market-based net asset value. If enough shareholders redeem shares under these conditions, the fund, absent a capital contribution by its investment adviser or another person, can break the buck, causing remaining shareholders to receive less than $1.00 per share. We believe that many institutional investors are currently well aware of this dynamic. If more shareholders understand the mechanical relationship between shareholder redemptions and market-based net asset value, the disclosure of a market-based net asset value below $1.00 might precipitate a run on the fund. If one fund were to fail for this reason, runs might develop in other money market funds, even those with relatively high market-based net asset values.

Notwithstanding these risks, we believe that shareholders will benefit from knowing the monthly market-based net asset values of money market funds.[332] We anticipate that the public availability of these values will help investors make better informed decisions about whether to invest, or maintain their investments, in money market funds. This disclosure will indicate the extent to which the fund is managing its portfolio to achieve its fundamental objective of maintaining a stable net asset value. In addition, if market-based prices indicate significant risks in a fund's portfolio, investors, advisers and others can have a more meaningful dialogue with the fund's manager about such risks and any plans the fund manager may have to address any discounts between the market-based net asset value and the stable net asset value. This type of dialogue already

[321] *See* Proposing Release, *supra* note 2, at paragraph accompanying n.245. *See also* Clearwater Comment Letter ("[R]egular disclosure will also allow third-party analytics and reporting providers to make meaningful comparisons of money funds and highlight certain characteristics that are of interest to investors and the market generally.").

[322] We stated that we intended to make Form N–MFP information public two weeks after the filing of the form. *See* Proposing Release, *supra* note 2, at paragraph accompanying n.245.

[323] *See* BlackRock Comment Letter; Federated Comment Letter; T. Rowe Price Comment Letter.

[324] *See, e.g.,* Fidelity Comment Letter; GE Asset Mgt. Comment Letter; Vanguard Comment Letter. Some commenters stated that the monthly fund Web site postings would provide sufficient transparency for investors. *See, e.g.,* Fifth Third Comment Letter; ICI Comment Letter; Vanguard Comment Letter.

[325] *See* Fund Democracy/CFA Comment Letter; Comment Letter of J.P. Morgan Investor Services Co. (Sept. 4, 2009).

[326] *See* Fund Democracy/CFA Comment Letter.

[327] *See* Proposing Release, *supra* note 2, at n.379 and accompanying and following text; ICI Report, supra note 14, at 93 ("Because of the specific characteristics of money market funds and their holdings * * * the frontrunning concerns are far less significant for this type of fund. For example, money market funds' holdings are by definition very short-term in nature and therefore would not lend themselves to frontrunning by those who may want to profit by trading in a money market fund's particular holdings. Rule 2a–7 also restricts the universe of Eligible Securities to such an extent that frontrunning, to the extent it exists at all, tends to be immaterial to money market fund performance.").

[328] As noted above, money market funds must provide a full schedule of their portfolio holdings in quarterly filings to the Commission. *See supra* note 287.

[329] *See, e.g.,* ABA Comment Letter; T. Rowe Price Comment Letter; USAA Comment Letter (redemptions might lead to greater volatility in cash flows and increase the instability of the fund). In addition, one commenter stated that the investor confusion might result in additional costs for funds due to the need to answer investor inquiries. *See* Dreyfus Comment Letter.

[330] *See* Shadow FRC Comment Letter.

[331] *See* Clearwater Comment Letter.

[332] Adequate disclosure to investors is a fundamental principle of the Commission's regulatory mandate. *See, e.g.,* section 1(b), 1(b)(1) of the Investment Company Act ("[N]ational public interest and the interests of investors are adversely affected * * * when investors purchase, pay for, exchange, * * * sell, or surrender securities issued by investment companies without adequate, accurate, and explicit information * * *.").

takes place between sophisticated investors and funds that disclose portfolio information on a current basis. These sophisticated, often institutional, investors have the resources to estimate current market values and make purchase and redemption decisions on the basis of information that, in the past, has been beyond the reach of most retail investors.

As a collateral effect, we expect that the public disclosure of monthly market-based net asset values may have the effect of discouraging a fund's portfolio manager from taking risks that might reduce the fund's market-based net asset value.[333] We also anticipate that such disclosure may lead to greater cash flows into funds that have a smaller discount from the $1.00 NAV (or less historical volatility in that discount). This disclosure, which will provide values that include and exclude the effect of any capital support agreements, might also have the effect of encouraging funds that have affiliates to request financial support or other appropriate measures as soon as problems develop. Such support or other measures could provide greater stability to money market funds.

Nevertheless, we understand commenters' concerns that the disclosure of certain fund information, including market-based values, might result in investor confusion and alarm, at least in the short term, that could result in redemption requests that exacerbate pricing deviations.[334] In response to these and other concerns discussed above, we are delaying the public availability of the information filed on Form N–MFP for 60 days after the end of the reporting period.[335] This 60-day delay in public availability mirrors the current 60-day lag under other rules between the end of a fund's reporting period and the public filing of portfolio information with the Commission.[336] In addition, funds currently are required to file twice a year a public report that includes the fund's market-based net asset value, within 60 days after the end of the reporting period.[337]

We anticipate that, during the 60 days between the end of the reporting period and public availability of the information, funds will take steps to resolve issues that may raise concerns with investors and analysts. In addition, because money market fund portfolios have a limited maturity, many of the portfolio securities will have matured by the time the information is released to the public. Thus we expect that the 60-day delay will ameliorate many of the risks associated with public disclosure. We also expect that, over time, investors and analysts will become more accustomed to the information disclosed about fund portfolios, and thus there may be less need in the future to require a 60-day delay between the end of the reporting period and the public availability of the information. We therefore may revisit in a subsequent release whether to retain the same (or any) delay in public availability of this information.

Timing. Each money market fund must submit Form N–MFP electronically to the Commission within five business days after the end of each month.[338] Under the proposed rule, a fund would have been required to file Form N–MFP with the Commission no later than two business days after the end of each month. Commenters asserted that the second business day deadline would not have provided funds enough time to compile, review, and file the requested portfolio information accurately.[339]

In response to commenters, we are delaying the mandatory filing date for several months after the effective date of the amendments, to permit money market funds to develop systems necessary to collect and submit the portfolio information on Form N–MFP.[340] Thus, the first mandatory filing will be due on December 7, 2010, for holdings as of the end of November 2010. For approximately two months before the first mandatory filing, our staff will accept the submission of trial data so that money market funds may voluntarily make (non-public) electronic submissions with us. We anticipate that these submissions will help money market funds gain experience collecting and submitting the information, and we will use these submissions and the experiences of the funds to make technical adjustments to our systems and provide any guidance. Because of the possibility of errors or mistakes in the information submitted, we do not intend to make the trial data public.

Method of filing. As proposed, Form N–MFP must be filed electronically through the Commission's EDGAR system in an eXtensible Markup Language ("XML") tagged data format.[341] We understand that money market funds already maintain most of the information that will be filed on the form, and therefore the main requirement for funds will be the tagging of the data and filing of the reports with the Commission.[342] Some commenters recommended that the Commission require that Form N–MFP be filed in an eXtensible Business Reporting Language ("XBRL") format.[343] Although XBRL may allow for more comparative analysis or more opportunities for manipulation of data than XML allows, we believe that the data required by Form N–MFP will be clearly defined and often repetitive from one month to the next, and therefore the XML format will provide us with the necessary information in the most timely and cost-effective manner.[344]

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[333] *See* Fund Democracy/CFA Comment Letter ("[G]reater transparency should provide a strong incentive for funds to avoid the excessively risky practices that lead to instability and encourage redemption.").

[334] *See supra* note 329 and accompanying text.

[335] Rule 30b1–7(b).

[336] Funds are required to file each quarter with the Commission portfolio holdings reports, which are available to the public, within 60 days after the end of the quarter. *See supra* note 287.

[337] Money market funds currently must disclose their mark-to-market net asset value per share, to four decimals, twice a year in their Form N–SAR filings [17 CFR 274.101]. *See* Sub-Item 74W of Form N–SAR. Form N–SAR must be filed with the Commission no later than the 60th day after the end of the fiscal period for which the report is being prepared. *See* General Instruction C to Form N–SAR. Information supplied on Form N–SAR is publicly available on EDGAR and in the public files of the Commission. *See* General Instruction A to Form N–SAR.

[338] *See* rule 30b1–7.

[339] *See, e.g.,* BlackRock Comment Letter; Dreyfus Comment Letter; Vanguard Comment Letter. The recommended deadlines submitted by commenters ranged from five business days to 15 to 30 business days. We are providing for an extended implementation period before compliance with rule 30b1–7 is required, as discussed below, during which time funds will be able to build or update systems to compile the data and file the new form, test those systems, and possibly participate in the voluntary compliance program. Therefore, we believe that lengthening the deadline to five business days should provide funds sufficient time to compile, review, and file Form N–MFP accurately.

[340] Several commenters requested that the Commission allow funds at least six months before mandatory compliance with the new reporting requirement on Form N–MFP. *See, e.g.,* FAF Advisors Comment Letter; ICI Comment Letter; J.P. Morgan Asset Mgt. Comment Letter.

[341] We anticipate that the XML interactive data file will be compatible with a wide range of open source and proprietary information management software applications. Continued advances in interactive data software, search engines, and other Web-based tools may further enhance the accessibility and usability of the data.

[342] We understand that many funds often provide this type of information in different formats to various information services and third-parties, including NRSROs. Standardizing the data format in Form N–MFP may encourage standardization across the industry, resulting in cost savings for money market funds.

[343] *See, e.g.,* Comment Letter of the American Institute of Certified Public Accountants (Sept. 8, 2009); Comment Letter of EDGAR Online, Inc. (July 23, 2009); Comment Letter of XBRL US (Sept. 8, 2009). Most commenters were neutral on the submission format for Form N–MFP. *See, e.g.,* Clearwater Comment Letter; Fund Democracy/CFA Comment Letter; ICI Comment Letter.

[344] The XBRL format would require a longer period for implementation by the Commission and

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Over time we expect these filings will become highly automated and involve minimal costs.

3. Phase-Out of Weekly Reporting by Certain Funds

We are adopting as final rule 30b1–6T, the temporary rule that requires the weekly filing of portfolio information by money market funds in certain circumstances. As adopted, the only change to the rule is the expiration date. Rule 30b1–6T will expire on December 1, 2010, which corresponds with the first filing of portfolio information required by new rule 30b1–7.

In September 2009, we adopted rule 30b1–6T.[345] The rule requires any money market fund that has a market-based net asset value per share below $0.9975 to provide the Commission with weekly portfolio and valuation information. The information required by the rule is similar to the information money market funds participating in the Treasury Department's Guarantee Program were required to provide under similar circumstances.[346] We requested comments on the rule when we adopted it, but received none.[347]

Rule 30b1–6T originally would have expired one year after we adopted it, *i.e.,* on September 17, 2010.[348] The information that rule 30b1–7, which we are adopting today, will require *all* money market funds to file on a monthly basis subsumes the information that funds with lower market-based NAVs were required to file under rule 30b1–6T. Therefore we are phasing out the latter rule, but are extending its expiration date so that we will continue to receive weekly reports until the monthly reporting requirements of rule 30b1–7 are mandatory. After that time, our monitoring of information filed by money market funds on Form N–MFP, as well as notifications of purchases of certain assets from funds in reliance on rule 17a–9 should enable our staff to identify, and analyze information from, money market funds that exhibit signs of distress and the need for further monitoring.[349]

Because the compliance date for filing monthly portfolio information on Form N–MFP is December 7, 2010, we are amending rule 30b1–6T so that it expires on December 1, 2010. The last date that funds will be required to file information under rule 30b1–6T therefore will be on November 30, 2010.

F. Processing of Transactions

We are amending rule 2a–7, substantially as proposed, to require that a fund (or its transfer agent) have the capacity to redeem and sell its securities at a price based on the fund's current net asset value per share, including the capacity to sell and redeem shares at prices that do not correspond to the stable net asset value or price per share.[350] This amendment will require that shareholder transactions be processed in an orderly manner, even under circumstances that require a fund to "break a dollar."[351] Other types of mutual funds already have this ability to process transactions at varying prices.

Several commenters supported the proposed amendment, noting that it is important that funds be able to redeem shareholders at prices based on the current net asset value of the fund.[352] Some commenters expressed concerns about the costs for funds to modify their systems under the amendment.[353] We noted when we proposed the amendment that, because funds are already obligated to redeem at a price other than the stable net asset value per share, there should be no new cost associated with the requirement that funds (or their transfer agents) have systems that can meet these requirements.[354] It is the responsibility of money market funds, as issuers of redeemable securities, to be able to satisfy redemption requests within seven days after tender of the securities, even if a fund has re-priced its net asset value at a price other than its stable net asset value per share.[355] Based on our recent experience, we believe it is unlikely that a fund that breaks the dollar would be able to satisfy redemption requests within seven days if it did not already have the capacity to process redemptions at prices other than the stable net asset value.[356] To the extent that funds incur costs in meeting the new requirement, we believe the benefits to shareholders justify those costs, which we discuss in detail in the cost benefit section below.[357]

When we proposed the amendment, we proposed to require that the fund's *board of directors determine* that the fund has the capacity to sell and redeem securities at the current net asset value.[358] We asked for comments on the board's role, and specifically whether the rule should require that the fund simply *have* the ability to process transactions at the fund's current net asset value without a specific board determination.[359] Some commenters preferred that the board not be required to make such a determination, arguing that the determination is operational in nature and more appropriate for the fund's investment adviser or chief compliance officer to make.[360] We agree that the focus of the rule should be on the fund's ability to process transactions, rather than on the board's determination regarding that ability, because the issue is operational in nature and need not directly involve the board. We have therefore revised the rule accordingly.[361]

Some commenters raised the issue of whether the rule applies to third-party intermediaries, *i.e.,* whether it requires third parties to have the capacity to

funds, and would entail additional costs. However, the XBRL format derives from and is compatible with the XML format. Moreover, to the extent possible, we intend to follow the naming convention for the XBRL-tagging of the Schedule of Investments in the voluntary filer program. *See* Interactive Data for Mutual Fund Risk/Return Summary, Investment Company Act Release No. 28617 (Feb. 11, 2009) [74 FR 7748 (Feb. 19, 2009)]. If the Commission determines at a future date to require the filing of Form N–MFP in an XBRL format, the Commission and funds might benefit from their experience with their existing XML technology.

[345] *See* Rule 30b1–6T Release, *supra* note 303. We adopted the rule on an interim final basis. *See id.* at Section II.C.

[346] *See* rule 30b1–6T(b)(3). *See also supra* note 16.

[347] *See* Rule 30b1–6T Release, *supra* note 303, at Section III.

[348] Rule 30b1–6T(d).

[349] *See infra* Section II.G.2 (notification provision under amended rule 2a–7 concerning purchases undertaken in reliance on rule 17a–9).

[350] Amended rule 2a–7(c)(13).

[351] Once a fund has broken a dollar, the fund could no longer use penny-rounding method of pricing or the amortized cost method of valuing portfolio securities, and therefore would have to compute share price by reference to the market values of the portfolio with the accuracy of at least a tenth of a cent. *See* 1983 Adopting Release, *supra* note 6, at n.6 and accompanying text. Thus, a fund whose market-based net asset value was determined to be $0.994 would, upon ceasing to use the amortized cost method of valuation, begin to redeem shares at $0.994 (rather than at $0.990). *See generally id.*

[352] *See, e.g.,* Dreyfus Comment Letter; Fund Democracy/CFA Comment Letter; MFDF Comment Letter.

[353] *See, e.g.,* Federated Comment Letter; RidgeWorth Comment Letter.

[354] *See* Proposing Release, *supra* note 2, at Section V.A.6 (cost benefit analysis).

[355] *See* section 22(e) of the Act.

[356] As we noted in the Proposing Release, the inability of one money market fund in 2008 to be able to process securities at prices other than $1.00 per share impeded its ability to distribute assets during its liquidation. *See* Proposing Release, *supra* note 2, at n.262 and accompanying text. Even if a fund were to break a dollar, decide to liquidate, and suspend redemptions in reliance on new rule 22e-3 that we are adopting today, *see infra* Section II.H, the fund's ability to process redemptions at prices other than the stable net asset value is necessary to facilitate the orderly liquidation of the fund.

[357] *See infra* Section V.

[358] Proposed rule 2a–7(c)(1) (last two sentences).

[359] *See* Proposing Release, *supra* note 2, at text following n.263.

[360] *See, e.g.,* Federated Comment Letter; MFDF Comment Letter; NYC Bar Assoc. Comment Letter.

[361] As adopted, the new requirement is paragraph (c)(13) of amended rule 2a–7, titled "Processing of Transactions."

process transactions in a money market fund at prices other than the fund's stable net asset value.[362] The rule by its terms applies only to money market funds and their transfer agents. We note, however, that intermediaries themselves typically have separate obligations to investors with regard to the distribution of proceeds received in connection with investments made or assets held on behalf of those investors.[363]

Several commenters requested that, if the Commission adopted the rule amendment, it provide ample time for money market funds to change their systems to accommodate purchases and redemptions at the current net asset value.[364] We have established a compliance date of October 31, 2011, which is approximately 18 months after the *effective* date of the rule amendments, and more than 20 months after adoption of the amendments. This compliance period is designed to enable funds and those who act on their behalf sufficient time to come into full compliance with the amended rule.

G. Exemption for Affiliate Purchases

The Commission is adopting an amendment to rule 17a–9 under the Investment Company Act to expand the circumstances under which certain affiliated persons can purchase portfolio securities from a money market fund.[365] The amendment permits money market funds to dispose of distressed securities (*e.g.,* securities depressed in value as a result of market conditions) quickly during times of market stress. The Commission is also adopting a related amendment to rule 2a–7, which requires funds to report all such transactions to the Commission.

1. Expanded Exemptive Relief

We are adopting the amendment to rule 17a–9, as proposed. The amendment expands the exemption provided by the rule from the Act's prohibition on affiliated transactions to permit affiliated persons to purchase from a money market fund a portfolio security that has defaulted,[366] but that continues to be an eligible security, as long as the conditions of the rule governing the purchase price are satisfied.[367] These conditions require that the purchase price is paid in cash and is equal to the greater of the security's amortized cost or its market value, including accrued interest.[368]

We are adding a new provision to the rule that will more broadly permit affiliated persons, under the same conditions as discussed above, to purchase other portfolio securities from an affiliated money market fund, for any reason, provided that such person promptly remits to the fund any profit it realizes from the later sale of the security.[369] In these circumstances there may not be an objective indication that the security is distressed and thus that the transaction is clearly in the interest of the fund. Therefore, as proposed, we have added the "claw back" requirement to eliminate incentives for fund advisers and other affiliated persons to buy securities for reasons other than protecting fund shareholders from potential future losses.

Commenters supported the proposed amendment, agreeing that it would provide money market fund advisers with important flexibility to manage fund assets for the benefit of all shareholders during volatile periods.[370] One commenter opposed the proposed amendment out of concern that the expansion of the rule may exacerbate the unwarranted expectation of some shareholders that advisers will take whatever steps are necessary to financially support the $1.00 share price of their money market funds.[371] While we appreciate the commenter's concern, we do not believe that today's action will materially change shareholders' perceptions about money market funds or the likelihood of sponsor support during times of market turmoil. The amendment simply extends the existing rule to types of transactions that historically have been permitted through no-action assurances obtained from the Commission's staff because the staff believed they were in the best interest of the fund's shareholders.[372]

The amendment to rule 17a–9 that we are adopting today is intended to enable advisers to address acute credit or liquidity problems in a money market fund portfolio by purchasing securities from the fund that would be difficult or impossible to sell on the open market at or near their amortized cost. We have crafted the conditions of the rule, including the pricing conditions and the new claw back provision, to protect shareholders' interests and prevent overreaching by advisers. Our staff's experience is that, under such circumstances, these transactions appear to be fair and reasonable and in the best interests of fund shareholders.[373] Moreover, we believe that the alternative of funds obtaining no-action assurances from the Commission staff for these transactions,

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[362] *See, e.g.,* Tamarack Funds Comment Letter (requesting that the Commission clarify that funds "are not responsible for ensuring that intermediaries have the capacity to effect share transactions at other than $1.00"); Russell Inv. Comment Letter (stating that the proposed rule amendment would not apply to intermediaries); *see also* ICI Comment Letter ("proposed amendments are silent with respect to * * * similar systems changes for broker-dealers, banks, insurance companies, trusts, 401(k) recordkeepers, and others that process such amendments"). Some commenters raised concerns about the costs that third parties might bear to revise their computer systems to have the capacity to accommodate purchases and redemptions of money market fund shares at prices other than the fund's stable net asset value. *See, e.g.,* ICI Comment Letter.

[363] *Cf.* rule 15c3–3(e)(3) under the Securities Exchange Act [17 CFR 240.15c3–3(e)(3)] (requiring broker-dealers to periodically re-compute the value of bank accounts held on behalf of broker-dealer customers); rule 15c3–2 under the Securities Exchange Act [17 CFR 240.15c3–2] (prohibiting a broker-dealer from using proceeds from free credit balances unless the proceeds are payable on demand of the customer). *See also Gilman* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 404 N.Y.S.2d 258, 262 (N.Y. Sup. Ct. 1978) (holding that after an investment is sold and proceeds belonging to the customer come into the broker's possession, the broker becomes a fiduciary with respect to those proceeds and may not consciously use them to the detriment of his customer and for his own benefit).

[364] *See, e.g.,* Federated Comment Letter (requesting at least one year); ICI Comment Letter (requesting at least two and a half years); SIFMA Comment Letter (requesting an "adequate period of time").

[365] Rule 17a–9 provides an exemption from section 17(a) of the Act to permit affiliated persons of a money market fund to purchase distressed portfolio securities from the fund. Absent a Commission exemption, section 17(a)(2) prohibits any affiliated person or promoter of or principal underwriter for a fund (or any affiliated person of such a person), acting as principal, from knowingly purchasing securities from the fund. Rule 17a–9 exempts certain purchases of securities from a money market fund from section 17(a), if the purchase price is equal to the greater of the security's amortized cost or market value (in each case, including accrued interest). For convenience, in this Release we refer to all of the persons who would otherwise be prohibited by section 17(a)(2) from purchasing securities of a money market fund as "affiliated persons." "Affiliated person" is defined in section 2(a)(3) of the Act.

[366] The rule excludes an immaterial default unrelated to the financial condition of the issuer, which would make the rule unavailable in the case of defaults that are technical in nature, such as where the obligor has failed to provide a required notice or information on a timely basis. *See* Proposing Release, *supra* note 2, at n.272. Other provisions of rule 2a–7 currently except immaterial defaults unrelated to the financial condition of the issuer. *See* amended rule 2a–7(c)(7)(ii)(A).

[367] *See* amended rule 17a–9(a). Previously, the exemption was available only for the purchase of a portfolio security that was no longer an "eligible security." This could occur, for example, when a security's ratings are downgraded. As we explained in the Proposing Release, this limitation served as a proxy indicating that the market value of the security was likely less than its amortized cost value, and thus the resulting transaction was fair to the fund and did not involve overreaching. *See* Proposing Release, *supra* note 2, at n.269 and accompanying text.

[368] *See* amended rule 17a–9(a)(1)–(2).

[369] *See* amended rule 17a–9(b)(1)–(2).

[370] *See, e.g.,* Dreyfus Comment Letter; Vanguard Comment Letter.

[371] *See* Federated Comment Letter.

[372] *See* Proposing Release, *supra* note 2, at nn.270–71 and preceding, accompanying, and following text.

[373] *See* Proposing Release, *supra* note 2, at text following n.271.

particularly during times of market stress, is time consuming and inefficient.

2. New Reporting Requirement

We also are adopting an amendment to rule 2a–7 to require a money market fund whose securities have been purchased by an affiliated person in reliance on rule 17a–9 to provide us with prompt notice by electronic mail of the transaction and the reasons for the purchase.[374] Such reasons might include, for example, that the fund's adviser expected that the security would be downgraded, that due to the decreased market value of the security the fund was at risk of breaking the buck, or that the fund was experiencing significant redemption requests and wished to avoid a "fire sale" of assets to satisfy such requests. The amendment is intended to provide us with more complete information about these transactions and to alert us to potential problems the fund may be experiencing.

All commenters who addressed the proposed reporting requirement agreed with the need to provide the Commission with this information.[375] At the suggestion of one,[376] we have modified the requirement to provide that the notification must include the price at which the transaction was conducted and the amortized cost value of the security (which will be different if the market value is higher than the amortized cost), which will help us monitor whether the pricing conditions of rule 17a–9 have been satisfied.[377]

H. Fund Liquidation

The Commission is adopting new rule 22e–3, which exempts money market funds from section 22(e) of the Act to permit them to suspend redemptions and postpone payment of redemption proceeds in order to facilitate an orderly liquidation of the fund. The rule permits a fund to suspend redemptions and payment of redemption proceeds if (i) The fund's board, including a majority of disinterested directors, determines that the deviation between the fund's amortized cost price per share and the market-based net asset value per share may result in material dilution or other unfair results, (ii) the board, including a majority of disinterested directors, irrevocably has approved the liquidation of the fund, and (iii) the fund, prior to suspending redemptions, notifies the Commission of its decision to liquidate and suspend redemptions.[378] The new rule replaces rule 22e–3T, a temporary rule that provided a similar exemption for money market funds that participated in the Treasury Department's Guarantee Program.[379]

Rule 22e–3 is intended to reduce the vulnerability of investors to the harmful effects of a run on the fund, and minimize the potential for disruption to the securities markets. Because the suspension of redemptions may impose hardships on investors who rely on their ability to redeem shares, the conditions of the rule limit the fund's ability to suspend redemptions to circumstances that present a significant risk of a run on the fund and potential harm to shareholders. The rule is designed only to facilitate the permanent termination of a fund in an orderly manner. We are revising one of the conditions of the rule, which requires that the board approve the liquidation of the fund, to provide that the fund board must have *irrevocably* approved the liquidation of the fund.[380]

Commenters generally supported the rule, which we are adopting largely as proposed.[381] We have revised one of the rule's conditions in response to commenters' concerns. The proposed rule conditioned its relief on a fund breaking a dollar and re-pricing its shares.[382] Some commenters argued that the rule should allow a fund to suspend redemptions before it breaks a dollar.[383] We are concerned that, without appropriate limits, fund sponsors might use the rule in the course of routine liquidations. We also recognize, however, that requiring a money market fund to actually re-price its securities may not be necessary in order to warrant the suspension of redemptions. Therefore, we have revised the rule's condition to require that the fund's board of directors, including a majority of disinterested directors, determine pursuant to rule 2a–7(c)(8)(ii)(C)[384] that the extent of the deviation between the fund's amortized cost price per share and its shadow price may result in material dilution or other unfair results to investors or existing shareholders.[385] In order to invoke the exemption, therefore, the fund's board must make the same determination that it would make if it were deciding to break a dollar. We believe the revised condition provides fund directors with the appropriate amount of discretion to act in the interest of shareholders.[386]

Paragraph (b) of rule 22e–3 allows a conduit fund (*i.e.,* a fund that invests in a money market fund) to rely on the rule if the money market fund in which it invests has suspended redemptions under the rule.[387] We anticipated when

[374] Amended rule 2a–7(c)(7)(iii)(B). We have clarified that not only purchases by affiliated persons, but also purchases by promoters and principal underwriters of a fund, and any affiliated person of such persons, which are exempt under rule 17a–9, must be reported to the Commission under the provision. *Compare* amended rule 2a–7(c)(7)(iii)(B) *with* proposed rule 2a–7(c)(7)(iii)(B).

[375] *See, e.g.,* BlackRock Comment Letter, Dreyfus Comment Letter. One suggested that sales prices of any securities purchased by the adviser pursuant to rule 17a–9 be promptly reported to the fund's board of directors as well as to the Commission. Comment Letter of the Independent Trustees of Fidelity Fixed Income Funds (Sept. 8, 2009) ("Fidelity Fixed Income Indep. Trustees Comment Letter"). We are not extending the reporting provision to include notification to fund boards because the provision is intended to enable the Commission to monitor how rule 17a–9 is being used. Nevertheless, we expect that fund boards will want to know this information and will request it.

[376] *See* Fidelity Fixed Income Indep. Trustees Comment Letter.

[377] *See* amended rule 2a–7(c)(iii)(B).

[378] Rule 22e–3(a). A fund that intends to be able to rely on rule 22e–3 may also need to update its prospectus to disclose the circumstances under which it may suspend redemptions. *See, e.g.,* Item 6 of Form N–1A ("Purchase and Sale of Fund Shares").

[379] *See* Temporary Exemption for Liquidation of Certain Money Market Funds, Investment Company Act Release No. 28487 (Nov. 20, 2008) [73 FR 71919 (Nov. 26, 2008)]. The Treasury Department's Guarantee Program guaranteed that shareholders of a participating money market fund would receive the fund's stable share price for each share owned as of September 19, 2008, if the fund were to liquidate under the terms of the Program. *See supra* note 16 and accompanying text. The Program expired on September 19, 2009, and rule 22e–3T expired on October 18, 2009.

[380] Rule 22e–3(a)(2). This revision is designed to limit the availability of the rule to extraordinary circumstances, by preventing a fund from invoking the rule if the board determines to liquidate the fund but subsequently revokes its determination, which might, in effect, enable the fund to temporarily suspend redemptions.

[381] Commenters generally agreed that the rule would facilitate fair and orderly liquidations to the benefit of all fund shareholders. *See, e.g.,* IDC Comment Letter; MFDF Comment Letter.

[382] Proposed rule 22e–3(a)(1).

[383] *See, e.g.,* ABA Comment Letter; ICI Comment Letter; IMMFA Comment Letter.

[384] Amended rule 2a–7(c)(8)(ii)(C) provides that, if a money market fund's board of directors believes that the deviation between the fund's amortized cost price per share and its shadow price may result in material dilution or other unfair results to investors or existing shareholders, it shall cause the fund to take such action as it deems appropriate to eliminate or reduce to the extent practicable such dilution or unfair results.

[385] Rule 22e–3(a)(1).

[386] Under the final rule, the exemption applies to securities tendered for redemption but not yet priced at the time the fund begins to rely on the rule. Therefore, for example, if a shareholder submits a redemption order at noon and the fund decides to liquidate and suspend redemptions pursuant to rule 22e–3 at 2:00 pm, the shareholder would be entitled to receive only his or her *pro rata* share of the fund's liquidation proceeds. This is also the case for shareholders who submitted redemption orders after the last time as of which the fund computed its net asset value and shareholders who submitted redemption orders after 2:00 pm.

[387] Rule 22e–3(b) also requires that the conduit fund promptly notify the Commission that it has suspended redemptions in reliance on the rule.

we proposed this provision that it would be used principally by insurance company separate accounts issuing variable insurance contracts and by funds participating in master-feeder arrangements.[388] At the suggestion of one commenter who pointed out that most insurance company separate accounts are organized as unit investment trusts rather than management companies,[389] we have expanded the rule to include unit investment trusts.[390]

Paragraph (c) of the rule provides that the Commission may take certain steps to protect shareholders. It permits the Commission to rescind or modify the relief provided by the rule (and thus require the fund to resume honoring redemptions) if, for example, a liquidating fund has not devised, or is not properly executing, a plan of liquidation that protects fund shareholders. Under this provision, the Commission may modify the relief after appropriate notice and opportunity for hearing in accordance with section 40 of the Act.[391] Commenters did not address this provision, and we are adopting it as proposed.

One commenter recommended that the rule not require prior notice to the Commission.[392] In light of the seriousness of the consequences to shareholders, we believe it is important that the Commission receive prior notice of a suspension of redemptions, particularly when the burden of providing such notice is minimal.[393] Another commenter suggested that the Commission require funds to disclose their plan of liquidation as a condition for suspending redemptions.[394] We are reluctant to impose such a requirement because the time needed to formulate such a plan may prevent fund boards from acting in a timely fashion in the case of an emergency, but we expect that funds would promptly communicate their plan of liquidation to shareholders. Another commenter recommended that the suspension period be limited to 60 days.[395] We have not modified the final rule in response to these comments because liquidations will proceed differently depending on a fund's particular circumstances, and we believe that fund management, under the supervision of the board, is best able to devise and execute a plan of liquidation that is in the best interest of fund shareholders. Furthermore, as discussed above, the Commission will retain authority under the rule to rescind or modify the relief (after appropriate notice and opportunity for hearing) if we conclude, for example, that a liquidating fund has not devised, or is not properly carrying out, a plan of liquidation that protects fund shareholders.[396]

III. Compliance Dates

The amendments to rules 2a–7, 17a–9 and 30b1–6T, and new rules 22e–3 and 30b1–7, and new Form N–MFP become effective May 5, 2010. Unless otherwise discussed below or in this Release, the compliance date is the date of effectiveness.

Some money market funds may have policies that can be changed only if authorized by a shareholder vote. For example, a money market fund may have a disclosed policy of maintaining a WAM (*i.e.,* weighted average maturity) no greater than 90 days, which is less restrictive than the amendment the Commission is adopting today requiring a money market fund to maintain a WAM no greater than 60 days.[397] The Commission believes that, in those circumstances where the existing policy is less restrictive than the amendments we are today adopting and does not conflict with those amendments, a money market fund would not need to hold a shareholder vote under sections 8(b) or 13(a) of the Act merely to comply with the amendments.[398] Moreover, we would not object if a fund were to amend its registration statement to reflect the fund's compliance with the amended rule pursuant to rule 485(b) under the Securities Act of 1933, if other changes in the fund's post-effective amendment meet the conditions for immediate effectiveness under that rule.[399]

A. Portfolio Requirements

Except as indicated below, the compliance date for amendments to rule 2a–7 related to portfolio quality, maturity, liquidity, and repurchase agreements, is May 28, 2010. Funds are not required to dispose of portfolio securities owned, or terminate repurchase agreements entered into, as of the time of adoption of the amendments to comply with the requirements of the rule as amended. Fund portfolios must meet the new maximum WAM and WAL limits by June 30, 2010.

B. Designation of NRSROs

Each fund must disclose the designated NRSROs in its Statement of Additional Information pursuant to amended rule 2a–7(a)(11)(iii) no later than December 31, 2010. This additional time should permit fund boards of directors to evaluate and designate NRSROs without the need to call a special board meeting. Fund boards are free to take advantage of the rule amendments any time after the effective date.

C. Disclosure and Reporting of Portfolio Information

Web site disclosure. The compliance date for public Web site disclosure is October 7, 2010. This should provide each fund sufficient time to revise its information and other systems to ensure that required information is accurately posted and maintained on its Web site.

Reporting to the Commission. All money market funds must begin filing information on Form N–MFP pursuant to rule 30b1–7 no later than December 7, 2010. This compliance date is designed to permit money market funds to develop systems necessary to collect and submit the portfolio information on Form N–MFP. Funds filing information with the Commission pursuant to rule 30b1–6T will no longer be required to file this information after December 1, 2010.

Beginning October 7, 2010, our staff will be able to receive trial data from funds, on a voluntary basis, pursuant to the requirements of rule 30b1–7. We will use these voluntary submissions and the experiences of funds during this period to make adjustments to our filing system and provide guidance to funds. We do not intend to make these submissions public.[400]

D. Processing of Transactions

Funds must comply with the new requirement to be able to process transactions at prices other than stable net asset value no later than October 31, 2011, which is more than 20 months

[388] *See* Proposing Release, *supra* note 2, at text accompanying n.289.

[389] *See* Committee Ann. Insur. Comment Letter.

[390] Rule 22e–3(b) (providing relief to a "registered investment company" rather than to a "fund," or "registered open-end management investment company," as proposed).

[391] Rule 22e–3(c).

[392] *See* ABA Comment Letter.

[393] In addition, these prior notices will, among other things, help us to ascertain whether a fund has erroneously invoked the rule in circumstances for which it was not intended to be used (*e.g.,* a routine liquidation).

[394] *See* Federated Comment Letter.

[395] *See* Bankers Trust Comment Letter.

[396] *See supra* note 391 and accompanying paragraph.

[397] *See supra* Section II.B.1.

[398] 15 U.S.C. 80a–8(b), 80a–13(a).

[399] 17 CFR 230.485(b).

[400] We do not intend to make public the information submitted to us on Form N–MFP as trial data before the mandatory compliance date because of the possibility of errors in the information submitted. *See supra* text following note 339.

after adoption of the amendments.[401] This compliance period is designed to enable funds and those who act on their behalf sufficient time to come into full compliance with the amended rule.

IV. Paperwork Reduction Act Analysis

Certain provisions of the amendments to rules 2a–7 and 30b1–6T, new rules 22e–3 and 30b1–7, and Form N–MFP under the Investment Company Act contain "collections of information" within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[402] The titles for the existing collections of information that are affected by the rule amendments are: "Rule 2a–7 under the Investment Company Act of 1940, Money market funds" (OMB Control No. 3235–0268), "Rule 30b1–6T under the Investment Company Act of 1940, Weekly portfolio report for certain money market funds" (OMB Control No. 3235–0652), and "Rule 38a–1 under the Investment Company Act of 1940, Compliance procedures and practices of registered investment companies" (OMB Control No. 3235–0586). The titles for the new collections of information are: "Rule 22e–3 under the Investment Company Act of 1940, Exemption for liquidation of money market funds," "Rule 30b1–7 under the Investment Company Act of 1940, Monthly report for money market funds," and "Form N–MFP under the Investment Company Act of 1940, Portfolio Holdings of Money Market Funds." We published notice soliciting comments on the collection of information requirements in the Proposing Release and submitted the proposed collections of information to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11 under the control numbers 3235–0268 (rule 2a–7), 3235–0654 (rule 22e–3), and 3235–0653 (rule 30b1–6 and Form N–MFP). OMB has approved the collection of information pursuant to rule 30b1–6T under the control number 3235–0652.

Our amendments and new rules are designed to make money market funds more resilient to risks in the short-term debt markets, and to provide greater protections for investors in a money market fund that is unable to maintain a stable net asset value. 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 control number.

[401] *See supra* text accompanying and following note 364.

[402] 44 U.S.C. 3501–3521.

A. Rule 2a–7

Rule 2a–7 under the Investment Company Act exempts money market funds from the Act's valuation requirements, permitting money market funds to maintain stable share pricing, subject to certain risk-limiting conditions. As discussed above, we are amending rule 2a–7 in several respects. Our amendments revise portfolio quality and maturity requirements; introduce liquidity requirements; require money market fund boards to adopt procedures providing for periodic stress testing of the fund's portfolio; require funds to disclose monthly on their Web sites information on portfolio securities; and finally, require money market funds to have the capability to redeem and issue their securities at prices other than the fund's stable net asset value per share.[403] Several of the amendments create new collection of information requirements. The respondents to these collections of information will be money market funds or their advisers, as noted below.

1. Designation of NRSROs

Under the amendments to rule 2a–7, money market funds will be required to disclose designated NRSROs (including any limitation in the use of the designated NRSRO) in their SAI,[404] which constitutes a collection of information. Compliance with this disclosure requirement will be mandatory for any fund that holds itself out as a money market fund in reliance on rule 2a–7. This information will not be kept confidential. The disclosures are intended to provide investors and third party analysts with information on NRSROs that money market funds will look to when they have to consider credit ratings under rule 2a–7, which may be relevant to investors in choosing among funds. Many money market funds currently discuss credit rating agencies in their registration statements describing threshold credit ratings for portfolio investments, and often specify NRSROs that rate instruments of the type the fund purchases. We anticipate that adding one or two sentences to the discussion identifying designated NRSROs (and any limitations on the use of a designated NRSRO) will not result in additional hourly burdens or printing costs beyond those currently approved in the existing collection of information titled "Form N–1A under the Securities Act of 1933 and under the Investment Company Act of 1940, registration statement of open-end management investment companies" (OMB Control No. 3235–0307).

[403] *See supra* Section II.A–F.

[404] Amended rule 2a–7(a)(11)(iii).

2. Portfolio Liquidity

As discussed above, the amended rule includes a general liquidity requirement, under which each money market fund must hold securities that are sufficiently liquid to meet foreseeable shareholder redemptions in light of its obligations under section 22(e) of the Act and any commitments the fund has made to shareholders. We also noted that in order to comply with this provision in amended rule 2a–7 under the compliance rule, we expect that money market funds will adopt policies and procedures designed to assure that appropriate efforts are undertaken to identify risk characteristics of the fund's shareholders.[405] We anticipate that these policies and procedures may add additional burdens to those currently approved in the existing collection of information under rule 38a–1 under the Investment Company Act. Based on commenters' views, we assume that money market funds currently monitor and manage daily net flows in and out of the funds,[406] and in doing so, monitor the risk characteristics and likely redemptions of certain shareholders, which is a factor we would expect funds to consider under the general liquidity requirement in the amended rule. We believe, however, that many, if not most, funds may have to document the procedures they adopt for the compliance rule. For purposes of this PRA analysis, we estimate that funds would incur a one-time average burden of 8 hours to document policies and procedures to identify risk characteristics of the fund's investors. In addition, staff estimates that the board of directors (as a whole) would take 1 hour to review and adopt these policies and procedures. Amortized over a 3 year period, this would be an annual burden per fund complex of 3 hours. We believe that these characteristics would be applicable to and documented on behalf of all money market funds in a fund complex, and we estimate that 163 fund complexes with money market funds are subject to rule 2a–7. Accordingly, we estimate that the total additional burden to document these policies would be 1467 hours.[407] Amortized over a 3-year period, the estimated annual hourly burden would be 489 hours for all

[405] *See supra* note 198 and accompanying text.

[406] *See* Dreyfus Comment Letter; RidgeWorth Comment Letter.

[407] This estimate is based on the following calculation: (8 + 1) hours × 163 fund complexes = 1467 hours.

money market fund complexes.[408] We believe that any ongoing burdens to reevaluate the need for changes in the policies and procedures would be incorporated in the current estimated burdens for rule 38a–1.

3. Stress Testing

We are requiring, substantially as proposed, that a money market fund's board of directors adopt written procedures that provide for the periodic testing of the fund's ability to maintain a stable net asset value per share based on certain hypothetical events.[409] The rule requires the board to determine the frequency of testing. The procedures must provide for a report of the testing results to be submitted to the board of directors at its next regularly scheduled meeting, or sooner if appropriate based on the results. The report must include an assessment by the fund's adviser of the fund's ability to withstand the events (and concurrent occurrences of those events) that are reasonably likely to occur within the following year.[410] Compliance with the new reporting requirement is mandatory for any fund that holds itself out as a money market fund and uses either the amortized cost method of valuing portfolio securities or the penny-rounding method of pricing fund shares. When provided to the Commission in connection with staff examinations or investigations, the information will be kept confidential to the extent permitted by law.

We anticipate that stress testing will give fund advisers a better understanding of the effect of potential market events and shareholder redemptions on their funds' ability to maintain a stable net asset value, the fund's exposure to the risk of not maintaining a stable net asset value, and actions the adviser may need to take to mitigate the possibility of the fund breaking the buck.[411]

Commission staff believes that in light of the events of the fall of 2008, most, if not all, money market funds currently conduct some stress testing of their portfolios as a matter of routine fund management and business practice.[412] These procedures likely vary depending on the fund's investments. For example, a prime money market fund that is offered to institutional investors may test for hypothetical events such as potential downgrades or defaults in portfolio securities while a U.S. Treasury money market fund might not.[413] Some funds that currently conduct testing may be required to include additional hypothetical events under the amended rule. These funds likely provide regular reports of the test results to senior management. We assumed, however, that currently most funds do not have written procedures documenting the stress testing, do not report the results of testing to their boards of directors, and do not provide an assessment from the fund's adviser regarding the fund's ability to withstand the hypothetical events reasonably likely to occur in the next year.

Commission staff believes that stress testing procedures will be developed for all the money market funds in a fund complex by the fund adviser, and will address appropriate variations for individual money market funds within the complex.[414] Staff estimates that it will take a portfolio risk analyst an average of 22 hours initially to draft procedures documenting the complex's stress testing, and 3 hours for the board of directors (as a whole) to consider and adopt the written procedures.[415] We therefore estimate that the total burden to draft these procedures initially will be 4075 hours.[416] Amortized over a three-year period, this will result in an average annual burden of 8.33 hours for an individual fund complex and a total of 1358 hours for all fund complexes.[417] Staff estimates that a risk analyst will also spend an average of 6 hours per year revising the written procedures to reflect changes in the type or nature of hypothetical events appropriate to stress tests and the board will spend 1 hour to consider and adopt the revisions, for a total annual burden of 1141 hours.[418]

As noted above, each report to the board of directors will include an assessment by the fund's adviser of the fund's ability to withstand reasonably likely hypothetical events in the coming year. Staff estimates that it will take on average: (i) 10 hours of portfolio management time to draft each report to the board and 2 hours of an administrative assistant's time to compile and copy the report (for a total of 12 hours), and (ii) 15 hours for the fund adviser to provide its assessment. Under normal circumstances, the report must be provided at the next scheduled board meeting, and we estimate that the report and the adviser's assessment will cover all money market funds in a complex. We assume that funds will conduct stress tests no less than monthly. With an average of 6 board meetings each year, we estimate that the annual burden for regularly scheduled reports would be 162 hours for an individual fund complex.[419] Under the final rule, a report must be provided earlier if appropriate in light of the results of the test. Staff estimates that as a result of unanticipated changes in market conditions or other events, stress testing results are likely to prompt additional reports on average four times each year.[420] Thus, we estimate these

[408] PRA submissions for approval are made every three years. To estimate an annual burden for a collection of information that occurs one time, the total burden is amortized over the three-year period.

[409] *See supra* Section II.C.4. These events include, without limitation, a change in short-term interest rates, an increase in shareholder redemptions, a downgrade of or default on portfolio securities, and the widening or narrowing of spreads between yields on an appropriate benchmark the fund has selected for overnight interest rates and commercial paper and other types of securities held by the fund. *See* amended rule 2a–7(c)(10)(v)(A).

[410] Amended rule 2a–7(c)(10)(v)(B). The report to the board must include the dates on which the testing was performed and the magnitude of each hypothetical event that would cause the deviation of the money market fund's net asset value calculated using available market quotations (or appropriate substitutes that reflect current market conditions) from its net asset value per share calculated using amortized cost to exceed ½ of 1%.

[411] *See* Proposing Release, *supra* note 2, at text following n.212.

[412] Commenters corroborated our staff's belief. *See, e.g.,* State Street Comment Letter; T. Rowe Price Comment Letter. The estimates of hour burdens and costs provided in the PRA and cost benefit analyses in the Proposing Release were based on staff discussions with representatives of money market funds and on the experience of Commission staff. We did not receive any comment on the estimates and assumptions with respect to stress testing included in the analysis in our proposal. Accordingly, we have not modified any of those assumptions and estimates other than as necessary in light of the new requirement included in the amended rule.

[413] *See* TDAM Comment Letter (noting that testing Treasury funds for downgrades or defaults would be unnecessary).

[414] We expect that the board of directors would be the same for all the money market funds in a complex, and thus could adopt the stress test procedures for all money market funds in the complex at the same meeting.

[415] We have added 1 hour to the estimate of 21 hours in the Proposing Release to account for drafting procedures on when additional reports must be provided to the board based on the results of stress testing.

[416] This estimate is based on the following calculation: (22 hours + 3 hours) × 163 fund complexes = 4075 hours.

[417] These estimates are based on the following calculations: (22 + 3) ÷ 3 = 8.33 hours; 8.33 × 163 fund complexes = 1357.79 hours. PRA submissions for approval are made every three years. To estimate an annual burden for a collection of information that occurs one time, the total burden is amortized over the three-year period.

[418] This estimate is based on the following calculation: (6 hours (analyst) + 1 hour (board)) × 163 fund complexes = 1141 hours.

[419] This estimate is based on the following calculation: (10 hours + 2 hours + 15 hours) × 6 meetings = 162 hours.

[420] We anticipate that in many years there will be no need for special reports, but that in a year in which there is severe market stress, a fund may report to the board weekly for a period of 3 to 6 months. Such reporting would generate 9 to 18 reports in addition to the regular monthly reports. Assuming that this type of event may occur once

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reports would result in an additional 108 hours for an individual fund complex each year.[421] We estimate the total annual burden for all fund complexes would be 44,010 hours.[422]

The amended rule requires a money market fund to retain records of the reports on stress tests for at least 6 years (the first two in an easily accessible place).[423] The retention of these records is necessary to allow the staff during examinations of funds to determine whether a fund is in compliance with the stress test requirements. We estimate that the burden will be 10 minutes per fund complex per report to retain these records for a total annual burden of 272 hours for all fund complexes.[424]

Thus, we estimate that for the three years following adoption, the average annual burden resulting from the stress testing requirements will be 287 hours for each fund complex with a total of 46,781 hours for all fund complexes.[425]

4. Repurchase Agreements

We are adopting, as proposed, amendments affecting a money market fund's ability to "look through" a repurchase agreement for purposes of rule 2a–7's diversification provisions.[426] One of these amendments is that a money market fund will be able to look through a repurchase agreement only if the fund's board of directors or its delegate evaluates the counterparty's creditworthiness.[427]

Several commenters stated that money market fund boards already evaluate the credit quality of counterparties in the course of making an overall credit risk determination under rule 2a–7(c)(3)(i).[428] Because we are adding a separate creditworthiness evaluation in rule 2a–7(c)(4)(ii)(A), funds will need to keep records of such evaluations pursuant to rule 2a–7(c)(11)(ii), which requires a money market fund to retain a record of considerations and actions under the rule for at least 6 years (the first two in an easily accessible place).[429] Compliance with this recordkeeping requirement is mandatory for all funds that take advantage of the special look-through treatment for diversification purposes. We estimate that the burden to keep those records will be 2 hours per fund complex, for a total annual burden of 326 hours for all fund complexes.[430]

5. Public Web site Posting

The amendments require money market funds to post monthly portfolio information on their Web sites.[431] We believe that greater transparency of fund portfolios will provide investors with a better understanding of the fund's investment risks, and may allow investors to exert influence on risk-taking by fund advisers and thus reduce the likelihood that a fund will break the buck. Information will be posted on a public Web site, and compliance with this requirement is mandatory for any fund that holds itself out as a money market fund in reliance on rule 2a–7. In the Proposing Release, Commission staff estimated that there are approximately 750 money market funds that would be affected by the amendments. In addition, our staff noted that based on interviews with industry representatives, most money market funds already post portfolio information on their webpages at least quarterly.[432] Commission staff also estimated that 20 percent of money market funds, or 150 funds, do not currently post this information at least quarterly, and therefore would need to develop a webpage to comply with the amendments. Staff estimated that a money market fund would spend approximately 24 hours of internal money market fund staff time initially to develop the Web page. Staff further estimated that a money market fund would spend approximately 4 hours of professional time to maintain and update the relevant webpage with the required information on a monthly basis.

No commenters addressed the number of money market funds that would be affected by the proposal or the estimated burden hours for developing, maintaining and updating the webpage. Although, as described above, we have revised the proposed disclosure which should result in less information being required on a fund's Web site, Commission staff believes that the number of money market funds is currently 719 and that the hour burden per fund remains the same as previously estimated. Although it is possible that the reduced information required might result in a minimal decrease in the amount of time required to develop, maintain and update the webpage, Commission staff believes that the decrease would be negligible.

One commenter stated that the funds that currently post portfolio holdings information at least quarterly on their Web sites would need, under the rule amendments, to develop the capability to retain previous months' portfolio holdings information on their Web sites, resulting in an additional one-time burden that Commission staff did not include in its estimate in the Proposing Release.[433] Based on a review of some of the current portfolio Web site disclosure by some commenters and follow-up discussions with some commenters, Commission staff estimates that 500 of the 575 funds that currently post portfolio information on their webpages at least quarterly will need to develop this capability. Commission staff further estimates that each of these 500 funds will spend 12 hours to develop this capability, resulting in an additional one-time burden for all such funds of 6000 hours.[434]

Based on an estimate of 719 money market funds posting their portfolio holdings on their webpages, including 144 funds incurring start-up costs to develop a webpage and 500 funds incurring a one-time cost to develop the capability to retain previous months' portfolio holdings information on their Web sites, we estimate that, in the aggregate, the amendment will result in a total of 37,664 average burden hours for all money market funds for each of the first three years.[435]

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every five years, and additional reports would be generated for 6 months, a fund would produce an average of four additional reports per year (18 additional reports ÷ 5 = 3.6 reports).

[421] This estimate is based on the following calculation: (10 hours + 2 hours + 15 hours) × 4 = 108 hours.

[422] This estimate is based on the following calculation: (162 hours + 108 hours) × 163 fund complexes = 44,010 hours.

[423] Amended rule 2a–7(c)(11)(vii).

[424] This estimate is based on the following calculation: 0.1667 hours × 10 reports × 163 fund complexes = 271.7 hours.

[425] These estimates are based on the following calculations: 8.33 hours (draft procedures) + 7 hours (revise procedures) + 120 hours (10 reports) + 150 hours (10 assessments) + 1.67 hours (record retention) = 287 hours; 287 hours × 163 complexes = 46,781 hours.

[426] *See supra* Section II.D; Proposing Release, *supra* note 2, at Section II.E.

[427] Amended rule 2a–7(c)(4)(ii)(A).

[428] *See supra* note 277.

[429] Amended rule 2a–7(c)(11)(ii).

[430] This estimate is based on the following calculation: 2 hours × 163 fund complexes = 326 hours.

[431] Amended rule 2a–7(c)(12).

[432] Certain of the required information is currently maintained by money market funds for regulatory reasons, such as in connection with accounting, tax, and disclosure requirements. We understand that the remaining information is retained by funds in the ordinary course of business. Accordingly, for the purposes of our analysis, we do not ascribe any time to producing the required information.

[433] *See* Data Communiqué Comment Letter. Under our proposal, funds would have been required to maintain the portfolio holdings information on their Web sites for at least 12 months. We are adopting a 6-month maintenance period for portfolio holding information.

[434] The estimated 12 hours is one-half the time that we estimated that a fund would need to set up a new webpage (24 hours).

[435] The estimate is based on the following calculations. The staff estimates that 144 funds will require a total of 3456 hours initially to develop a webpage (144 funds × 24 hours per fund = 3456

6. Reporting of Rule 17a–9 Transactions

We are amending rule 2a–7 to require a money market fund to promptly notify the Commission by electronic mail of the purchase of a money market fund's portfolio security by certain affiliated persons in reliance on rule 17a–9 and to explain the reasons for, and the transaction price of, such purchase.[436] The reporting requirement is designed to assist Commission staff in monitoring money market funds' affiliated transactions that otherwise would be prohibited. The new collection of information will be mandatory for money market funds that rely on rule 2a–7 and that rely on rule 17a–9 for an affiliated person to purchase a money market fund's portfolio security. Information submitted to the Commission related to a rule 17a–9 transaction will not be kept confidential.

We estimate that fund complexes will provide one notice for all money market funds in a particular fund complex holding a distressed security purchased in a transaction under rule 17a–9. As noted above, Commission staff estimates that there are 163 fund complexes with money market funds subject to rule 2a–7. Of these fund complexes, Commission staff estimates that an average of 25 per year will be required to provide notice to the Commission of a rule 17a–9 transaction, with the total annual response per fund complex, on average, requiring 1 hour of an in-house attorney's time. We received no comments on this estimate and have not modified it. Given these estimates, the total annual burden of this amendment to rule 2a–7 for all money market funds would be approximately 25 hours.[437]

7. Total Burden

The currently approved burden for rule 2a–7 is 310,983 hours. The additional burden hours associated with the proposed amendments to rule 2a–7 will increase the renewal estimate to 395,779 hours annually.[438]

B. Rule 22e–3

Rule 22e–3 permits a money market fund that has broken the buck, or is at imminent risk of breaking the buck, to suspend redemptions and postpone the payment of proceeds pending board-approved liquidation proceedings. The rule also requires a money market fund to provide prior notification to the Commission of its decision to suspend redemption and liquidate. Rule 22e–3 is intended to facilitate an orderly liquidation, reduce the vulnerability of shareholders to the harmful effects of a run on a fund, and minimize the potential for market disruption. The notification requirement is a collection of information under the PRA, and is designed to assist Commission staff in monitoring a money market fund's suspension of redemption. The respondents to this information collection would be money market funds that break the buck, or are at imminent risk of breaking the buck, and elect to rely on the exemption afforded by the rule. Respondents also will include certain conduit funds that have invested in money market funds that suspended redemptions in reliance on the rule. Compliance with the notification requirement is mandatory for funds and conduit funds that rely on rule 22e–3, and the information will not be kept confidential.

In the Proposing Release, Commission staff estimated for purposes of the Paperwork Reduction Act that, on average, one money market fund would break the buck and liquidate every six years.[439] The staff further estimated that a fund would spend approximately one hour of an in-house attorney's time to prepare and submit the notice. No commenter addressed the estimated number of money market funds that would rely on the rule or the estimated burden hours associated with complying with the rule's notification requirement. The rule permits funds that invest in a money market fund pursuant to section 12(d)(1)(E) of the Act (''conduit funds'') to rely on the rule, and requires the conduit fund to notify the Commission of its reliance on the rule.[440] The proposed rule would have applied only to conduit funds that are registered open-end management investment companies, and in response to one comment we have expanded the provision to also permit conduit funds that are organized as unit investment trusts to rely on the rule.[441] The staff estimates that there are a total of 780 conduit funds that may invest in money market funds that suspend redemptions in reliance on the rule, and that an average of 10 conduit funds may invest in any money market fund.[442] Given these estimates, the total annual burden of proposed rule 22e–3 for all money market funds and conduit funds would be approximately 110 minutes.[443]

C. Monthly Reporting of Portfolio Holdings

Rule 30b1–7 requires money market funds to file electronically a monthly report on Form N–MFP within five business days after the end of each month. The rule is intended to improve transparency of information about money market funds' portfolio holdings and facilitate oversight of money market funds. The information required by the form will be data-tagged in XML format and filed through EDGAR. The respondents to rule 30b1–7 will be investment companies that are regulated as money market funds under rule 2a–7. Compliance with rule 30b1–7 is mandatory for any fund that holds itself out as a money market fund in reliance on rule 2a–7. Responses to the disclosure requirements will not be kept confidential.

In the Proposing Release, Commission staff estimated that 750 money market funds would be required by proposed rule 30b1–6 to file, on a monthly basis, a complete Form N–MFP disclosing certain information regarding the fund and its portfolio holdings.[444] No commenters addressed this estimate. For purposes of this PRA analysis, the burden associated with the requirements of rule 30b1–7 has been included in the collection of information requirements of Form N–MFP.

Based on our experience with other interactive data filings, we estimated in the Proposing Release that money market funds would require an average of approximately 40 burden hours to compile, tag, and electronically file the required portfolio holdings information

hours) and 500 funds will require a total of 6000 hours initially to develop the capability to maintain historical portfolio holding information (500 funds × 12 hours per fund = 6000 hours). In addition, each of the 719 funds would require 48 hours per year to update and maintain the webpage, for a total of 34,512 hours per year (4 hours per month × 12 months = 48 hours per year; 48 hours per year × 719 funds = 34,512). The average annual hour burden for each of the first three years would thus equal 37,664 hours (3456 + 6000 + (34,512 × 3) ÷ 3).

[436] *See* amended rule 2a–7(c)(7)(iii)(B).

[437] The estimate is based on the following calculation: (25 fund complexes × 1 hour) = 25 hours.

[438] This estimate is based on the following calculation: 310,983 hours (current burden) + 46,781 hours (stress testing) + 326 hours (repurchase agreements) + 37,664 hours (Web site posting) + 25 hours (reporting 17a–9 transactions) = 395,779 hours.

[439] As noted above, only two money market funds have broken the buck since the adoption of rule 2a–7 in 1983.

[440] *See* rule 22e–3(b).

[441] *See supra* note 390 and accompanying text.

[442] These estimates are based on a review of filings with the Commission.

[443] This estimate is based on the following calculations: (1 hour ÷ 6 years) = 10 minutes per year for each fund and conduit fund that is required to provide notice under the rule. 10 minutes per year × 11 (combined number of affected funds and conduit funds) = 110 minutes.

[444] As noted above, in September 2009 we adopted interim final temporary rule 30b1–6T. In order to minimize confusion over rule numbering, we are adopting proposed rule 30b1–6 as rule 30b1–7.

for the first time and an average of approximately 8 burden hours in subsequent filings.[445] Two commenters asserted that the Commission's estimates did not include time to review the information required in Form N–MFP.[446] While the estimate did include time for the review of the information, we nevertheless have increased our estimate to include an additional 2 hours per filing for review of the information to account for a full and careful review of the information to be filed. We now estimate that there are 719 money market funds and that they will require an average of approximately 42 burden hours to compile (including review of the information), tag and electronically file the required portfolio holdings information for the first time and an average of approximately 10 burden hours in subsequent filings. Based on these estimates, we estimate the average annual burden over a three-year period would be 131 hours per money market fund.[447] Based on an estimate of 719 money market funds submitting Form N–MFP in interactive data format, each incurring 131 hours per year on average, we estimate that, in the aggregate, Form N–MFP would result in 94,189 burden hours, on average, for all money market funds for each of the first three years.[448]

D. Weekly Reporting of Portfolio Holdings

Rule 30b1–6T requires a money market fund whose market-based net asset value is less than $0.9975 to electronically (i) notify the Commission promptly and submit a portfolio schedule within one business day, and (ii) submit a portfolio schedule within two business days after the end of each week until such time as the fund's market-based net asset value equals or exceeds $0.9975. The rule is intended to facilitate our oversight of money market funds. We are adopting as final rule 30b1–6T. As adopted, the only change to the rule is the expiration date. Rule 30b1–6T will expire on December 1, 2010. The respondents to rule 30b1–6T are investment companies that are regulated as money market funds under rule 2a–7. Compliance with the rule is mandatory for any money market fund whose market-based NAV is less than $0.9975. Responses to the disclosure requirements will be kept confidential.

We previously estimated, based on past experience under the Guarantee Program, that at any given time 10 money market funds will be required by rule 30b1–6T to provide weekly reports disclosing certain information regarding the fund's portfolio holdings.[449] We received no comments on our estimates. We estimate that money market funds will require an average of approximately 6 burden hours to compile and electronically submit the initial required portfolio holdings information, and an average of approximately 4 burden hours in subsequent reports.[450] Based on these estimates, we estimate the annual burden will be 210 hours per money market fund that is required to provide the information.[451] Based on an estimate of 10 money market funds submitting information under the rule, we estimate that, in the aggregate, rule 30b1–6T will result in 2100 burden hours for all money market funds required to submit portfolio schedules.

V. Cost Benefit Analysis

The Commission is sensitive to the costs and benefits imposed by its rules. We have identified certain costs and benefits of the amendments and new rules. We received comments on the Commission's cost benefit analysis of our proposed amendments to rule 2a–7 and on new rule 30b1–7 and Form N–MFP, which are discussed below. The Commission notes that no comments addressed the Commission's analysis of the costs and benefits associated with the proposed amendments to rule 17a–9 and new rule 22e–3 contained in the Proposing Release. We also received no comments on the cost benefit analysis of rule 30b1–6T. As discussed throughout the release, although there are costs associated with the rules, we think the rules we are adopting will provide significant benefits to the investing public and money market funds. We believe these benefits justify the costs.

A. Rule 2a–7

1. Second Tier Securities, Portfolio Maturity, and Liquidity Requirements

We are adopting several changes to the risk-limiting conditions of rule 2a–7. While we believe that these changes will impart substantial benefits to money market funds, we recognize that they also may also impose certain costs.

First, we are amending rule 2a–7 to further restrict money market funds' exposure to the risks presented by second tier securities. Under the amendments, money market funds will not be permitted to acquire second tier securities unless immediately after their acquisition the money market fund would not have invested (i) more than three percent of its total assets in second tier securities and (ii) more than 0.5 percent of its total assets in second tier securities of any particular issuer.[452] In addition, money market funds will not be permitted to acquire any second tier security with a remaining maturity in excess of 45 days.[453]

Second, we are changing rule 2a–7's portfolio maturity limits. We are

[445] *See* Proposing Release, *supra* note 2, at n.334 and accompanying text. We understand that the required information is currently maintained by money market funds pursuant to other regulatory requirements or in the ordinary course of business. Accordingly, for the purposes of our analysis, we do not ascribe any time to producing the required information.

[446] *See* Data Communiqué Comment Letter; Comment Letter of Bowne & Co. Inc. (Oct. 29, 2009) ("Bowne Comment Letter"). In addition, one commenter asserted that the Commission's estimate of 128 burden hours per money market fund for the first year (1 filing × 40 hours + 11 filings × 8 hours) is far too low for subadvised funds. *See* Committee Ann. Insur. Comment Letter. The commenter, however, did not provide an estimate of the first year burden hour for subadvised funds. As explained below in our discussion of the effect the rule and form will have on competition, we do not believe that the one-time burden for subadvised funds will be much different than the burden on non-subadvised money market funds because the information already should be readily available to the subadviser and the lengthened time for filing Form N–MFP (from the proposed two business days to five business days after the end of each month) should provide subadvisers with sufficient time to send the information to the principal adviser without having to invest in new infrastructure to provide the information on a real-time basis. *See also infra* Section VI.D.

[447] The staff estimates that a fund will make 36 filings in three years. The first filing will require 42 hours and subsequent filings would require 10 hours each, for an average annual burden of 131 hours (1 filing × 42 hours = 42 hours; 35 filings × 10 hours = 350 hours; 42 hours + 350 hours = 392 hours; 392 hours ÷ 3 years = 130.66 hours). Thereafter, filers generally would not incur the start-up burdens applicable to the first filing.

[448] This estimate is based on the following calculation: 719 portfolios × 131 hours = 94,189 hours.

[449] *See* Rule 30b1–6T Release, *supra* note 303, at Section V.

[450] We understand that the required information is currently maintained by money market funds pursuant to other regulatory requirements or in the ordinary course of business. Accordingly, for the purposes of our analysis, we do not ascribe any time to producing the required information.

[451] Because one report is required each week, a fund would submit 52 reports in one year. The first report would require 6 hours and subsequent reports would require 4 hours each. The difference between the hours is due to the fact that funds generally would not incur the additional start-up time applicable to the first report. The burden of the reporting requirement would be 210 hours (1 report × 6 hours = 6 hours, 51 reports × 4 hours = 204 hours, and 6 hours + 204 hours = 210 hours).

[452] *See* amended rule 2a–7(c)(3)(ii) (portfolio quality—second tier securities); amended rule 2a–7(a)(27) (defining "total assets"); amended rule 2a–7(c)(4)(i)(C) (portfolio diversification—issuer diversification—second tier securities). We also are proportionately reducing by half the ability of a money market fund to acquire "demand features" or "guarantees" of a single issuer that are second tier securities from 5% to 2.5% of the money market fund's total assets. *See* amended rule 2a–7(c)(4)(iii)(B) and discussion of our rationale for making this change in note 59 *supra.*

[453] *See* amended rule 2a–7(c)(3)(ii).

reducing the maximum weighted average maturity of a money market fund permitted by rule 2a–7 from 90 days to 60 days.[454] We also are adopting a new 120-day maturity limitation on the "weighted average life" of fund portfolio securities that will limit the portion of a fund's portfolio that can be held in longer term floating- or variable-rate securities.[455] This restriction will require a fund to calculate the weighted average maturity of its portfolio without regard to interest rate reset dates. Finally, we are deleting a provision in rule 2a–7 that permitted money market funds not relying on the amortized cost method of valuation to acquire Government securities with a remaining maturity of up to 762 calendar days.[456] Under the amended rule, money market funds cannot acquire any security with a remaining maturity of more than 397 days, subject to the maturity shortening provisions for floating- and variable-rate securities and securities with a demand feature.[457]

Third, we are adopting new liquidity requirements for money market funds. In particular, we are amending rule 2a–7 to (i) Require that each money market fund hold securities that are sufficiently liquid to meet reasonably foreseeable shareholder redemptions in light of its obligations under section 22(e) of the Act and any commitments the fund has made to shareholders; [458] (ii) further limit a money market fund's investments in illiquid securities (i.e. securities that cannot be sold or disposed of in the ordinary course of business within seven days at approximately the value ascribed to them by the money market fund); [459] and (iii) require a taxable money market fund to hold at least 10 percent of its total assets in "daily liquid assets" and any money market fund to hold at least 30 percent of its total assets in "weekly liquid assets."[460]

[454] *See* amended rule 2a–7(c)(2)(ii).

[455] *See* amended rule 2a–7(c)(2)(iii).

[456] *Compare* amended rule 2a–7(c)(2)(i) *with* current rule 2a–7(c)(2)(ii). In a conforming change, we also are amending the maturity-shortening provision of the rule for variable-rate Government securities to require that the variable rate of interest is readjusted no less frequently than every 397 days, instead of 762 days as previously permitted. *See* amended rule 2a–7(d)(1).

[457] *See* amended rule 2a–7(c)(2)(i); amended rule 2a–7(d)(1)–(5).

[458] *See* amended rule 2a–7(c)(5).

[459] *See* amended rule 2a–7(c)(5)(i). Under the amended rule, a money market fund cannot acquire illiquid securities if immediately after the acquisition, the fund would have invested more than five percent of its total assets in illiquid securities.

[460] *See* amended rule 2a–7(c)(5)(ii)-(iii). *See also* amended rule 2a–7(a)(8) (defining "daily liquid assets") and 2a–7(a)(32) (defining "weekly liquid assets").

a. Benefits

We believe that the amendments to rule 2a–7's risk-limiting conditions are likely to produce broad benefits for money market fund investors. As discussed in Sections II.A–C above, commenters agreed that the proposed rule 2a–7 amendments concerning second tier securities, maturity, and liquidity would benefit money market funds and their investors.[461] The amendments should reduce money market funds' exposure to certain credit, interest rate, spread, and liquidity risks. For example, limiting money market funds' ability to acquire second tier securities will decrease money market funds' exposure to credit, spread, and liquidity risks. Reducing the maximum weighted average maturity of money market funds' portfolios will further decrease their interest rate sensitivity. It also will increase their ability to maintain a stable net asset value in the face of multiple shocks to a money market fund, such as a simultaneous widening of spreads and increase in redemptions, such as occurred during the fall of 2008.[462] Introducing the weighted average life limitation on money market funds' portfolios will limit credit spread risk and interest rate spread risk to funds from longer term floating- or variable-rate securities. In addition, fund portfolios with a lower WAM and a 120-day maximum WAL will turn over more quickly, and the fund will be better able to increase its holdings of highly liquid securities in the face of illiquid markets than funds operating under a maximum 90-day WAM limitation.

We believe that the new liquidity requirements will decrease liquidity risk. As discussed above, they are designed to increase a money market fund's ability to withstand illiquid markets by ensuring that the fund further limits its acquisitions of illiquid securities and that a certain percentage of its assets are held in daily and weekly liquid assets.[463] Under the general liquidity requirement, moreover, each money market fund must assess its liquidity needs on an ongoing basis and take additional actions as appropriate in order to manage its liquidity. Together, these requirements should decrease the likelihood that a fund would have to realize losses from selling portfolio securities into an illiquid market to satisfy redemption requests, which could put pressure on the fund's ability to maintain a stable net asset value.[464] The minimum daily and weekly liquidity standards require a money market fund to hold cash or securities that can be readily converted to cash. In certain circumstances, funds would be required to increase the level of these assets under the general liquidity standard.[465] We believe that these requirements, rather than our traditional notion of liquidity, which was based on a fund's ability to find a buyer of a security, are more likely to enable money market fund advisers to meet their funds' liquidity needs and adjust the funds' portfolios to increase liquidity when needed.[466]

We believe that a reduction of these credit, interest rate, spread, and liquidity risks will better enable money market funds to weather market turbulence and maintain a stable net asset value per share. The amendments are designed to reduce the risk that a money market fund will break the buck, and thereby prevent losses to fund investors. To the extent that money market funds are more stable, they also will reduce systemic risk to the capital markets and provide a more stable source of financing for issuers of short-term credit instruments, thus promoting capital formation. If money market funds become more stable investments as a result of the rule amendments, they may attract further investment, increasing their role as a source of capital.

b. Costs

We recognize that our amendments regarding second tier securities, portfolio maturity, and liquidity will impose costs on some money market funds. For example, yields might decrease in funds depending on their current positions in second tier securities, less liquid securities, and longer term instruments because those instruments typically offer above average yields. We note that the yield offered by a security is tied to its risk. It is important to consider our rule amendments' impact on money market fund yields in this context.

Second Tier Securities. We received several comments on the estimated costs of eliminating money market funds' ability to acquire second tier securities. One commenter stated that such an elimination would cost a money market fund 2 basis points in yield, assuming

[461] *See supra* notes 36–40 and accompanying text; notes 137–139 and accompanying text; notes 159–161 and accompanying text; and notes 184–185 and accompanying text.

[462] *See* discussion in Section II.B.1 of this Release for an example of the size of simultaneous shocks that a money market fund could withstand with a WAM of 90 days as opposed to a WAM of 60 days.

[463] *See supra* Section II.C.

[464] *See id.*

[465] *See supra* Section II.C.1.

[466] *See supra* Section II.C.

that this money market fund held 5 percent of its assets in second tier securities.[467] This commenter stated that it believed that this cost would be appropriate to strengthen the stability of money market funds to weather potential future liquidity and credit crises and to promote investor confidence. Several commenters agreed, stating that they did not expect elimination to lead to market disruption.[468] One commenter added that given the small size of the second tier securities market, the benefits of elimination would far outweigh any disadvantages.[469]

Another commenter stated that the benefits of money market funds being able to invest in second tier securities, in terms of reducing portfolio concentration in financial institution securities and providing affordable financing for second tier security issuers, outweigh any potential increased credit risk.[470] This commenter estimated that elimination of a money market fund's ability to acquire second tier securities would cost it 3 basis points in yield, again assuming that the money market fund held a full 5 percent of its assets in second tier securities. Finally, a third commenter estimated that elimination of money market funds' ability to acquire second tier securities would cost a retail money market fund 4–8 basis points in yield, a non-rated institutional money market fund 2–4 basis points in yield, and a rated institutional fund 1–3 basis points in yield.[471] This commenter assumed that these money market funds held 5 percent of their assets in second tier securities and 5 percent of their assets in lower quality first tier assets, and that all of these assets would not be held if funds' ability to acquire second tier securities was eliminated.

As discussed above, we have determined not to eliminate money market funds' ability to acquire second tier securities, but instead are further restricting this ability. This change from our proposal should result in costs that are less than estimated in the proposal and less than commenters estimated for full-scale elimination. We believe that the 3 percent limitation on money market funds' ability to acquire second tier securities will have a small impact on money market funds.[472] Based on commenters' estimates described above, a reduction in a money market fund's investment in second tier securities from 5 percent to 3 percent of its total assets would reduce its yield on average by approximately 1.2 basis points.[473] However, very few money market funds hold more than 3 percent of their total assets in second tier securities, and even fewer hold a full 5 percent. Our staff's review of money market fund portfolios in September 2008 found that only 4 percent of money market funds held more than 3 percent of their assets in second tier securities. Accordingly, we estimate that each of only 29 money market funds[474] would face a reduction of yield of 1.2 basis points as a result of our amendments.

We also are further reducing the ability of money market funds to acquire second tier securities of any particular issuer from the greater of 1 percent of assets or $1 million to 0.5 percent of assets. Based on our staff's review of money market fund portfolios in September 2008, 8 percent of money market funds held second tier securities of any particular issuer in excess of 0.5 percent of the money market fund's assets. We expect that these money market funds, however, will simply reinvest this excess in the securities of other second tier issuers and, therefore, that there will be no loss in fund yield as a result of this restriction.[475] Several commenters argued that there are many second tier security issuers worthy of investment.[476] If any of these money market funds did not perform credit analysis of a large enough group of second tier security issuers, these funds may incur some administrative costs in tracking additional issuers.[477]

Finally, we are limiting money market funds to only acquiring second tier securities with a remaining maturity of less than 45 days. According to Federal Reserve data, in 2009, only 4 percent of A2/P2 non-financial commercial paper had a maturity of greater than 40 days on issuance, and thus we do not expect that the 45-day maturity limit will have more than a negligible cost impact on taxable money market funds.[478] In addition, based on our staff's review of tax-free money market fund portfolios in September 2008, we estimate that very few money market funds held second tier municipal securities with a maturity of greater than 45 days that were second tier securities at the time of acquisition. As a result, we do not expect that the 45-day maturity limit will have more than a negligible cost impact on money market funds.

WAM and WAL. Three commenters provided cost estimates for a reduction in the maximum weighted average maturity for money market funds. One commenter estimated that if all money market funds had a WAM of 75 days and reduced their WAM to 60 days, it would cost each money market fund 2.5 to 3 basis points in yield.[479] Similarly, another commenter estimated that this same reduction would cost each money market fund 3 basis points in yield, and a reduction in WAM from 90 days to 75

[467] This number was obtained in discussions with a commenter clarifying certain aspects of its comment letter. *See* J.P. Morgan Asset Mgt. Comment Letter.

[468] ICI Comment Letter; TDAM Comment Letter; Thrivent Comment Letter.

[469] TDAM Comment Letter.

[470] *See* Federated Comment Letter. As discussed in Section II.A.1 of this Release, other commenters also asserted that a complete ban on acquisition of second tier securities would not be justified on a cost-benefit basis, would have a material adverse impact on second tier security issuers, would have unintended effects on the capital markets, and would increase borrowing costs for second tier security issuers. We discuss these comments, and provide our response, *supra* notes 41–53 and accompanying and following text.

[471] Fidelity Comment Letter. According to the iMoneyNet Money Market Fund Analyzer Database, as of November 17, 2009, 61% of money market fund assets were held in funds that were top rated by at least one NRSRO and 34% of money market funds had a top rating from at least one NRSRO. In order to retain a top rating, money market funds must only hold first tier securities. According to analysis of the iMoneyNet analyzer database, as of December 1, 2009, approximately 48% of money market funds were retail funds and 52% were institutional funds. Accordingly, Fidelity's estimates result in a blended impact on money market funds of (6 basis points × 48% retail funds) + (3 basis points × 34% non-rated institutional funds) + (2 basis points × 18% rated institutional funds) = 4.3 basis points per fund.

[472] As discussed above, we do not believe that further limitations on money market funds' ability to acquire second tier securities will prevent their ability to achieve diversification benefits. *See supra* note 47 and accompanying text.

[473] This estimate is based on averaging the 2 basis point, 3 basis point, and 4.3 basis point estimates from commenters for a reduction in second tier securities investment from 5% to 0%, proportionately adjusted to reflect a reduction in investment from 5% to 3%.

[474] This estimate is based on the following calculation: 719 money market funds × 4% = 29 money market funds.

[475] Commenters (for example, the Federated Comment Letter and the Fidelity Comment Letter) asserted that there are numerous quality second tier security issuers. Because this limitation, when combined with the 3% aggregate limitation on acquisition of second tier securities, only limits money market funds to holding a minimum of 6 second tier issuers if it were to maximize the limitations (rather than 5 second tier issuers under the current rule), we do not expect that money market funds would have difficulty finding six appropriate second tier security issuers in which to invest.

[476] *See, e.g.,* Chamber/Tier 2 Issuers Comment Letter; Federated Comment Letter; Fidelity Comment Letter; USAA Comment Letter.

[477] Based on discussions we had with certain commenters clarifying certain aspects of their comment letters, we understand that all of these larger managers track sufficient second tier security issuers that the 0.5% limitation per second tier security issuer should not create additional costs related to tracking additional issuers.

[478] *See* Federal Reserve, *Volume Statistics for Commercial Paper, A2/P2 Nonfinancial, available at http://www.federalreserve.gov/releases/cp/volumestats.htm.*

[479] J.P. Morgan Asset Mgt. Comment Letter.

days would also cost a money market fund 3 basis points in yield.[480] Finally, a third commenter estimated that if all money market funds had a WAM of 90 days and reduced their WAM to 60 days, it would cost each money market fund 5 to 10 basis points in yield.[481] According to these estimates, it would cost a money market fund 5 to 10 basis points in yield to reduce its WAM from 90 days to 60 days.

However, historically most money market funds have not maintained a WAM of more than 60 days. According to data provided by the ICI, from January 1998 through April 2009, even the 75th percentile of prime money market funds has maintained an average WAM of 53 days and the 90th percentile of prime money market funds has maintained an average WAM of 65 days.[482] As of November 17, 2009, despite the historically low interest rate environment in which money market funds have tended to extend WAM closer to the maximum limits to gain additional yield, only 1.5 percent of taxable money market funds reported a WAM of more than 75 days (with most of those having a WAM of only slightly over 75 days) and only 15.5 percent reported a WAM of 61–75 days (with these funds having an average WAM of 68 days).[483] We understand that most money market funds like to have some cushion by maintaining a WAM below the permitted maximum, but we do not believe that money market funds believe that such a large cushion must always be maintained. Rather, we believe that many money market funds have maintained lower WAMs than required because they believed that it is prudent management of their portfolio to do so.[484]

Based on this data, on the WAMs of taxable and prime money market funds and on commenters' estimates of the impact of a reduction in WAM, we estimate that 10 money market funds will have to reduce their WAM from 78 days to 55 days at a cost of 6 basis points per fund. We further estimate that 70 money market funds will have to reduce their WAM from 68 days to 55 days at a cost of 2 basis points per fund.

Three commenters provided cost estimates for a reduction in the maximum weighted average life for money market funds. One commenter estimated that if all money market funds had a WAL of 180 days and reduced their WAL to 120 days, it would cost each money market fund 2 to 4 basis points in yield.[485] Another commenter estimated that a WAL reduction of 150 to 120 days would cost each money market fund 1 to 3 basis points in yield.[486] Finally, a third commenter estimated that if all money market funds reduced their WAL to 120 days, it would cost each money market fund 3 basis points in yield.[487] According to these estimates, it would cost a money market fund 1 to 3 basis points in yield to reduce its WAL from 150 days to 120 days.[488] We estimate that two-thirds of taxable money market funds and all tax-free money market funds already maintain a WAL of 120 days or less and thus will incur no cost in transitioning to this amendment to rule 2a–7.[489] We estimate that the other third of taxable money market funds, or 163 funds, maintain a maximum WAL of no greater than 150 days and will incur on average a cost of 2 basis points per fund to reduce their WAL to 120 days.

Several commenters stated that the new WAM limitation would reduce the range of securities available for money market fund investment and increase demand for shorter term securities.[490] No commenters provided any cost estimate for this potential impact. If this did occur, and if the increased demand was not met with increased supply of such securities, the new maturity limitations could result in additional incremental costs to money market funds.

A few commenters also believed that the amended maturity limitations would increase security issuer costs because they would have to issue shorter maturity securities and assume greater risk from having to roll over their securities more frequently.[491] No commenters provided any cost estimate for this potential impact. If security issuer costs do increase as a result of the amended maturity limitations and these issuers as a consequence are unable to obtain the same amount of financing, it may have a negative impact on capital formation.

General Liquidity Requirement. As discussed above, the amended rule includes a general liquidity requirement, under which a fund's management and its board must evaluate the funds' liquidity needs and protect shareholders from the harm that can occur from the failure to properly anticipate and provide for those needs. We also noted that in order to comply with this provision in amended rule 2a–7 under the compliance rule, we expect that money market funds would adopt policies and procedures designed to assure that appropriate efforts are undertaken to identify risk characteristics of the fund's shareholders.[492] For purposes of the PRA analysis, we estimated that each fund complex would incur, on average, 9 hours to document, review, and adopt policies and procedures for monitoring the risk characteristics of money market

[480] Federated Comment Letter.

[481] Fidelity Comment Letter.

[482] Investment Company Institute, Average Maturity of Taxable Prime Money Market Funds, 1998–2009, *available at http://www.sec.gov/comments/s7-11-09/s71109-14.htm.*

[483] Based on data from the iMoneyNet Money Market Fund Analyzer Database as of November 17, 2009. The WAMs of the funds with WAMs over 75 days were: 2 at 76 days, 1 at 77 days, and 3 at 78 days. Tax-free money market funds have WAMs considerably lower (30% of money market funds were tax-free as of December 8, 2009 according to data from the iMoneyNet Money Market Fund Analyzer Database).

[484] *See, e.g., supra* notes 137–139 and accompanying text.

[485] J.P. Morgan Asset Mgt. Comment Letter and subsequent Commission staff conversation with J.P. Morgan staff breaking down the cost estimate in the J.P. Morgan Asset Mgt. Comment Letter by each proposed amendment to rule 2a–7.

[486] Fidelity Comment Letter (focusing on government money market funds).

[487] Federated Comment Letter. The Federated Comment Letter did not specify a WAL starting point for its assumed reduction to a 120-day WAL. Rather, it evaluated instruments that it believed would likely be subject to greater demand or a shorter maturity with a 120-day maximum WAL requirement and estimated the increased cost to money market funds from those securities becoming more expensive as a result.

[488] Based on discussions we had with certain commenters clarifying certain aspects of their comment letters, we do not believe that more than a negligible number of money market funds are maintaining a WAL of 180 days.

[489] We are not aware of any data provider that tracks the WAL of all money market funds (likely because money market funds are not limited currently in the weighted average life that they must maintain). An analysis of the 16 largest, top-rated, prime institutional money market funds (representing 53% of all prime institutional money market fund assets as of June 30, 2009) found that of the 14 funds providing information on the final maturities of their portfolio securities, all had a WAL of under 120 days. *See* Capital Advisors Group, How Safe are Prime Money Market Funds? (Nov. 1, 2009), *available at http://web.capitaladvisors.com/whitepapers/How%20Safe%20Are%20MMFs.pdf* ("CAG Report"). This information, combined with discussions we had with certain commenters clarifying certain aspects of their comment letters, leads us to estimate that two thirds of money market funds currently are maintaining a WAL of no greater than 120 days and that the other third currently are maintaining a WAL of no greater than 150 days. We also understand that the majority of money market funds currently are in compliance with the maximum 120-day WAL because of their voluntary compliance with the recommendations contained in the ICI Report. Because most securities held by tax-free money market funds have a demand feature reducing the security's maturity under the WAL calculation to a very short duration, we understand that tax-free money market funds do not have a WAL greater than 120 days.

[490] *See, e.g.,* Charles Schwab Comment Letter; J.P. Morgan Asset Mgt. Comment Letter; State Street Comment Letter.

[491] *See, e.g.,* Fannie Mae Comment Letter; State Street Comment Letter; Wells Fargo Comment Letter.

[492] *See supra* note 198 and accompanying text.

fund investors.[493] Based on this estimate, we estimate that it would cost a fund complex $6976 to document, review, and adopt these policies and procedures, for a total cost of $1,137,000.[494]

Illiquid Securities. Two commenters provided estimates with respect to the proposed ban on purchases of illiquid securities. One commenter estimated that the proposed ban would decrease money market funds' yields from 2 to 6 basis points, assuming that the fund holds 10 percent of its total assets in illiquid securities.[495] Another commenter submitted that the ban on illiquid securities would decrease yields by 3 basis points.[496] Based on commenters' estimates, a money market fund that reduces its investments in illiquid securities from 10 percent to 5 percent would reduce its yield on average by 2 basis points.[497]

Our staff's review of money market funds' portfolios in September 2008 found that 24 percent of funds reported held any illiquid securities.[498] Based on the staff's review as applied to the current number of money market funds (719),[499] we estimate current money market fund holdings of illiquid securities as follows:

Percentage of total assets represented by illiquid securities	Percentage of funds	Number of funds
10 percent	0.6	4
9 percent	0.4	3
8 percent	0.4	3
7 percent	0.4	3
6 percent	1.0	7
5 percent or less	97.2	698

Based on these estimated holdings, staff makes the following estimates: 4 funds with 10 percent of assets invested in illiquid securities will experience a reduction in holdings of 5 percent and a yield impact of 2 basis points;[500] 3 funds with 9 percent of assets invested in illiquid securities holdings will experience a reduction in holdings of 4 percent and a yield impact of 1.6 basis points;[501] 3 funds with 8 percent of assets invested in illiquid securities holdings will experience a reduction in holdings of 3 percent and a yield impact of 1.2 basis points;[502] 3 funds with 7 percent of assets invested in illiquid securities holdings will experience a reduction in holdings of 2 percent and a yield impact of 0.8 basis points;[503] 7 funds with 6 percent of assets invested in illiquid securities holdings will experience a reduction in holdings of 1 percent and a yield impact of 0.4 basis points.[504]

Daily Liquidity Requirements. Two commenters specifically addressed the proposed daily liquidity requirements. Both commenters estimated that there would be no yield impact as a result of the proposed 10 percent threshold.[505] Based on these comments, we assume that the 10 percent daily minimum liquidity standard we are adopting will have no impact on money market funds' yield.[506]

Weekly Liquidity Requirements. A few commenters provided estimates on the costs of the proposed weekly liquidity requirements. One commenter estimated that the yield impact of the proposed 30 percent weekly liquidity standard for institutional funds would range from 15 to 20 basis points,[507] while another commenter estimated that the yield impact would be 10 basis points.[508] A third commenter submitted that the proposed 30 percent weekly liquidity requirement would have a yield impact of 9 basis points, but would have no impact if the threshold was 20 percent and included agency discount notes with remaining maturities of 95 days or less.[509] None of these commenters explained the baseline (*i.e.,* the percentage of weekly liquid assets institutional funds currently hold) on which their estimated impacts on yield are based. A fourth commenter estimated that if money market funds had to increase their weekly liquid assets by 10 percent, the yield impact would be between 3 and 6 basis points.[510] Thus, commenters' estimates of the yield impact to institutional funds of maintaining 30 percent of their portfolio in weekly liquid assets ranged

[493] *See supra* note 407 and accompanying and preceding text.

[494] These estimates are based on the following calculations: 8 hours × $372/hour (for a senior portfolio manager) = $2976; 1 hour × $4000 (for a board of directors) = $4000; ($2976 + $4000) × 163 complexes = $1,137,088. The hourly wage used for senior portfolio managers is from the SIFMA *Report on Management & Professional Salaries Data* (Sept. 2008), modified to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

[495] *See* Fidelity Comment Letter.

[496] *See* Federated Comment Letter (without specifying the assumed holdings of illiquid securities).

[497] The individual reduction in basis points is calculated by taking the average of the estimated range of 2 to 6 basis points ((2+6) ÷ 2 = 4 basis points; 4 basis points ÷ 10% = 0.4 basis points per 1% reduction), proportionally adjusted to reflect an adjustment in investment in illiquid securities from 10% to 5% (5 x 0.4 = 2).

[498] We note that these holdings are likely to include some securities that were not illiquid at acquisition. Thus, our estimates on the impact of reducing holdings of illiquid securities may be higher than the impact that would be experienced by some money market funds.

[499] The number of money market funds is based on Investment Company Institute, *Trends in Mutual Fund Investing,* Oct. 2009, *available at http://www.ici.org/research/stats/trends/trends_10_09.*

[500] (10% − 5% (allowable amount remaining) = 5%). 5 × 0.4 basis points (basis point impact per 1%) = 2 basis points.

[501] (9% − 5% (allowable amount remaining) = 4%). 4 × 0.4 basis points = 1.6 basis points.

[502] (8% − 5% (allowable amount remaining) = 3%). 3 × 0.4 basis points = 1.2 basis points.

[503] (7% − 5% (allowable amount remaining) = 2%). 2 × 0.4 basis points = 0.8 basis points.

[504] (6% − 5% (allowable amount remaining) = 1%). 1 × 0.4 basis points = 0.4 basis points.

[505] *See* Federated Comment Letter; Fidelity Comment Letter.

[506] Our understanding is that money market funds' current practice is to maintain approximately 10% of their portfolio in daily liquid assets. *See* CAG Report, *supra* note 489; Fitch Report, *supra* note 274, at 6 (Fitch-rated prime money market funds' aggregate exposure to sources of overnight liquidity, including repurchase agreements, time deposits and shares of other money market funds, was approximately 15% of total assets for the six-month period ended on May 15, 2009).

[507] *See* Fidelity Comment Letter (noting that including agency discount notes with remaining maturities of 397 days or less in weekly liquid assets would have reduced this estimate by about 3 basis points for institutional money market funds).

[508] GE Asset Mgt. Comment Letter (arguing that the requirement could cause a more pronounced yield widening effect as a result of supply/demand dynamics, *i.e.,* there would be an increase in demand for securities with 7-day maturities or less, which would result in a corresponding decrease in yield for such instruments; consequently, there could also be a reduced demand for longer-dated instruments, which would adversely impact the short-term financing for issuers of such instruments).

[509] Federated Comment Letter.

[510] J.P. Morgan Asset Mgt. Comment Letter and subsequent Commission staff conversation with J.P. Morgan staff breaking down the cost estimate in the J.P. Morgan Asset Mgt. Comment Letter by each proposed amendment to rule 2a–7.

from 3 to 20 basis points.[511] We have averaged these estimates to determine our estimated yield impact on institutional funds of 1.025 basis points per percentage increase in existing assets that would have to be converted to weekly liquid assets.[512]

We estimate that half of institutional money market funds currently maintain 30 percent or more of their total assets in weekly liquid assets and thus would experience no reduction in yield as a result of the weekly liquidity requirement. We further estimate that 38 percent of institutional funds maintain 25 percent of their assets in weekly liquid assets; 6 percent of institutional funds maintain 20 percent of their assets in weekly liquid assets and 6 percent of institutional funds maintain 15 percent of their assets in weekly liquid assets.[513] Based on these estimates, we estimate that 187 funds may experience no impact, 142 funds may experience a 5.125 basis point impact on yield, 22 funds may experience a 10.25 basis points, and 22 funds may experience a 15.375 basis point impact on yield.[514]

One commenter provided specific estimates for the impact of the proposed 15 percent weekly liquid asset requirement on retail money market funds of between two and four basis points.[515] Assuming that the starting point for these estimates was 10 percent of investments in weekly liquid assets, we estimate that the yield impact per percentage increase to satisfy the weekly liquid asset requirement would be 0.6 basis points.[516] We estimate that all retail money market funds maintain 15 percent of their total assets in weekly liquid assets.[517] Based on this estimate, we estimate that the average yield impact for each retail money market fund would be 9 basis points.[518]

Investors. The decreased yield that some money market funds may offer as a result of the amendments we are adopting today may limit the range of choices that individual money market fund investors have to select their desired level of investment risk. This might cause some investors to shift their assets to, among other places, bank deposits or offshore or other enhanced cash funds unregulated by rule 2a–7 that are able to offer a higher yield.[519] Investors that choose to move to unregulated products may have fewer protections than they had in money market funds regulated under rule 2a–7. When markets come under stress, investors may be more likely to withdraw their money from these offshore or private funds due to their perceived higher risk[520] and substantial redemptions from those funds and accompanying sales of their portfolio securities could increase systemic risk to short-term credit markets, which would impact money market funds. In addition, the stricter portfolio quality, maturity, and liquidity requirements may result in some money market funds having fewer issuers from which to select securities if some issuers only offer second tier securities, less liquid securities, or a larger percentage of longer term securities.

Issuers. Our new portfolio quality, maturity, and liquidity restrictions also may impact issuers. Issuers may experience increased financing costs to the extent that they are unable to find alternative purchasers at previous market rates of second tier securities, less liquid securities, longer term securities, or adjustable-rate securities that money market funds determine to no longer acquire because of the new restrictions. Several commenters stated that elimination of money market funds' ability to acquire second tier securities would increase issuers' borrowing costs and thus could increase the cost of capital formation.[521] No commenters provided estimates of such costs.

As noted earlier in this section, we do not believe that money market funds currently hold a significant amount of second tier securities or securities that are illiquid at acquisition in excess of the newly adopted limitations for these securities. Thus, we expect that the amendments' impact on issuers of these securities will be minimal. We also know that few money market funds maintain a WAM in excess of 60 days, and we therefore believe that our new WAM restriction will not have a significant impact on issuers of longer term securities.[522] To the extent that the new WAM limitation results in companies or governments issuing shorter maturity securities, those issuers may be exposed to an increased risk of insufficient demand for their securities and adverse credit market conditions because they must roll over their short-term financing more frequently. We note that this impact could be mitigated if money market funds sufficiently staggered or "laddered" the maturity of the securities in their portfolios.

Finally, we estimate that one third of taxable money market funds will have to reduce the WAL of their portfolio,[523] and thus it is possible that some adjustable-rate security issuers will need to shorten the maturities of some of the securities they offer, which may result in increased borrowing costs.[524] In addition, the markets for longer term securities may become less liquid if the

[511] We note that the range of these estimates is likely to be lower if agency discount notes with remaining maturities of less than 60 days are included. We have not adjusted for that, however, to maintain a conservative estimate.

[512] Our estimate is based on an average of the commenters' estimated (or the midpoint of commenters' estimated) impacts of 17.5, 10, 9, and 4.5 basis points per 10% increase in weekly liquid assets as proportionally adjusted: 1.75 + 1.0 + 0.9 + 0.45 = 4.1; 4.1 basis points ÷ 4 = 1.025 basis point increase. *See* notes 507–510 and accompanying text.

[513] While we are not aware of any data provider that tracks the actual maturities of securities (as opposed to WAM, which estimates the maturity of floating rate notes based on the interest reset date rather than actual maturity), we are able to provide estimates based on the analysis of the Capital Advisors Group that found that on or near September 30, 2009, the 16 funds providing information on their portfolio securities averaged 30% of assets in securities convertible to cash in 1 to 7 days. In addition, 8 (50%) had 7-day liquidity of 30% or greater; 6 (38%) had 7-day liquidity of 25%–30%; 1 (6%) had liquidity of 20%–25%, and 1 (6%) had 7-day liquidity of 15%–20%. *See* CAG Report, *supra* note 489. For purposes of our estimates, we are assuming the funds in each category held the lowest level of weekly liquid assets in the category.

[514] As noted above, there are currently 719 money market funds, of which we estimate that 52% (374) are institutional funds. *See supra* notes 471 and 499.

[515] *See* Fidelity Comment Letter.

[516] This assumes an average of 3 basis points proportionally adjusted for an increase of 5%. We assume that the commenter based its estimate on an increase from 10% holdings because as noted above, we assume that all money market funds have on average daily liquidity of at least 10% and the commenter based its estimates on the proposed weekly liquid asset requirement of 15% for retail funds. *See supra* note 506 and accompanying text.

[517] We believe that most retail money market funds currently are in voluntary compliance with the 20% weekly liquidity standard recommended by the ICI Report, which would include agency discount notes with original issue maturity of 95 days or less. The final rule permits agency discount notes with remaining maturities of 60 days or less, and we are conservatively estimating that retail funds maintain an average of 15% of assets in weekly liquid assets.

[518] 0.6 basis points x 15% = 9 basis points. This estimate may be overstated because, as noted above, we believe that most retail funds hold 20% of their assets in weekly liquid assets, and thus would have to convert a smaller percentage of assets to weekly liquid assets.

[519] Some commenters suggested this possibility. *See, e.g.,* Goldman Sachs Comment Letter; State Street Comment Letter (making this comment with respect to reducing the maximum permissible WAM).

[520] During the market events of 2007–2008, investors redeemed substantial amounts of assets from certain bond funds and offshore money market funds. *See* ICI Report, *supra* note 14, at 106–07.

[521] *See, e.g.,* Am. Elec. P. Comment Letter; Chamber/Tier 2 Issuers Comment Letter. *But see* ICI Comment Letter (stating their belief that elimination would have a manageable impact on second tier security issuers).

[522] *See supra* notes 482–483 and accompanying text.

[523] *See supra* note 489 and accompanying and following text.

[524] *See supra* note 491 and accompanying text for comments asserting this possible negative impact.

rule amendments cause issuance of these instruments to decline.[525]

Government Securities. We do not believe that eliminating the provision in rule 2a–7 that allowed money market funds relying solely on the penny-rounding method of pricing to hold Government securities with remaining maturities of up to 762 days will have a material impact on money market funds, investors, or issuers of longer term Government securities because we believe that substantially all money market funds rely on the amortized cost method of valuation, and not exclusively on the penny-rounding method of pricing, and thus are not eligible to rely on this exception. We received one comment on this proposal, which stated that they were not aware of any money market funds that relied on the penny rounding method of pricing.[526]

2. Designation of NRSROs

The amendments to rule 2a–7 require a money market fund's board of directors to designate at least four NRSROs whose credit ratings the fund will use in determining the eligibility of portfolio securities under the rule and that the board determines annually issue credit ratings that are sufficiently reliable for this use.[527] In addition, money market funds are required to disclose designated NRSROs in their registration statements.[528]

We anticipate that the requirement to designate at least four NRSROs could foster competition among NRSROs to produce the most accurate ratings in order to obtain designation by money market fund boards. Several commenters agreed that designating at least three NRSROs could encourage competition among NRSROs to achieve designation by money market fund boards.[529] To the extent that competition increases the reliability of the credit ratings of designated NRSROs, this could increase the efficiency of fund managers in determining eligibility of portfolio securities. Some commenters expressed concern, however, that a requirement to designate at least three NRSROs could result in fund boards designating only the three largest NRSROs that issue most of the ratings,[530] which could result in decreased competition among NRSROs. To address this concern, in light of the Commission's goal of increasing competition among NRSROs, we are requiring each fund to designate at least four NRSROs. In addition, requiring designation of four NRSROs may encourage new NRSROs that issue ratings specifically for money market fund instruments to enter the market.

We recognize that the requirement to designate and annually evaluate at least four NRSROs will result in costs to the fund.[531] For the purposes of the PRA, we estimate that the requirement that money market funds disclose this designation, including any limitations on the use of the designations, in their SAIs will not result in additional costs for funds.[532] We expect that boards will designate NRSROs based on recommendations from the fund's adviser and its credit analysts. Similarly, we believe the board's annual determination regarding designated NRSROs will be based on recommendations from the adviser and its credit analysts. Staff estimates that it will take each fund's board of directors approximately 6 hours each year to designate NRSROs and determine whether the NRSROs ratings are sufficiently reliable for such use. Based on an hourly rate for the board of $4000, we estimate that each money market fund will incur $24,000 and all fund complexes will incur $3.9 million annually for the boards of directors to initially designate and determine the reliability and sufficiency of the designated NRSROs' credit ratings for use in determining eligibility of portfolio securities.[533]

We expect that fund advisers currently evaluate the reliability of NRSRO ratings and ratings criteria as part of the credit analysis they perform (under delegated authority from the board) in determining the eligibility of portfolio securities. We also assume that this evaluation includes consideration and internal documentation of whether an NRSRO's rating is sufficient for that use. Accordingly, while we do not anticipate that fund advisers will incur additional time to prepare their recommendations, we expect that fund advisers will incur costs to draft those recommendations in a presentation or report for board review regarding designation of NRSROs and the sufficiency of designated NRSROs' ratings. Staff estimates that the investment adviser for each complex will spend 6 hours annually to prepare a report based on the adviser's internal review and documentation that summarizes its recommendation with respect to each NRSRO that may be considered for designation and any limits on the use of that NRSRO under the rule at a cost per fund complex of $1770 and a total cost of $288,510.[534]

As noted above, we understand that money market fund advisers currently evaluate NRSROs that rate securities in which the fund invests. We also understand that fund advisers monitor NRSROs for potential downgrades of portfolio securities. Prior to today's amendments, if the fund invested in unrated or second tier securities, the adviser had to monitor all NRSROs in case there was a downgrade of a second tier security or an unrated security received a rating below one of the top two categories.[535] Thus, we do not expect that limiting the number of NRSROs that a fund must monitor to four (or more, if the fund chooses) will result in increased costs to fund advisers to monitor NRSROs.

3. Stress Testing

As proposed, we are amending rule 2a–7 to require that a money market fund's board of directors adopt written procedures that provide for the periodic stress testing of each money market fund's portfolio.[536] A fund's board of directors determines the frequency of stress testing. The procedures must require testing of the fund's ability to

[525] No commenters addressed this possibility.

[526] BlackRock Comment Letter.

[527] Amended rule 2a–7(a)(11) (defining the term "designated NRSRO").

[528] Amended rule 2a–7(a)(11)(iii). The fund would be required to make the disclosure in its SAI, under Part B of Form N–1A [17 CFR 239.15A].

[529] *See, e.g.,* HighMark Capital Comment Letter; Invesco Aim Comment Letter.

[530] *See* DBRS Comment Letter; C. Wesselkamper Comment Letter. We note that of the 10 registered NRSROs, three issued over 97% of the ratings across categories that NRSROs reported to the Commission. *See* SEC, *Annual Report on Nationally Recognized Statistical Rating Organizations* at 9 (Sept. 2009).

[531] While we received comments regarding the designation of NRSROs, none of the comments discussed the costs of designation to funds or their advisers.

[532] *See supra* Section IV.A.1.

[533] This estimate is based on the following calculation: $24,000 × 163 (fund complexes) = $3,912,000. We have estimated total costs for fund complexes because we assume that boards of directors will undertake to designate and determine for all funds in the complex at the same time (although boards may designate and make annual determinations with respect to different NRSROs for different money market funds).

[534] These estimates are based on the following calculations: ($202/hour (intermediate portfolio manager) × 3 hours) + ($388/hour (senior portfolio manager) × 3 hours) = $1770; $1770 × 163 fund complexes = $288,510. Hourly wages used for purposes of the estimate of portfolio manager salaries are from the SIFMA *Report on Management & Professional Salaries Data* (Sept. 2008), modified to account for an 1800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead.

[535] *See* current rule 2a–7(c)(6)(i)(A)(2).

[536] *See supra* Section II.C.4. We did not receive any comment on the estimates and assumptions included in our proposal. Accordingly, we have not modified any of those estimates except to reflect the new requirement included in the amended rule.

maintain a stable net asset value per share based upon certain hypothetical events.[537] The procedures also must provide for a report to be delivered to the fund's board of directors at its next regularly scheduled meeting on the results of the testing, or more often as appropriate in light of the results.[538] The report must include an assessment by the fund's adviser of the fund's ability to withstand the events (and concurrent occurrences of those events) that are reasonably likely to occur within the following year.[539]

We anticipate that stress testing will give fund advisers a better understanding of the effect of potential market events and shareholder redemptions on their funds' ability to maintain a stable net asset value, the funds' exposure to the risk that they would break the buck, and actions the advisers may need to take to mitigate the possibility of the funds breaking the buck.[540] We believe that many funds currently conduct stress testing as a matter of routine fund management and business practice.[541] We anticipate, however, that funds that do not currently perform stress testing and funds that may revise their procedures in light of the amended rule will give their managers a tool to better manage those risks. For fund boards of directors that do not currently receive stress test results, we believe that the regular reports of the testing and assessments will provide money market fund boards a better understanding of the risks to which the fund is exposed.

We understand that today rigorous stress testing is a best practice followed by many money market funds.[542] We understand that the fund complexes that conduct stress tests include smaller complexes that offer money market funds externally managed by advisers experienced in this area of management.[543] Accordingly, staff estimates that as a result of the new requirement to adopt stress testing procedures: (i) Funds that currently conduct rigorous stress testing, including tests for hypothetical events listed in the amended rule (and concurrent occurrences of those events), will incur some costs to evaluate whether their current test procedures comply with the new requirement, but will be likely to incur relatively few costs to revise those procedures or continue the stress testing they currently perform; (ii) funds that conduct less rigorous stress testing, or that do not test for all the hypothetical events listed in the amended rule, will incur somewhat greater expenses to revise those procedures in light of the new requirement and maintain the revised testing; and (iii) funds that do not conduct stress testing will incur costs to develop and adopt stress test procedures and conduct stress tests.

As noted above, we believe that there is a range in the extent and rigor of stress testing currently performed by money market funds. We also expect that stress test procedures are being or will be developed by the adviser to a fund complex for all money market funds in the complex, while specific stress tests are performed for each individual money market fund. We estimate that a fund complex that currently does not conduct stress testing will require approximately 1 month for 2 risk management specialists and 2 systems analysts to develop stress test procedures at a cost of approximately $155,000, 22 hours for a risk management specialist to draft the procedures, and 3 hours of board of directors' time to adopt the procedures for a total of approximately $173,000.[544] Costs for fund complexes that will have to revise or fine-tune their stress test procedures would be less. For purposes of this cost benefit analysis, we estimate that these funds will incur half the costs of development, for a total of approximately $96,000.[545] Funds that will not have to change their test procedures will incur approximately $20,000 to determine compliance with the new requirement and to draft and adopt the procedures.[546] We also anticipate that in light of the new demand to develop stress testing procedures, third parties will develop programs that funds will be able to purchase for less than our estimated cost to develop the programs themselves.

As with the development of stress test procedures, the costs funds will incur each year as a result of the proposed amendments to update test procedures, conduct stress tests, and provide reports on the tests and assessments to the board of directors will vary. Funds that currently conduct stress tests already incur costs to perform the tests. In addition, some of those funds may currently provide reports to senior management (if not the board) of their test results. We assume, however, that few, if any, fund advisers provide a regular assessment to the board of the fund's ability to withstand the events reasonably likely to occur in the following year. For that reason, we estimate that for routine reports, each fund complex will incur costs of $3000 to provide a written report on the test results to the board, $4000 to provide the assessment in the report, and $10 to retain records of the reports for a total annual cost to a fund complex of $42,000.[547] As noted above, however, the procedures must provide for additional reports to the board as appropriate based on testing results, and we estimate that each fund complex will incur costs of $28,000 for an average of four of these reports each year.[548] We estimate that a portion of funds will incur additional costs to perform stress tests and update their procedures each

[537] As proposed, the hypothetical events described in the final rule include a change in short-term interest rates, an increase in shareholder redemptions, a downgrade of or default on a portfolio security, and widening or narrowing of spreads between yields on a benchmark selected by the fund and securities held by the fund. *See* amended rule 2a–7(c)(10)(v)(A).

[538] Amended rule 2a–7(c)(10)(v)(B). The report must include dates on which the testing was performed and the magnitude of each hypothetical event that would cause the deviation of the money market fund's net asset value, calculated using available market quotations (or appropriate substitutes that reflect current market conditions), from its net asset value per share, calculated using amortized cost, to exceed ½ of 1%. Amended rule 2a–7(c)(10)(v)(B)(*1*).

[539] Amended rule 2a–7(c)(10)(v)(B)(*2*).

[540] *See supra* note 411 and accompanying and preceding text.

[541] *See* Proposing Release, *supra* note 2, at paragraph following n.358.

[542] *See id.* at n.359 and accompanying text.

[543] These complexes do not, however, meet the definition of "small entities" under the Investment Company Act for purposes of the Regulatory Flexibility Act of 1980. 17 CFR 270.0–10. *See infra* note 636.

[544] This estimate is based on the following calculations: $275/hour × 280 hours (collectively, 2 senior risk management specialists) + $244/hour × 320 hours (collectively, 2 senior systems analysts) = $155,080; $275/hour (senior risk management specialist) × 22 hours = $6050; $4000/hour × 3 hours = $12,000; $155,080 + $6050 + $12,000 = $173,130.

[545] This estimate is based on the following calculation: ($155,080 × 0.5) (revise procedures) + $6050 (draft procedures) + $12,000 (board approval) = $95,590.

[546] This estimate is based on the following calculation: $275/hour (senior risk management specialist) × 8 hours = $2200; $2200 + $6050 + $12,000 = $20,250.

[547] *See supra* note 419 and preceding, accompanying, and following text. This estimate is based on the following calculation: *Report:* $275/hour × 10 hours (senior risk management specialist) + $62 × 2 hours (administrative assistant) = $2874; *Assessment:* $275/hour × 15 hours (senior risk management specialist) = $4125; *Record retention:* $62/hour × 0.1667 hours (administrative assistant) = $10.33; ($2874 + $4125 +$10) × 6 (board meetings per year) = $42,054. Hourly wages used for purposes of the estimate of administrative assistant salaries are from the SIFMA *Report on Management & Professional Salaries Data* (Sept. 2008), modified to account for an 1800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead.

[548] *See supra* note 420 and accompanying text. This estimate is based on the following calculation: ($2874 (reports) + ($4125) (assessment) + $10 (recordkeeping)) × 4 = $28,036.

year, up to a maximum of approximately $149,000.[549]

For purposes of this cost benefit analysis, Commission staff has estimated that 25 percent of fund complexes (or 41 complexes) will have to develop stress test procedures, 50 percent (or 81) would have stress test procedures, but have to revise those procedures, and 25 percent of complexes (or 41 complexes) will review the procedures without having to change them. Based on these estimates, staff further estimates that the total one-time costs for fund complexes to develop or refine existing stress test procedures will be approximately $16 million.[550] In addition, staff estimates that the annual costs to all funds to conduct stress tests, update test procedures, provide reports to fund boards, and retain records of the reports will be approximately $24 million.[551]

4. Repurchase Agreements

We are adopting, as proposed, changes affecting a money market fund's ability to "look through" a repurchase agreement for purposes of rule 2a–7's diversification provisions.[552] Under the amended rule, a money market fund will be able to look through a repurchase agreement only if it is collateralized by cash items or Government securities, and if the fund's board of directors or its delegate evaluates the counterparty's creditworthiness.

The changes are designed to reduce money market funds' risks related to repurchase agreement investments so that funds will be better positioned to weather market turbulence and maintain a stable net asset value per share. A money market fund that invests in a repurchase agreement collateralized by cash items or Government securities is less likely to experience losses upon the sale of collateral in the event of a counterparty's default.[553] The creditworthiness evaluation, moreover, will diminish the risk that a money market fund in the first place enters into a repurchase agreement with a counterparty that subsequently defaults.

We believe that the costs associated with these changes will be minimal. As confirmed by commenters, most money market funds typically do not look through repurchase agreements collateralized with securities other than Government securities.[554] Under the amended rule, money market funds will be able, as they have in the past, to invest in such repurchase agreements, although the funds will not be able to look through the repurchase agreements for purposes of rule 2a–7's diversification provisions.[555]

With regard to the new creditworthiness evaluation, several commenters stated that money market funds already evaluate the credit quality of counterparties under rule 2a–7(c)(3).[556] We estimate, therefore, that investment advisers to only approximately 20 percent of all 163 fund complexes are not currently making such determinations. To the extent that boards or their delegates, in response to the amended rule, will make determinations that they would not otherwise make, those parties will expend time and/or resources in making those determinations. We estimate that, if an investment adviser were to spend 10 hours a year making creditworthiness determinations that it would not otherwise make concerning repurchase agreement counterparties, it would spend approximately $2750 per year.[557] Therefore the total cost to all money market funds would be approximately $90,750 per year.[558] In addition to these costs, we also estimated above, for purposes of the Paperwork Reduction Act, that funds might spend 2 hours per year maintaining records concerning the determinations made under the amended rule.[559] We estimate the aggregate total costs associated with this recordkeeping to be $20,212 per year.[560]

5. Public Web site Posting

The amendments to rule 2a–7 require money market funds to post monthly portfolio information on their Web sites.[561] The rule amendments are intended to provide shareholders with timely information about the securities held by the money market fund.

We anticipate that requiring funds to post monthly portfolio information on their Web sites will benefit investors by providing them a better understanding of their own risk exposure enabling them to make better informed investment decisions. The rule amendments may thus instill more discipline into portfolio management and reduce the likelihood of a money market fund breaking the buck.

The Web site posting requirement will impose certain costs on funds. We estimated in the Proposing Release that money market funds would be required to spend 24 hours of internal money market fund staff time initially to develop a webpage, at a cost of $4944 per fund.[562] We also estimated that all money market funds would be required to spend 4 hours of professional time to maintain and update the Webpage each month, at a total annual cost of $9888 per fund.[563] We also stated that we believe, however, that our estimates may overstate the actual costs that would be incurred to comply with the Web site posting requirement because many funds currently post their portfolio holdings on a monthly, or more frequent, basis.[564] For purposes of the cost benefit analysis in the Proposing Release, Commission staff estimated that 20 percent of money market portfolios (150 portfolios) did not post portfolio holdings information on their Web sites.[565] We requested comment on these estimated costs in the Proposing Release.[566] One commenter suggested that we may have underestimated the costs associated with the initial development of the Web page, but also may have overestimated the costs associated with the ongoing

[549] This estimate is based on the following calculations: *Tests:* $275/hour × 15 hours (senior risk management specialist) + $244/hour × 20 hours (senior systems analyst) = $9005; $9005 × 12 (monthly testing) + ($9005 × 4 additional "appropriate" testing) = $144,080; *Update procedures:* $275/hour × 5 hours (senior risk management specialist) + $4000/hour × 1 hour = $5375; $144,080 + $5375 = $149,455.

[550] This estimate is based on the following calculation: (41 × $173,000) + (81 × $95,000) + (41 × $20,000) = $15,608,000.

[551] This estimate is based on the following calculation: (41 × $149,455) + (81 × $149,455 × 0.5) + (163 × $70,090 (reports, including assessments)) = $23,605,252.5.

[552] *See supra* Section II.D; Proposing Release, *supra* note 2, at Section II.E.

[553] *See supra* note 272 and accompanying text.

[554] *See supra* note 274 and accompanying text.

[555] No commenter has expressed the view that the new diversification requirement will increase money market funds' cost of investing in repurchase agreements.

[556] As discussed above, three commenters argued that the proposed creditworthiness evaluation is unnecessary because it is already an element of the minimal credit risk determination that a fund makes pursuant to rule 2a–7(c)(3). *See supra* note 277.

[557] This estimate is based on the following calculation: $275/hour (senior risk management specialist) × 10 hours = $2750.

[558] This estimate is based on the following calculation: $275/hour (senior risk management specialist) × 10 hours × 33 fund complexes = $90,750.

[559] *See supra* Section IV.A.4.

[560] This estimate is based on the following calculation: $62/hour (administrative assistant) × 2 hours × 163 fund complexes = $20,212.

[561] Amended rule 2a–7(c)(12).

[562] *See* Proposing Release, *supra* note 2, at n.374 and accompanying text. The staff estimated that a webmaster at a money market fund would require 24 hours (at $206 per hour) to develop and review the webpage (24 hours × $206 = $4944).

[563] *See* Proposing Release, *supra* note 2, at n.375 and accompanying text. The staff estimated that a webmaster would require 4 hours (at $206 per hour) to maintain and update the relevant webpages on a monthly basis (4 hours × $206 × 12 months = $9888).

[564] *See* Proposing Release, *supra* note 2, at n.376 and accompanying text.

[565] *See* Proposing Release, *supra* note 2, at text preceding n.377.

[566] *See* Proposing Release, *supra* note 2, at Section V.A.5.

maintenance of Web site reporting.[567] The commenter did not provide any cost estimates. Commission staff continues to believe that these cost estimates are appropriate. In addition, as discussed above, we have decided not to require some of the information required by Regulation S–X, which we proposed that funds post on their Web sites.[568] We expect that eliminating the mandatory posting of this information, which we believe is not critical to be made available to investors, will reduce costs for funds and their advisers.[569]

One commenter, however, stated that the cost estimates did not include the cost for the 80 percent of money market portfolios that currently post portfolio holdings information at least quarterly on their Web sites to develop the capability to retain previous months' portfolio holdings information on their Web sites.[570] Based on a review of some of the commenters' current portfolio Web site disclosure and follow-up discussions with some commenters, Commission staff estimates that 500 funds will need to develop this capability. Commission staff estimates that each of these 500 funds will spend approximately 12 hours, at a one-time cost of $2472 per fund, to develop this capability.[571]

Based on these estimates, we estimate that the total initial costs for the Web site disclosure will be $1,947,936.[572] In addition, we estimate that the annual costs for all money market funds to maintain and update their webpages will be $7.1 million.[573]

In addition, monthly Web site disclosure may impose other costs on funds and their shareholders. For example, more frequent disclosure of portfolio holdings may arguably expand the opportunities for professional traders to exploit this information by engaging in predatory trading practices, such as front-running. However, given the short-term nature of money market fund investments and the restricted universe of eligible portfolio securities, we believe that the risk of trading ahead is severely curtailed in the context of money market funds.[574] For similar reasons, we believe that the potential for "free riding" on a money market fund's investment strategies, *i.e.*, obtaining for free the benefits of fund research and investment strategies, is minimal. Given that shares of money market funds are ordinarily purchased and redeemed at the stable price per share, we believe that there would be relatively few opportunities for profitable arbitrage. Thus, we estimate that the costs of predatory trading practices under the amended rule will be minimal. Furthermore, as previously noted, most money market fund portfolios (80 percent) already are posted on fund Web sites at least quarterly.

6. Processing of Transactions

The amendments to rule 2a–7 require a money market fund to have the capacity to redeem and sell its securities at a price based on the fund's current net asset value per share, including the capacity to sell and redeem shares at prices that do not correspond to the stable net asset value or price per share.[575] As discussed above, the events of fall 2008 revealed that some funds had not implemented automated systems to process redemptions at prices other than the funds' stable net asset value per share. As a result, transactions were processed manually, which extended the time that investors had to wait for the proceeds from their redeemed shares. This experience showed that funds that cannot electronically process redemptions at prices other than the funds' stable net asset value per share risk being unable to meet their obligations to redeem shares and pay redemption proceeds within seven days, as required under the Act.

The amendments to rule 2a–7 mitigate the risk that money market funds would not be able to meet these obligations in the event the fund breaks a buck. These amendments benefit shareholders because they increase the likelihood that shareholders will timely receive the proceeds of their investments when a fund breaks the buck.

Because funds have an existing obligation to redeem at other than their stable net asset value per share, we do not believe that this amendment to rule 2a–7 imposes any additional costs on funds or their transfer agents.[576] Nonetheless, to the extent that funds and transfer agents have to change their systems, we estimated in the Proposing Release that the total cost for a fund complex would be $39,040.[577] We further estimated that one-third of the fund complexes are not currently able to redeem at prices other than stable net asset value, and thus the total cost to all money market funds would be $2,225,280.[578]

Several commenters claimed that the costs of changing the systems would exceed our estimates.[579] One commenter estimated that the costs of making the required changes to the core transfer agent and ancillary systems would total approximately $24 million for ten fund complexes, representing 63 percent of money market fund assets, and two of the three largest transfer agent service providers.[580] Based on those figures, we have revised our estimate to reflect that the total cost of making the required systems changes for all money market funds would be approximately $38.1 million.[581]

B. Rule 17a–9

The Commission is amending rule 17a–9 to expand the circumstances under which affiliated persons can purchase money market fund portfolio securities. Under the amendment, a money market fund generally will be able to sell a portfolio security that has defaulted to an affiliated person for cash equal to the greater of the security's amortized cost value or market value (including accrued interest), even though the security continues to be an eligible security.[582]

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[567] *See* Clearwater Comment Letter.

[568] *See supra* note 285 and accompanying text.

[569] *Id.*

[570] *See* Data Communiqué Comment Letter. Under our proposal, funds would have been required to maintain the portfolio holdings information on their Web sites for at least twelve months. We are adopting a six-month maintenance period for portfolio holding information.

[571] The staff estimates that a Webmaster at a money market fund would require 12 hours (at $206 per hour) to develop the capability to retain previous months' portfolio holdings information on their Web sites as required by the rule (12 hours × $206 = $2472).

[572] This calculation was based on the following estimate: ($4944 × 144 portfolios) (cost to develop webpage) + ($2472 × 500 portfolios) (cost to develop capability to retain previous months' portfolio holdings information on existing Web sites) = $1,947,936.

[573] This calculation was based on the following estimate: ($9888 × 719 portfolios) = $7,109,472.

[574] *See ICI Report, supra* note 14, at 93.

[575] Amended rule 2a–7(c)(13).

[576] *See supra* Section II.F.

[577] This estimate is based on the following calculation: $244/hour × 160 hours (senior systems analyst) = $39,040.

[578] This estimate was based on the following calculation: (171 fund complexes ÷ 3) × $39,040 = $2,225,280.

[579] *See, e.g.,* HighMark Capital Comment Letter; ICI Comment Letter.

[580] *See* ICI Comment Letter. The ICI conducted a survey of its members and gathered data from 10 fund complexes and 2 transfer agent service providers. Six of the 12 respondents indicated that their transfer agent system already had the capability to process money market fund trades at other than a $1.00 stable net asset value.

[581] We believe that the systems changes costs are correlated to the size of the fund complex. Accordingly, this estimate is based on the following calculations: $24 million ÷ 63% = $38.1 million. The ICI Comment Letter also provided additional cost estimates for changes to the systems of intermediaries who perform sub-transfer agency or similar recordkeeping functions. We do not discuss those additional costs here because, as discussed above, the rule does not impose any requirements on those intermediaries. *See supra* text preceding note 363.

[582] *See* amended rule 17a–9(a).

The amendment essentially codifies past Commission staff no-action letters [583] and should benefit investors by enabling money market funds to dispose of distressed securities (*e.g.*, securities depressed in value as a result of market conditions) from their portfolios quickly without any loss to fund shareholders. It also benefits money market funds by eliminating the cost and delay of requesting no-action assurances in these scenarios and the uncertainty whether such assurances will be granted.[584] We do not believe that there are any costs associated with this amendment, and we received no comments on this analysis.

In addition, the amendment permits affiliated persons to purchase other portfolio securities from an affiliated money market fund, for any reason, as long as the security's purchase price meets the rules' other conditions and such person promptly remits to the fund any profit it realizes from the later sale of the security.[585] Our staff provided temporary no-action assurances during the fall of 2008 to certain funds facing extraordinary levels of redemption requests for affiliated persons of such funds to purchase eligible securities from the funds at the greater of amortized cost or market value (plus accrued and unpaid interest).[586] In these circumstances, money market funds may need to obtain cash quickly to avoid selling securities into the market at fire sale prices to meet shareholder redemption requests, to the detriment of remaining shareholders. The staff also provided no-action assurances to money market funds for affiliated persons of the fund to purchase at the greater of amortized cost or market value (plus accrued and unpaid interest) certain distressed securities that were depressed in value due to market conditions potentially threatening the stable share price of the fund, but that remained eligible securities and had not defaulted.[587] Money market funds and their shareholders benefit if affiliated persons are able to purchase securities from the fund at the greater of amortized cost or market value (plus accrued and unpaid interest) in such circumstances without the time, expense, and uncertainty of applying to Commission staff for no-action assurances.

Affiliated persons purchasing such securities will have costs in creating and implementing a system for tracking the purchased securities and remitting to the money market fund any profit ultimately received as a result. We estimate that creating such a system on average would require 5 hours of a senior programmer's time, at a cost of $1460 for each of the 163 fund complexes with money market funds, and a total cost of $237,980.[588] After the initial creation of this system, we expect that the time spent noting in this system that a security was purchased under rule 17a–9 would require a negligible amount of compliance personnel's time. Based on our experience, we do not anticipate that there would be many instances, if any, in which an affiliated person will be required to repay profits in excess of the purchase price paid to the fund. However, if there is a payment, it would be made to the fund. If the payment is sufficiently large, we believe that funds are likely to include it with the next distribution to shareholders, which would not result in any additional costs to the fund. We received no comments on this analysis.

The Commission also is adopting a related amendment to rule 2a–7, which requires that funds report all transactions under rule 17a–9 to the Commission. We believe that this reporting requirement benefits fund investors by allowing the Commission to monitor the purchases for possible abuses and conflicts of interest on the part of the affiliates. It also allows the Commission to observe what types of securities are distressed and which money market funds are holding distressed securities or are subject to significant redemption pressures. This information will assist us in monitoring emerging risks at money market funds. For purposes of the Paperwork Reduction Act analysis, we estimate this amendment will impose relatively small reporting costs on money market funds of $7625 per year.[589] We received no comments on this analysis.

C. Rule 22e–3

Rule 22e–3 permits a money market fund that has broken the buck, or is at imminent risk of breaking the buck, to suspend redemptions and postpone the payment of proceeds pending board-approved liquidation proceedings. By facilitating orderly liquidations in distressed circumstances, we anticipate that rule 22e–3 will reduce the vulnerability of shareholders to the harmful effects of a run on a fund and minimize the potential for market disruption. The rule also enables funds to avoid the expense and delay of obtaining an exemptive order from the Commission, which we estimate would otherwise cost approximately $75,000, and will provide legal certainty to funds that wish to suspend redemptions during a liquidation in the interest of fairness to all shareholders.

Rule 22e–3 will impose certain minimal costs on funds relying on the rule by requiring them to provide prior notice to the Commission of their decision to suspend redemptions in connection with a liquidation. Furthermore, the rule will impose minimal costs on certain conduit funds that have invested in money market funds that suspended redemptions in reliance on the rule by also requiring those conduit funds to provide notice to the Commission. We estimate that the total annual burden of the notification requirement for all money markets funds and conduit funds will be 110 minutes, at a cost of $559.[590] In addition, rule 22e–3 imposes costs on shareholders who seek to redeem their shares, but are unable to do so. In those instances, shareholders may have to borrow funds from another source, and thereby incur interest charges and other transaction fees. We believe, however, that the costs associated with rule 22e–3 are minimal because the rule provides a very limited exemption that is triggered only when a fund breaks the buck, or is in imminent risk of breaking the buck, and liquidates.

D. Rule 30b1–7 and Form N–MFP: Monthly Reporting of Portfolio Holdings

Rule 30b1–7 and Form N–MFP require money market funds to file with the Commission interactive data-formatted portfolio holdings information on a monthly basis. We expect that the rule and form will improve the efficiency and effectiveness of the Commission's oversight of money market funds by enabling Commission staff to manage and analyze comprehensive money market fund portfolio information more quickly and at a lower cost than is currently possible. The interactive data will also facilitate the flow of information between money market funds and other users of this information, such as information services, academics, and

[583] *See supra* Section II.G.1.

[584] Commission staff estimates that the costs to obtain staff no-action assurances range from $50,000 to $100,000.

[585] *See* amended rule 17a–9(b).

[586] Many of the no-action letters can be found on our Web site. *See http://www.sec.gov/divisions/investment/im-noaction.shtml#money.*

[587] *Id.*

[588] This estimate is based on the following calculation: $292/hour × 5 hours × 163 fund complexes = $237,980.

[589] This estimate is based on the following calculation: 25 (notices) × $305/hour (attorney) × 1 hour = $7625. *See supra* note 437 and accompanying text.

[590] *See supra* note 443 and accompanying text. This estimate is based on the following calculation: $305/hour × 110 minutes = $559.

investors. As a result, users of this information, including investors, may benefit by gaining a better understanding of money market funds' risk exposure and becoming better informed in their investment decisions. As the development of software products to analyze the data continues to grow, we expect these benefits will increase. Finally, the portfolio reporting may instill more discipline into portfolio management and reduce the likelihood of a money market fund breaking the buck.

Money market funds may also realize cost savings from the rule. Currently, money market funds provide portfolio holdings information in a variety of formats to different third-parties, such as information services and NRSROs. The rule may encourage the industry to adopt a standardized format, thereby reducing the burdens on money market funds of having to produce this information in multiple formats.

The reporting requirement will also impose certain costs. We estimated in the Proposing Release, that, for the purposes of the PRA, these filing requirements (including collecting, tagging, and electronically filing the report) would impose 128 burden hours at a cost of $35,968 [591] per money market fund for the first year, and 96 burden hours at a cost of $26,976 [592] per money market fund in subsequent years.[593] We requested comment on these estimated costs in the Proposing Release.[594]

As discussed above, two commenters asserted that the Commission's cost estimates did not include time to review the information required in Form N–MFP.[595] In response to these commenters, we revised our PRA estimates to include an additional 2 hours per filing for review of the information.[596] As a result of this increase, we have revised our cost estimates. We estimate that, for the purposes of the PRA, these filing requirements (including collecting (and review), tagging, and electronically filing the report) would impose 152 burden hours at a cost of $42,712 [597] per money market fund for the first year, and 120 burden hours at a cost of $33,720 [598] per money market fund in subsequent years.[599] We estimate that the total cost for all money market funds for the first year would be $30,709,928.[600] The total annual estimated cost for all money market funds in subsequent years would be $24,244,680.[601]

In addition, funds may incur additional costs as a result of the public availability of a fund's market-based net asset value, which is required to be included in Form N–MFP filings. In particular, some commenters noted that if investors systematically redeem shares for one dollar when the market-based net asset value is less than one dollar, the fund might have difficulty maintaining its stable price. However, in response to concerns about the disclosure of market-based values, we are delaying the public availability of the information filed on Form N–MFP for 60 days after the end of the reporting period.[602] We acknowledge that investors might choose to sell their money market fund shares that have a low market-based net asset value, and it is possible that a run could develop. Nevertheless, at least two other factors will reduce the risk of a run. First, portfolio managers may choose to follow less risky investment strategies in an effort to maintain a high market-based net asset value. Second, funds may be quicker to ask for help from their affiliates through, for example, rule 17a–9 transactions.

The money market fund industry is characterized by a mix of competitors with and without affiliates that can provide financial support. The disclosure of a fund's market-based net asset value might encourage funds that have affiliates with the ability to provide financial support to request such support as soon as any problems develop. This support could provide stability to funds that receive the support. This support might also give a competitive advantage to funds that receive it because they may be more willing to invest in securities with higher risk and higher yields. However, the extent of this competitive advantage may be mitigated because the amendments will require the disclosure of the fund's market-based NAV with and without capital support agreements. In addition, much of the extent to which fund managers might take advantage of capital support arrangements to boost fund yields is independent of the amendments we are adopting today and affiliated persons of money market funds are not obligated to support these funds. For the reasons outlined in the discussion on the monthly Web site posting requirement, we estimate that there will be minimal additional costs incurred from predatory trading practices (*e.g.,* front-running or "free riding") as a result of the reporting requirement.[603]

E. Rule 30b1–6T

We adopted rule 30b1–6T to enable the Commission staff to continue to have effective oversight of money market funds. The rule was designed to improve the efficiency and effectiveness of the Commission's oversight by providing useful information about money market funds that report under the rule, and by enabling the staff to manage and analyze money market fund portfolio information more quickly and at a lower cost than possible without electronic submissions of portfolio schedules. When we adopted rule 30b1–6T in September 2009, we requested

[591] *See* Proposing Release, *supra* note 2, at n.396 and accompanying text. This estimate was based on the following calculation: $281/hour × 128 hours (senior database administrator) = $35,968.

[592] *See* Proposing Release, *supra* note 2, at n.397 and accompanying text. This estimate was based on the following calculation: $281/hour × 96 hours (senior database administrator) = $26,976.

[593] We understand that some money market funds may outsource all or a portion of these responsibilities to a filing agent, software consultant, or other third-party service provider. We believe, however, that a fund would engage third-party service providers only if the external costs were comparable, or less than, the estimated internal costs of compiling, tagging, and filing the Form N–MFP.

[594] *See* Proposing Release, *supra* note 2, at paragraph following n.398.

[595] *See* Bowne Comment Letter; Data Communiqué Comment Letter. Another commenter suggested that we may have underestimated the costs associated with the initial filing of Form N–MFP, but also may have overestimated the ongoing costs associated with subsequent filings. *See* Clearwater Comment Letter. The commenter, however, did not provide any cost estimates.

[596] *See supra* Section IV.C.

[597] This estimate is based on the following calculation: $281/hour × 152 hours (senior database administrator) = $42,712.

[598] This estimate is based on the following calculation: $281/hour × 120 hours (senior database administrator) = $33,720.

[599] We understand that some money market funds may outsource all or a portion of these responsibilities to a filing agent, software consultant, or other third-party service provider. We believe, however, that a fund would engage third-party service providers only if the external costs were comparable, or less than, the estimated internal costs of compiling, tagging, and filing the Form N–MFP.

[600] This estimate is based on the following calculation: $42,712 (total estimated cost per fund for first year) × 719 funds = $30,709,928.

[601] This estimate is based on the following calculation: $33,720 (total estimated cost per fund after the first year) × 719 funds = $24,244,680.

[602] *See* rule 30b1–7(b). *See also supra* text accompanying note 320. As noted above, money market funds currently must disclose their mark-to-market net asset value per share semi-annually in their Form N–SAR filings [17 CFR 274.101], which are publicly available. Form N–SAR must be filed with the Commission no later than the 60th day after the end of the fiscal period for which the report is being prepared. *See supra* note 337 and accompanying text. Thus, investors already have access to market-based portfolio value information on the basis of which they could make redemptions.

[603] *See supra* note 574 and accompanying and following text.

comments on the costs and benefits of the rule but received no comments.[604]

Rule 30b1–6T will impose some costs on funds. For the purposes of the PRA, we estimated that the rule will result in an increase of 2100 burden hours per year. We estimate that these burden hours will cost a total of $590,100.[605] We do not believe that rule 30b1–6T will impose other significant costs, especially given the nonpublic nature of the reports required under the rule.

VI. Competition, Efficiency, and Capital Formation

Section 2(c) of the Investment Company Act requires the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is consistent with the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.[606]

A. Rule 2a–7

1. Second Tier Securities, Portfolio Maturity, and Liquidity Limits

We are adopting several amendments to rule 2a–7 to tighten the risk-limiting conditions of the rule. As discussed above, we are further restricting money market funds' ability to acquire second tier securities. The amendments reduce the maximum weighted average maturity of a money market fund permitted by rule 2a–7 from 90 days to 60 days.[607] They also impose a new maturity limitation based on the weighted average "life" of fund securities that limits the portion of a fund's portfolio that can be held in longer term floating- or variable-rate securities.[608] We are deleting a provision in rule 2a–7 that permitted money market funds not relying on the amortized cost method of valuation to acquire Government securities with a remaining maturity of up to 762 calendar days.

Finally, we are adopting new liquidity requirements for money market funds. In particular, we are amending rule 2a–7 to (i) Require that each money market fund hold securities that are sufficiently liquid to meet reasonably foreseeable shareholder redemptions in light of its obligations under section 22(e) of the Act and any commitments the fund has made to shareholders;[609] (ii) further limit a money market fund's investments in illiquid securities (i.e. securities that cannot be sold or disposed of in the ordinary course of business within seven days at approximately the value ascribed to them by the money market fund);[610] and (iii) require a taxable money market fund to hold at least 10 percent of its total assets in "daily liquid assets" and any money market fund to hold at least 30 percent of its total assets in "weekly liquid assets."[611]

We believe that these changes will reduce money market funds' sensitivity to interest rate, credit, and liquidity risks. These changes will also limit the spread risk produced by longer term securities and second tier securities. A reduction of these risks will help individual money market funds to weather market turbulence and maintain a stable net asset value per share, which will increase the stability of the entire money market fund industry. To the extent that money market funds are more stable, the changes also will reduce systemic risk to the capital markets and ensure a stable source of financing for issuers of short-term credit instruments. We believe that these effects will encourage capital formation by encouraging investment in money market funds as well as the issuance of securities that money market funds can purchase.

These changes also may reduce maturities of short-term credit securities that issuers offer, which may increase financing costs for these issuers who might have to go back more frequently to the market for financing. As discussed above, several commenters stated that the elimination of money market funds' ability to acquire second tier securities could increase second tier security issuers' borrowing costs and thus increase capital formation costs.[612] Some of these commenters also asserted that such a prohibition could require second tier security issuers to rely more on bank financing, which could negatively impact banks' ability to lend to other parts of the economy.[613] We note that these impacts should be mitigated given that we are limiting and not eliminating money market funds' ability to acquire second tier securities. However, to the extent that some issuers are unwilling or unable to issue securities that match money market fund demand given these new restrictions or that banks become less willing to lend to finance new businesses, the amendments could have a negative impact on capital formation.

As discussed in the cost benefit analysis above, we expect that the amendments will reduce yields that some money market funds are able to offer. The lower yields may affect the ability of money market funds to compete with other investment vehicles. While money market funds compete with each other, they also compete for investors on the basis of risk-return tradeoff with other lower-risk investment vehicles, such as offshore or unregulated money market funds, bank money market deposit accounts, and deposit accounts in general. The reduction in yield may cause some investors to move their money to, among other places, offshore or unregulated money market funds that do not follow rule 2a–7's strictures and thus are able to offer a higher yield. Beyond the competitive impact, such a change could increase systemic risks to short-term credit markets and capital formation by increasing investment in less stable short-term instruments.

Further limitations on money market funds' ability to acquire second tier securities also may have anticompetitive effects on some relatively small money market funds that may compete with larger funds on the basis of yield. One commenter stated that elimination of money market funds' ability to acquire second tier securities could have a disproportionate impact on smaller money market funds.[614] Our review of money market fund holdings of second tier securities during September 2008 did not reveal smaller money market funds holding second tier securities to a greater extent than larger funds, although smaller funds may try to increase their holdings of second tier securities in different market environments. Even if there were any anticompetitive effects on smaller money market funds, these effects should be reduced by the fact that we are only further limiting, and not eliminating, money market funds' ability to acquire second tier securities.

The further limitations on the ability of money market funds to invest in second tier securities may affect the capital raising ability and strategies of second tier security issuers or otherwise

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[604] *See* Rule 30b1–6T Release, *supra* note 303, at Section VI.

[605] This estimate is based on the following calculation: 2100 hours × $281/hour (senior database administrator) = $590,100.

[606] 15 U.S.C. 80a–2(c).

[607] *See* amended rule 2a–7(c)(2)(ii).

[608] *See* amended rule 2a–7(c)(2)(iii).

[609] Amended rule 2a–7(c)(5).

[610] Amended rule 2a–7(c)(5)(i). Under the amended rule, a money market fund cannot acquire illiquid securities if immediately after the acquisition, the fund would have invested more than five percent of its total assets in illiquid securities.

[611] *See* amended rule 2a–7(c)(5)(ii)–(iii). *See also* amended rule 2a–7(a)(8) (defining "daily liquid assets"); 2a–7(a)(32) (defining "weekly liquid assets").

[612] *See supra* notes 48–49 and accompanying paragraph.

[613] *See, e.g.,* Chamber/Tier 2 Issuers Comment Letter.

[614] *See* Thrivent Comment Letter.

affect their financing arrangements, and may affect the flexibility of investing options for funds. As a preliminary matter, taking into account commenters' concerns, we have determined not to eliminate money market funds' ability to acquire second tier securities. Further, as noted above, second tier securities represent only a very small percentage of money market fund portfolios today and money market funds are not the primary purchasers of second tier securities, which suggests that our amendments would not in themselves have a material effect on capital formation.[615] Nonetheless, we recognize that some non-rule 2a–7 regulated cash management funds and investment pools voluntarily use rule 2a–7 as an investment guideline.[616] However, since we are only further limiting, and not eliminating, money market funds' ability to acquire second tier securities, we do not believe that the behavior of these non-rule 2a–7 funds will have a material adverse effect on capital formation.

2. Designation of NRSROs

We are adopting amendments requiring money market fund boards to designate at least four NRSROs that the fund will use in determining the eligibility of portfolio securities and that the board determines annually issue credit ratings that are sufficiently reliable for this use.[617] As noted above, several commenters suggested that designating at least three NRSROs could encourage competition among NRSROs to achieve designation by money market fund boards.[618] We assume that three NRSROs issue more than 90 percent of ratings of short-term debt.[619] Requiring the designation of at least four NRSROs will ensure that money market funds will consider NRSROs beyond the dominant three. In addition, the amendment may encourage new NRSROs that issue ratings specifically for money market fund instruments to enter the market. To the extent that requiring designation of at least four NRSROs will further increase competition, it also should increase the reliability of the credit ratings of designated NRSROs. Having better information about risk could increase the efficiency of fund managers in determining eligibility of portfolio securities. We do not anticipate that the proposed designation of NRSROs will have an adverse impact on capital formation.

3. Stress Testing

We are amending rule 2a–7 to require the board of directors of each money market fund to adopt procedures providing for periodic stress testing of the money market fund's portfolio, reporting the results of the testing to fund boards, and providing an assessment to the board.[620] We believe that stress testing will increase the efficiency of money market funds by enhancing their risk management and thus making it more likely that the fund will be better prepared for potential stress on the fund due to market events or shareholder behavior. Money market funds will likely become more stable as a result of the risk management benefits provided by stress testing, allowing them to expand and attract further investment. If so, this result will promote capital formation. We do not believe that stress testing will have an adverse impact on competition or capital formation.[621]

4. Repurchase Agreements

We are adopting, as proposed, changes to the conditions under which a money market fund may take advantage of the special look-through treatment of repurchase agreements under rule 2a–7's diversification provisions.[622] In order to obtain such special treatment, a money market fund will be limited to investing in repurchase agreements collateralized by cash items or Government securities and the fund's board of directors or its delegate will have to evaluate the creditworthiness of the repurchase agreement's counterparty.

We believe that these changes will limit the risk that a money market fund incurs losses upon the sale of collateral in the event of a counterparty's default.[623] The lower risk will in turn increase money market funds' ability to maintain a stable net asset value per share, thereby preventing losses to fund investors. More stable money market funds may attract greater investments, thus promoting capital formation and providing a greater source of financing in the capital markets. The changes will not negatively impact competition, efficiency, or capital formation. In particular, commenters noted that most money market funds typically do not look through to collateral consisting of non-Government securities.[624]

5. Public Web Site Disclosure

One of the amendments to rule 2a–7 requires money market funds to disclose certain portfolio holdings information on their Web sites on a monthly basis.[625] In the Proposing Release, we requested comment on what effect this rule amendment would have on competition, efficiency, and capital formation.[626] No commenters addressed the effect of this amendment on competition, efficiency, and capital formation.

The rule amendment will provide greater transparency of the fund's investments for current and prospective shareholders, and may thus promote more efficient allocation of investments by investors.[627] We believe the rule amendment may also improve competition, as better-informed investors may prompt funds managers to provide better services and products. We do not anticipate that funds would be disadvantaged, with respect to competition, because so many already have chosen to provide the information more frequently than monthly. In addition, the investments selected by money market funds are less likely than, for example, equity funds, to be investments from which competing funds would obtain benefit by scrutinizing on a monthly basis.

The rule amendment may also promote capital formation by making portfolio holdings information readily accessible to investors, who may thus be more inclined to allocate their investments in a particular fund or in money market funds instead of an

[615] Based on discussions with one commenter to clarify certain aspects of its comment letter, however, we understand that money market funds purchase approximately 80% of the commercial paper of at least one second tier issuer. *See* Chamber/Tier 2 Issuers Comment Letter. We understand that such a significant reliance on money market funds to purchase a second tier issuer's securities is quite unusual.

[616] *See, e.g.,* Chamber/Tier 2 Issuers Comment Letter.

[617] Amended rule 2a–7(a)(11)(i).

[618] *See, e.g.,* HighMark Capital Comment Letter; Invesco Aim Comment Letter.

[619] *See* Proposing Release, *supra* note 2, at text accompanying and following n.116. *See also supra* note 104 and accompanying text.

[620] Amended rule 2a–7(c)(10)(v).

[621] No commenters addressed the analysis in the Proposing Release regarding whether the proposed stress testing requirements would promote competition, efficiency, and capital formation.

[622] *See supra* Section II.D; Proposing Release, *supra* note 2, at Section II.E.

[623] *See supra* note 272 and accompanying text.

[624] *See supra* note 274. Wells Fargo stated that the amendment would negatively affect capital formation because money market funds will no longer invest in repurchase agreements collateralized with securities with the highest rating or unrated securities of comparable quality, which would negatively affect counterparties and issuers of collateral. *See* Wells Fargo Comment Letter. We discuss those comments above. *See supra* note 273.

[625] *See supra* Section II.E.1.

[626] *See* Proposing Release, *supra* note 2, at Section VI.A.4.

[627] Due to the availability of the portfolio holding information on fund Web sites, investors may allocate their investments away from funds with riskier portfolios. Among other things, this may reduce systemic risks as money market funds may respond by investing in securities with less risk.

alternative product. Alternatively, the rule amendment might have the reverse effect if the portfolio holdings information makes investors less confident regarding the risks associated with money market funds, including the risk that market participants might use the information obtained through the disclosures to the detriment of the fund and its investors, such as by trading along with the fund or ahead of the fund by anticipating future transactions based on past transactions. We also recognize the potential for runs on money market funds that might result from any investors who compute market-based net asset values from the public disclosure of portfolio holdings. As discussed above, however, most money market funds currently disclose their portfolio holdings on their Web sites, and therefore we do not believe that our requirement that funds post monthly portfolio holdings will have a material effect on the ability of investors to compute market-based values and incite a run on the fund.

6. Processing of Transactions

The amendments to rule 2a–7 require a money market fund to have the capacity to redeem and sell its securities at a price based on the fund's current net asset value per share, even if the fund's current net asset values does not correspond to the fund's stable net asset value or price per share. This amendment increases efficiency at money market funds that break the buck by increasing the speed and minimizing the operational difficulties in satisfying shareholder redemption requests in such circumstances. It may also reduce investors' concerns that redemptions would be unduly delayed if a money market fund were to break the buck. We do not believe that this amendment has a material impact on competition or capital formation.

B. Rule 17a–9

The Commission is amending rule 17a–9 to expand the circumstances under which affiliated persons can purchase money market fund securities. Under the amendments, a money market fund generally will be able to sell a portfolio security that has defaulted to an affiliated person for the greater of the security's amortized cost value or market value (including accrued interest), even though the security continued to be an eligible security.[628] In addition, the amendment permits affiliated persons, for any reason, to purchase other portfolio securities from an affiliated money market fund on the same terms as long as such person is required to promptly remit to the fund any profit it realizes from the later sale of the security.[629] These amendments increase the efficiency of both the Commission and money market funds by allowing affiliated persons to purchase portfolio securities from money market funds under distress without having to seek no-action assurances from Commission staff. The money market fund industry is competitive; some money market funds have well-funded affiliates to support the money market fund while others do not. This amendment may increase the competitive advantage of money market funds with well-funded affiliates relative to other money market funds, which we balanced against the need to promote stability in money market funds. We do not believe that the amendments will have any material impact on capital formation. We received no comments on this analysis.

C. Rule 22e–3

Rule 22e–3 permits a money market fund that has broken the buck, or is at imminent risk of breaking the buck, to suspend redemptions and postpone the payment of proceeds pending board-approved liquidation proceedings. We anticipate the rule will promote efficiency in the financial markets by facilitating the orderly disposal of assets during a liquidation. To the extent that investors choose money market funds over alternative investments because the rule provides reassurance as to the protection of fund assets in the event a money market fund breaks the buck, the rule also may promote capital formation. If, however, the possibility that redemptions may be suspended during a liquidation makes money market funds less appealing to investors, the rule may have a negative effect on capital formation. The rule also may help make investors more confident that they will receive the proceeds from their investment in the event of a liquidation. We do not believe that the rule will have any adverse effect on competition. We received no comments on this analysis.

D. Rule 30b1–7 and Form N–MFP: Monthly Reporting of Portfolio Holdings

New rule 30b1–7 and Form N–MFP mandate the monthly electronic filing of each money market fund's portfolio holdings information in XML-tagged format. As discussed above, we believe the new reporting requirement will improve the efficiency and effectiveness of the Commission's oversight of money market funds. The availability, and usability, of this data will also promote efficiency for other third parties that may be interested in collecting and analyzing money market funds' portfolio holdings information. Money market funds currently are often required to provide this information to various third parties in different formats. To the extent that the new reporting requirement may encourage a standardized format for disclosure or transmission of portfolio holdings information, it may promote efficiency for money market funds. We do not believe that the reporting requirement will have an adverse effect on capital formation.

In the Proposing Release, we requested comment on what effect the proposed rule[630] would have on competition, efficiency, and capital formation.[631] One commenter stated that the Commission's view that the proposed rule would not have an adverse effect on competition may be incorrect for subadvised money market funds, because a number of the information items in Form N–MFP require information that typically is in the possession of the subadviser who manages the portfolio and not the principal adviser who, in most cases, would be responsible for preparing Form N–MFP. The commenter stated that obtaining the data from subadvisers would be costly because it would have to be done on a real-time basis, which would require a significant investment in new infrastructure.[632] The information required by the items cited by the commenter, however, already should be readily available to the subadviser.[633] The information also is

[628] *See* amended rule 17a–9(a).

[629] *See* amended rule 17a–9(b).

[630] The rule was proposed as rule 30b1–6. As noted above, in September 2009 we adopted interim final temporary rule 30b1–6T. We therefore have adopted proposed rule 30b1–6 as rule 30b1–7.

[631] *See* Proposing Release, *supra* note 2, at Section VI.D.

[632] *See* Committee Ann. Insur. Comment Letter. In particular, the commenter stated that the information required by Items 17 (dollar weighted average life maturity), 20 (CIK of the issuer of security), 26(b) (credit rating given by the NRSROs for the security), and 30–35 (information on enhancements) of proposed Form N–MFP are not typically in the possession of the principal adviser and must be obtained from the subadviser managing the portfolio. The commenter asserted that the Commission's estimate of 128 burden hours per money market fund for the first year (1 filing × 40 hours + 11 filings × 8 hours) is far too low for subadvised funds. For the reasons discussed below, we do not believe that subadvised funds would be subject to significant investment in new infrastructure and thus we believe that the burden estimate is not too low for subadvised funds. The commenter does not state that there would be any ongoing additional costs for compliance with Form N–MFP by subadvised money market funds.

[633] Subadvisers must have all of the information required by the particular items the commenter

not needed on a real-time basis by the principal adviser because the form requires information as of the last business day of the preceding month. Moreover, we have lengthened the time for filing Form N–MFP from the proposed two business days after the end of each month to five business days after the end of each month. This change should provide subadvisers with sufficient time to send the information to the principal adviser without having to invest in new infrastructure to provide the information on a real-time basis.[634] We therefore continue to believe that the reporting requirement will not have an adverse effect on competition.

The amendments also will require the public disclosure of a money market fund's market-based net asset value. We expect that the disclosure of month-end market-based NAV may discourage the fund's portfolio manager from taking certain risks that could reduce the fund's market-based NAV. The money market fund industry is characterized by a mix of competitors with and without affiliates that can provide financial support. The new disclosure might encourage funds that have affiliates with the ability to provide financial support to request such support as soon as any problems develop. This support could provide stability to funds that receive the support. This support might also give a competitive advantage to funds that receive it because they may be more willing to invest in securities with higher risk and higher yields. However, the extent of this competitive advantage may be mitigated because the amendments will require the disclosure of the fund's market-based NAV with and without capital support agreements. In addition, much of the extent to which fund managers might take advantage of capital support arrangements to boost fund yields is independent of the amendments we are adopting today and affiliated persons of money market funds are not obligated to support these funds.

The disclosure of a market-based net asset value below $1.00 also might precipitate a run on the fund. If one fund were to fail for this reason, runs might develop in other money market funds, even those with relatively high market-based net asset values. However, we believe that shareholders will benefit from knowing the monthly market-based net asset values of money market funds. We anticipate that the public availability of these values will help investors make informed decisions about whether to invest, or maintain their investments, in money market funds. We also anticipate that retail investors over time will become acclimated to the market-based net asset value information that money market funds will be required to disclose, and that most of those investors will not likely make decisions based on immaterial changes to funds' portfolio values. In response to concerns expressed by some commenters about the potential for harm that immediate public disclosure may pose for funds, we will delay for 60 days after the end of the reporting period, public disclosure of the information filed on Form N–MFP, including the market-based net asset values.[635]

E. Rule 30b1–6T

Rule 30b1–6T is intended to facilitate oversight of money market funds that present a greater risk that they will be unable to maintain their primary investment objectives. As noted above, the nonpublic reports are designed to improve the efficiency and effectiveness of the Commission's oversight of such money market funds, which may also provide reassurance to investors, which may in turn promote capital formation. We do not believe that the rule will have any effect on competition.

VII. Regulatory Flexibility Act Certification

The Commission certified, pursuant to section 605(b) of the Regulatory Flexibility Act of 1980 that the proposed amendments to rules 2a–7, 17a–9, and 30b1–5, and proposed rules 30b1–6 and 22e–3 under the Investment Company Act would not have a significant economic impact on a substantial number of small entities.[636] We included this certification in Section VII of the Proposing Release. Although we encouraged written comments regarding this certification, no commenters responded to this request.[637]

VIII. Statutory Authority

The Commission is adopting amendments to rule 2a–7 under the exemptive and rulemaking authority set forth in sections 6(c), 8(b), 22(c), and 38(a) of the Investment Company Act [15 U.S.C. 80a–6(c), 80a–8(b), 80a–22(c), 80a–37(a)]. The Commission is adopting amendments to rule 17a–9 pursuant to the authority set forth in sections 6(c) and 38(a) of the Investment Company Act [15 U.S.C. 80a–6(c), 80a–37(a)]. The Commission is adopting rule 22e–3 pursuant to the authority set forth in sections 6(c), 22(e) and 38(a) of the Investment Company Act [15 U.S.C. 80a–6(c), 80a–22(e), and 80a–37(a)]. The Commission is adopting an amendment to rule 30b1–6T pursuant to authority set forth in sections 8(b), 30(b), 31(a), and 38(a) of the Investment Company Act [15 U.S.C. 80a–8(b), 80a–29(b), 80a–30(a), and 80a–37(a)]. The Commission is adopting new rule 30b1–7 and Form N–MFP pursuant to authority set forth in sections 8(b), 30(b), 31(a), and 38(a) of the Investment Company Act [15 U.S.C. 80a–8(b), 80a–29(b), 80a–30(a), and 80a–37(a)].

List of Subjects in 17 CFR Parts 270 and 274

Investment companies, Reporting and recordkeeping requirements, Securities.

Text of Rules, Rule Amendments, and Form

■ For reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

■ 1. The authority citation for Part 270 continues to read, in part, as follows:

Authority: 15 U.S.C. 80a–1 *et seq.*, 80a–34(d), 80a–37, and 80a–39, unless otherwise noted.

* * * * *

■ 2. Section 270.2a–7 is revised to read as follows:

§ 270.2a–7 Money market funds.

(a) *Definitions.*

(1) *Acquisition* (or *Acquire*) means any purchase or subsequent rollover (but does not include the failure to exercise a Demand Feature).

specifies in order to manage the portfolio on a day-to-day basis in compliance with rule 2a–7, other than an issuer's CIK. Under Form N–MFP, as adopted, the CIK of the issuer of the security is only required if the security does not have a CUSIP and the issuer has a CIK. Under our proposal the CIK number of the issuer would have been required for all securities.

[634] By increasing the deadline to five business days, filers also will have at least two non-business days (in addition to the extra three business days) in which to complete and submit the form.

[635] *See supra* Section II.E.2.

[636] 5 U.S.C. 605(b). Based on information in filings submitted to the Commission, we believe that there are no money market funds that are small entities. Under rule 0–10 under the Investment Company Act, an investment company is considered a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.

[637] We also certified that rule 30b1–6T would not have a significant economic impact on a substantial number of small entities. *See* Rule 30b1–6T Release, *supra* note 303, at Section VIII. We received no comment on that certification.

(2) *Amortized Cost Method* of valuation means the method of calculating an investment company's net asset value whereby portfolio securities are valued at the fund's Acquisition cost as adjusted for amortization of premium or accretion of discount rather than at their value based on current market factors.

(3) *Asset Backed Security* means a fixed income security (other than a Government Security) issued by a Special Purpose Entity (as defined in this paragraph), substantially all of the assets of which consist of Qualifying Assets (as defined in this paragraph). *Special Purpose Entity* means a trust, corporation, partnership or other entity organized for the sole purpose of issuing securities that entitle their holders to receive payments that depend primarily on the cash flow from Qualifying Assets, but does not include a registered investment company. *Qualifying Assets* means financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period, plus any rights or other assets designed to assure the servicing or timely distribution of proceeds to security holders.

(4) *Business Day* means any day, other than Saturday, Sunday, or any customary business holiday.

(5) *Collateralized Fully* means "Collateralized Fully" as defined in § 270.5b–3(c)(1) except that § 270.5b–3(c)(1)(iv)(C) and (D) shall not apply.

(6) *Conditional Demand Feature* means a Demand Feature that is not an Unconditional Demand Feature. A Conditional Demand Feature is not a Guarantee.

(7) *Conduit Security* means a security issued by a Municipal Issuer (as defined in this paragraph) involving an arrangement or agreement entered into, directly or indirectly, with a person other than a Municipal Issuer, which arrangement or agreement provides for or secures repayment of the security. *Municipal Issuer* means a State or territory of the United States (including the District of Columbia), or any political subdivision or public instrumentality of a State or territory of the United States. A Conduit Security does not include a security that is:

(i) Fully and unconditionally guaranteed by a Municipal Issuer;

(ii) Payable from the general revenues of the Municipal Issuer or other Municipal Issuers (other than those revenues derived from an agreement or arrangement with a person who is not a Municipal Issuer that provides for or secures repayment of the security issued by the Municipal Issuer);

(iii) Related to a project owned and operated by a Municipal Issuer; or

(iv) Related to a facility leased to and under the control of an industrial or commercial enterprise that is part of a public project which, as a whole, is owned and under the control of a Municipal Issuer.

(8) *Daily Liquid Assets* means:

(i) Cash;

(ii) Direct obligations of the U.S. Government; or

(iii) Securities that will mature or are subject to a Demand Feature that is exercisable and payable within one Business Day.

(9) *Demand Feature* means:

(i) A feature permitting the holder of a security to sell the security at an exercise price equal to the approximate amortized cost of the security plus accrued interest, if any, at the time of exercise. A Demand Feature must be exercisable either:

(A) At any time on no more than 30 calendar days' notice; or

(B) At specified intervals not exceeding 397 calendar days and upon no more than 30 calendar days' notice; or

(ii) A feature permitting the holder of an Asset Backed Security unconditionally to receive principal and interest within 397 calendar days of making demand.

(10) *Demand Feature Issued By A Non-Controlled Person* means a Demand Feature issued by:

(i) A person that, directly or indirectly, does not control, and is not controlled by or under common control with the issuer of the security subject to the Demand Feature (*control* means "control" as defined in section 2(a)(9) of the Act) (15 U.S.C. 80a–2(a)(9)); or

(ii) A sponsor of a Special Purpose Entity with respect to an Asset Backed Security.

(11) *Designated NRSRO* means any one of at least four nationally recognized statistical rating organizations, as that term is defined in section 3(a)(62) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(62)), that:

(i) The money market fund's board of directors:

(A) Has designated as an NRSRO whose credit ratings with respect to any obligor or security or particular obligors or securities will be used by the fund to determine whether a security is an Eligible Security; and

(B) Determines at least once each calendar year issues credit ratings that are sufficiently reliable for such use;

(ii) Is not an "affiliated person," as defined in section 2(a)(3)(C) of the Act (15 U.S.C. 80a–2(a)(3)(C)), of the issuer of, or any insurer or provider of credit support for, the security; and

(iii) The fund discloses in its statement of additional information is a Designated NRSRO, including any limitations with respect to the fund's use of such designation.

(12) *Eligible Security* means:

(i) A Rated Security with a remaining maturity of 397 calendar days or less that has received a rating from the Requisite NRSROs in one of the two highest short-term rating categories (within which there may be sub-categories or gradations indicating relative standing); or

(ii) An Unrated Security that is of comparable quality to a security meeting the requirements for a Rated Security in paragraph (a)(12)(i) of this section, as determined by the money market fund's board of directors; provided, however, that: a security that at the time of issuance had a remaining maturity of more than 397 calendar days but that has a remaining maturity of 397 calendar days or less and that is an Unrated Security is not an Eligible Security if the security has received a long-term rating from any Designated NRSRO that is not within the Designated NRSRO's three highest long-term ratings categories (within which there may be sub-categories or gradations indicating relative standing), unless the security has received a long-term rating from the Requisite NRSROs in one of the three highest rating categories.

(iii) In addition, in the case of a security that is subject to a Demand Feature or Guarantee:

(A) The Guarantee has received a rating from a Designated NRSRO or the Guarantee is issued by a guarantor that has received a rating from a Designated NRSRO with respect to a class of debt obligations (or any debt obligation within that class) that is comparable in priority and security to the Guarantee, unless:

(*1*) The Guarantee is issued by a person that, directly or indirectly, controls, is controlled by or is under common control with the issuer of the security subject to the Guarantee (other than a sponsor of a Special Purpose Entity with respect to an Asset Backed Security);

(*2*) The security subject to the Guarantee is a repurchase agreement that is Collateralized Fully; or

(*3*) The Guarantee is itself a Government Security; and

(B) The issuer of the Demand Feature or Guarantee, or another institution, has undertaken promptly to notify the holder of the security in the event the Demand Feature or Guarantee is

substituted with another Demand Feature or Guarantee (if such substitution is permissible under the terms of the Demand Feature or Guarantee).

(13) *Event of Insolvency* means "Event of Insolvency" as defined in § 270.5b–3(c)(2).

(14) *First Tier Security* means any Eligible Security that:

(i) Is a Rated Security that has received a short-term rating from the Requisite NRSROs in the highest short-term rating category for debt obligations (within which there may be sub-categories or gradations indicating relative standing);

(ii) Is an Unrated Security that is of comparable quality to a security meeting the requirements for a Rated Security in paragraph (a)(14)(i) of this section, as determined by the fund's board of directors;

(iii) Is a security issued by a registered investment company that is a money market fund; or

(iv) Is a Government Security.

(15) *Floating Rate Security* means a security the terms of which provide for the adjustment of its interest rate whenever a specified interest rate changes and that, at any time until the final maturity of the instrument or the period remaining until the principal amount can be recovered through demand, can reasonably be expected to have a market value that approximates its amortized cost.

(16) *Government Security* means any "Government security" as defined in section 2(a)(16) of the Act (15 U.S.C. 80a–2(a)(16)).

(17) *Guarantee* means an unconditional obligation of a person other than the issuer of the security to undertake to pay, upon presentment by the holder of the Guarantee (if required), the principal amount of the underlying security plus accrued interest when due or upon default, or, in the case of an Unconditional Demand Feature, an obligation that entitles the holder to receive upon exercise the approximate amortized cost of the underlying security or securities, plus accrued interest, if any. A Guarantee includes a letter of credit, financial guaranty (bond) insurance, and an Unconditional Demand Feature (other than an Unconditional Demand Feature provided by the issuer of the security).

(18) *Guarantee Issued By A Non-Controlled Person* means a Guarantee issued by:

(i) A person that, directly or indirectly, does not control, and is not controlled by or under common control with the issuer of the security subject to the Guarantee (*control* means "control" as defined in section 2(a)(9) of the Act) (15 U.S.C. 80a–2(a)(9)); or

(ii) A sponsor of a Special Purpose Entity with respect to an Asset Backed Security.

(19) *Illiquid Security* means a security that cannot be sold or disposed of in the ordinary course of business within seven calendar days at approximately the value ascribed to it by the fund.

(20) *Penny-Rounding Method* of pricing means the method of computing an investment company's price per share for purposes of distribution, redemption and repurchase whereby the current net asset value per share is rounded to the nearest one percent.

(21) *Rated Security* means a security that meets the requirements of paragraphs (a)(21)(i) or (ii) of this section, in each case subject to paragraph (a)(21)(iii) of this section:

(i) The security has received a short-term rating from a Designated NRSRO, or has been issued by an issuer that has received a short-term rating from a Designated NRSRO with respect to a class of debt obligations (or any debt obligation within that class) that is comparable in priority and security with the security; or

(ii) The security is subject to a Guarantee that has received a short-term rating from a Designated NRSRO, or a Guarantee issued by a guarantor that has received a short-term rating from a Designated NRSRO with respect to a class of debt obligations (or any debt obligation within that class) that is comparable in priority and security with the Guarantee; but

(iii) A security is not a Rated Security if it is subject to an external credit support agreement (including an arrangement by which the security has become a Refunded Security) that was not in effect when the security was assigned its rating, unless the security has received a short-term rating reflecting the existence of the credit support agreement as provided in paragraph (a)(21)(i) of this section, or the credit support agreement with respect to the security has received a short-term rating as provided in paragraph (a)(21)(ii) of this section.

(22) *Refunded Security* means "Refunded Security" as defined in § 270.5b–3(c)(4).

(23) *Requisite NRSROs* means:

(i) Any two Designated NRSROs that have issued a rating with respect to a security or class of debt obligations of an issuer; or

(ii) If only one Designated NRSRO has issued a rating with respect to such security or class of debt obligations of an issuer at the time the fund acquires the security, that Designated NRSRO.

(24) *Second Tier Security* means any Eligible Security that is not a First Tier Security.

(25) *Single State Fund* means a Tax Exempt Fund that holds itself out as seeking to maximize the amount of its distributed income that is exempt from the income taxes or other taxes on investments of a particular State and, where applicable, subdivisions thereof.

(26) *Tax Exempt Fund* means any money market fund that holds itself out as distributing income exempt from regular Federal income tax.

(27) *Total Assets* means, with respect to a money market fund using the Amortized Cost Method, the total amortized cost of its assets and, with respect to any other money market fund, the total market-based value of its assets.

(28) *Unconditional Demand Feature* means a Demand Feature that by its terms would be readily exercisable in the event of a default in payment of principal or interest on the underlying security or securities.

(29) *United States Dollar-Denominated* means, with reference to a security, that all principal and interest payments on such security are payable to security holders in United States dollars under all circumstances and that the interest rate of, the principal amount to be repaid, and the timing of payments related to such security do not vary or float with the value of a foreign currency, the rate of interest payable on foreign currency borrowings, or with any other interest rate or index expressed in a currency other than United States dollars.

(30) *Unrated Security* means a security that is not a Rated Security.

(31) *Variable Rate Security* means a security the terms of which provide for the adjustment of its interest rate on set dates (such as the last day of a month or calendar quarter) and that, upon each adjustment until the final maturity of the instrument or the period remaining until the principal amount can be recovered through demand, can reasonably be expected to have a market value that approximates its amortized cost.

(32) *Weekly Liquid Assets* means:

(i) Cash;

(ii) Direct obligations of the U.S. Government;

(iii) Government Securities that are issued by a person controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States that:

(A) Are issued at a discount to the principal amount to be repaid at maturity; and

(B) Have a remaining maturity date of 60 days or less; or

(iv) Securities that will mature or are subject to a Demand Feature that is exercisable and payable within five Business Days.

(b) *Holding Out and Use of Names and Titles.* (1) It shall be an untrue statement of material fact within the meaning of section 34(b) of the Act (15 U.S.C. 80a–33(b)) for a registered investment company, in any registration statement, application, report, account, record, or other document filed or transmitted pursuant to the Act, including any advertisement, pamphlet, circular, form letter, or other sales literature addressed to or intended for distribution to prospective investors that is required to be filed with the Commission by section 24(b) of the Act (15 U.S.C. 80a–24(b)), to hold itself out to investors as a money market fund or the equivalent of a money market fund, unless such registered investment company meets the conditions of paragraphs (c)(2), (c)(3), (c)(4), and (c)(5) of this section.

(2) It shall constitute the use of a materially deceptive or misleading name or title within the meaning of section 35(d) of the Act (15 U.S.C. 80a–34(d)) for a registered investment company to adopt the term "money market" as part of its name or title or the name or title of any redeemable securities of which it is the issuer, or to adopt a name that suggests that it is a money market fund or the equivalent of a money market fund, unless such registered investment company meets the conditions of paragraphs (c)(2), (c)(3), (c)(4), and (c)(5) of this section.

(3) For purposes of this paragraph, a name that suggests that a registered investment company is a money market fund or the equivalent thereof shall include one that uses such terms as "cash," "liquid," "money," "ready assets" or similar terms.

(c) *Share Price Calculations.* The current price per share, for purposes of distribution, redemption and repurchase, of any redeemable security issued by any registered investment company ("money market fund" or "fund"), notwithstanding the requirements of section 2(a)(41) of the Act (15 U.S.C. 80a–2(a)(41)) and of §§ 270.2a–4 and 270.22c–1 thereunder, may be computed by use of the Amortized Cost Method or the Penny-Rounding Method; provided, however, that:

(1) *Board Findings.* The board of directors of the money market fund shall determine, in good faith, that it is in the best interests of the fund and its shareholders to maintain a stable net asset value per share or stable price per share, by virtue of either the Amortized Cost Method or the Penny-Rounding Method, and that the money market fund will continue to use such method only so long as the board of directors believes that it fairly reflects the market-based net asset value per share.

(2) *Portfolio Maturity.* The money market fund shall maintain a dollar-weighted average portfolio maturity appropriate to its objective of maintaining a stable net asset value per share or price per share; provided, however, that the money market fund will not:

(i) Acquire any instrument with a remaining maturity of greater than 397 calendar days;

(ii) Maintain a dollar-weighted average portfolio maturity that exceeds 60 calendar days; or

(iii) Maintain a dollar-weighted average portfolio maturity that exceeds 120 calendar days, determined without reference to the exceptions in paragraph (d) of this section regarding interest rate readjustments.

(3) *Portfolio Quality*—(i) *General.* The money market fund shall limit its portfolio investments to those United States Dollar-Denominated securities that the fund's board of directors determines present minimal credit risks (which determination must be based on factors pertaining to credit quality in addition to any rating assigned to such securities by a Designated NRSRO) and that are at the time of Acquisition Eligible Securities.

(ii) *Second Tier Securities.* No money market fund shall Acquire a Second Tier Security with a remaining maturity of greater than 45 calendar days. Immediately after the Acquisition of any Second Tier Security, a money market fund shall not have invested more than three percent of its Total Assets in Second Tier Securities.

(iii) *Securities Subject to Guarantees.* A security that is subject to a Guarantee may be determined to be an Eligible Security or a First Tier Security based solely on whether the Guarantee is an Eligible Security or First Tier Security, as the case may be.

(iv) *Securities Subject to Conditional Demand Features.* A security that is subject to a Conditional Demand Feature ("Underlying Security") may be determined to be an Eligible Security or a First Tier Security only if:

(A) The Conditional Demand Feature is an Eligible Security or First Tier Security, as the case may be;

(B) At the time of the Acquisition of the Underlying Security, the money market fund's board of directors has determined that there is minimal risk that the circumstances that would result in the Conditional Demand Feature not being exercisable will occur; and

(*1*) The conditions limiting exercise either can be monitored readily by the fund, or relate to the taxability, under Federal, State or local law, of the interest payments on the security; or

(*2*) The terms of the Conditional Demand Feature require that the fund will receive notice of the occurrence of the condition and the opportunity to exercise the Demand Feature in accordance with its terms; and

(C) The Underlying Security or any Guarantee of such security (or the debt securities of the issuer of the Underlying Security or Guarantee that are comparable in priority and security with the Underlying Security or Guarantee) has received either a short-term rating or a long-term rating, as the case may be, from the Requisite NRSROs within the NRSROs' two highest short-term or long-term rating categories (within which there may be sub-categories or gradations indicating relative standing) or, if unrated, is determined to be of comparable quality by the money market fund's board of directors to a security that has received a rating from the Requisite NRSROs within the NRSROs' two highest short-term or long-term rating categories, as the case may be.

(4) *Portfolio Diversification*—(i) *Issuer Diversification.* The money market fund shall be diversified with respect to issuers of securities Acquired by the fund as provided in paragraphs (c)(4)(i) and (c)(4)(ii) of this section, other than with respect to Government Securities and securities subject to a Guarantee Issued By A Non-Controlled Person.

(A) *Taxable and National Funds.* Immediately after the Acquisition of any security, a money market fund other than a Single State Fund shall not have invested more than five percent of its Total Assets in securities issued by the issuer of the security; provided, however, that such a fund may invest up to twenty-five percent of its Total Assets in the First Tier Securities of a single issuer for a period of up to three Business Days after the Acquisition thereof; provided, further, that the fund may not invest in the securities of more than one issuer in accordance with the foregoing proviso in this paragraph at any time.

(B) *Single State Funds.* With respect to seventy-five percent of its Total Assets, immediately after the Acquisition of any security, a Single

State Fund shall not have invested more than five percent of its Total Assets in securities issued by the issuer of the security.

(C) *Second Tier Securities.* Immediately after the Acquisition of any Second Tier Security, a money market fund shall not have invested more than one half of one percent of its Total Assets in the Second Tier Securities of any single issuer.

(ii) *Issuer Diversification Calculations.* For purposes of making calculations under paragraph (c)(4)(i) of this section:

(A) *Repurchase Agreements.* The Acquisition of a repurchase agreement may be deemed to be an Acquisition of the underlying securities, provided the obligation of the seller to repurchase the securities from the money market fund is Collateralized Fully and the fund's board of directors has evaluated the seller's creditworthiness.

(B) *Refunded Securities.* The Acquisition of a Refunded Security shall be deemed to be an Acquisition of the escrowed Government Securities.

(C) *Conduit Securities.* A Conduit Security shall be deemed to be issued by the person (other than the Municipal Issuer) ultimately responsible for payments of interest and principal on the security.

(D) *Asset Backed Securities*—(*1*) *General.* An Asset Backed Security Acquired by a fund ("Primary ABS") shall be deemed to be issued by the Special Purpose Entity that issued the Asset Backed Security, provided, however:

(*i*) *Holdings of Primary ABS.* Any person whose obligations constitute ten percent or more of the principal amount of the Qualifying Assets of the Primary ABS ("Ten Percent Obligor") shall be deemed to be an issuer of the portion of the Primary ABS such obligations represent; and

(*ii*) *Holdings of Secondary ABS.* If a Ten Percent Obligor of a Primary ABS is itself a Special Purpose Entity issuing Asset Backed Securities ("Secondary ABS"), any Ten Percent Obligor of such Secondary ABS also shall be deemed to be an issuer of the portion of the Primary ABS that such Ten Percent Obligor represents.

(*2*) *Restricted Special Purpose Entities.* A Ten Percent Obligor with respect to a Primary or Secondary ABS shall not be deemed to have issued any portion of the assets of a Primary ABS as provided in paragraph (c)(4)(ii)(D)(*1*) of this section if that Ten Percent Obligor is itself a Special Purpose Entity issuing Asset Backed Securities ("Restricted Special Purpose Entity"), and the securities that it issues (other than securities issued to a company that controls, or is controlled by or under common control with, the Restricted Special Purpose Entity and which is not itself a Special Purpose Entity issuing Asset Backed Securities) are held by only one other Special Purpose Entity.

(*3*) *Demand Features and Guarantees.* In the case of a Ten Percent Obligor deemed to be an issuer, the fund shall satisfy the diversification requirements of paragraph (c)(4)(iii) of this section with respect to any Demand Feature or Guarantee to which the Ten Percent Obligor's obligations are subject.

(E) *Shares of Other Money Market Funds.* A money market fund that Acquires shares issued by another money market fund in an amount that would otherwise be prohibited by paragraph (c)(4)(i) of this section shall nonetheless be deemed in compliance with this section if the board of directors of the Acquiring money market fund reasonably believes that the fund in which it has invested is in compliance with this section.

(iii) *Diversification Rules for Demand Features and Guarantees.* The money market fund shall be diversified with respect to Demand Features and Guarantees Acquired by the fund as provided in paragraphs (c)(4)(iii) and (c)(4)(iv) of this section, other than with respect to a Demand Feature issued by the same institution that issued the underlying security, or with respect to a Guarantee or Demand Feature that is itself a Government Security.

(A) *General.* Immediately after the Acquisition of any Demand Feature or Guarantee or security subject to a Demand Feature or Guarantee, a money market fund, with respect to seventy-five percent of its Total Assets, shall not have invested more than ten percent of its Total Assets in securities issued by or subject to Demand Features or Guarantees from the institution that issued the Demand Feature or Guarantee, subject to paragraphs (c)(4)(iii)(B) and (C) of this section.

(B) *Second Tier Demand Features or Guarantees.* Immediately after the Acquisition of any Demand Feature or Guarantee (or a security after giving effect to the Demand Feature or Guarantee) that is a Second Tier Security, a money market fund shall not have invested more than 2.5 percent of its Total Assets in securities issued by or subject to Demand Features or Guarantees from the institution that issued the Demand Feature or Guarantee.

(C) *Demand Features or Guarantees Issued by Non-Controlled Persons.* Immediately after the Acquisition of any security subject to a Demand Feature or Guarantee, a money market fund shall not have invested more than ten percent of its Total Assets in securities issued by, or subject to Demand Features or Guarantees from the institution that issued the Demand Feature or Guarantee, unless, with respect to any security subject to Demand Features or Guarantees from that institution (other than securities issued by such institution), the Demand Feature or Guarantee is a Demand Feature or Guarantee Issued By A Non-Controlled Person.

(iv) *Demand Feature and Guarantee Diversification Calculations*—(A) *Fractional Demand Features or Guarantees.* In the case of a security subject to a Demand Feature or Guarantee from an institution by which the institution guarantees a specified portion of the value of the security, the institution shall be deemed to guarantee the specified portion thereof.

(B) *Layered Demand Features or Guarantees.* In the case of a security subject to Demand Features or Guarantees from multiple institutions that have not limited the extent of their obligations as described in paragraph (c)(4)(iv)(A) of this section, each institution shall be deemed to have provided the Demand Feature or Guarantee with respect to the entire principal amount of the security.

(v) *Diversification Safe Harbor.* A money market fund that satisfies the applicable diversification requirements of paragraphs (c)(4) and (c)(6) of this section shall be deemed to have satisfied the diversification requirements of section 5(b)(1) of the Act (15 U.S.C. 80a–5(b)(1)) and the rules adopted thereunder.

(5) *Portfolio Liquidity.* The money market fund shall hold securities that are sufficiently liquid to meet reasonably foreseeable shareholder redemptions in light of the fund's obligations under section 22(e) of the Act (15 U.S.C. 80a–22(e)) and any commitments the fund has made to shareholders; provided, however, that:

(i) *Illiquid Securities.* The money market fund shall not Acquire any Illiquid Security if, immediately after the Acquisition, the money market fund would have invested more than five percent of its Total Assets in Illiquid Securities.

(ii) *Minimum Daily Liquidity Requirement.* The money market fund shall not Acquire any security other than a Daily Liquid Asset if, immediately after the Acquisition, the fund would have invested less than ten percent of its Total Assets in Daily Liquid Assets. This provision shall not apply to Tax Exempt Funds.

(iii) *Minimum Weekly Liquidity Requirement.* The money market fund shall not Acquire any security other than a Weekly Liquid Asset if, immediately after the Acquisition, the fund would have invested less than thirty percent of its Total Assets in Weekly Liquid Assets.

(6) *Demand Features and Guarantees Not Relied Upon.* If the fund's board of directors has determined that the fund is not relying on a Demand Feature or Guarantee to determine the quality (pursuant to paragraph (c)(3) of this section), or maturity (pursuant to paragraph (d) of this section), or liquidity of a portfolio security, and maintains a record of this determination (pursuant to paragraphs (c)(10)(ii) and (c)(11)(vi) of this section), then the fund may disregard such Demand Feature or Guarantee for all purposes of this section.

(7) *Downgrades, Defaults and Other Events*—(i) *Downgrades*—(A) *General.* Upon the occurrence of either of the events specified in paragraphs (c)(7)(i)(A)(*1*) and (*2*) of this section with respect to a portfolio security, the board of directors of the money market fund shall reassess promptly whether such security continues to present minimal credit risks and shall cause the fund to take such action as the board of directors determines is in the best interests of the money market fund and its shareholders:

(*1*) A portfolio security of a money market fund ceases to be a First Tier Security (either because it no longer has the highest rating from the Requisite NRSROs or, in the case of an Unrated Security, the board of directors of the money market fund determines that it is no longer of comparable quality to a First Tier Security); and

(*2*) The money market fund's investment adviser (or any person to whom the fund's board of directors has delegated portfolio management responsibilities) becomes aware that any Unrated Security or Second Tier Security held by the money market fund has, since the security was Acquired by the fund, been given a rating by a Designated NRSRO below the Designated NRSRO's second highest short-term rating category.

(B) *Securities To Be Disposed Of.* The reassessments required by paragraph (c)(7)(i)(A) of this section shall not be required if the fund disposes of the security (or it matures) within five Business Days of the specified event and, in the case of events specified in paragraph (c)(7)(i)(A)(*2*) of this section, the board is subsequently notified of the adviser's actions.

(C) *Special Rule for Certain Securities Subject to Demand Features.* In the event that after giving effect to a rating downgrade, more than 2.5 percent of the fund's Total Assets are invested in securities issued by or subject to Demand Features from a single institution that are Second Tier Securities, the fund shall reduce its investment in securities issued by or subject to Demand Features from that institution to no more than 2.5 percent of its Total Assets by exercising the Demand Features at the next succeeding exercise date(s), absent a finding by the board of directors that disposal of the portfolio security would not be in the best interests of the money market fund.

(ii) *Defaults and Other Events.* Upon the occurrence of any of the events specified in paragraphs (c)(7)(ii)(A) through (D) of this section with respect to a portfolio security, the money market fund shall dispose of such security as soon as practicable consistent with achieving an orderly disposition of the security, by sale, exercise of any Demand Feature or otherwise, absent a finding by the board of directors that disposal of the portfolio security would not be in the best interests of the money market fund (which determination may take into account, among other factors, market conditions that could affect the orderly disposition of the portfolio security):

(A) The default with respect to a portfolio security (other than an immaterial default unrelated to the financial condition of the issuer);

(B) A portfolio security ceases to be an Eligible Security;

(C) A portfolio security has been determined to no longer present minimal credit risks; or

(D) An Event of Insolvency occurs with respect to the issuer of a portfolio security or the provider of any Demand Feature or Guarantee.

(iii) *Notice to the Commission.* The money market fund shall promptly notify the Commission by electronic mail directed to the Director of Investment Management or the Director's designee, of any:

(A) Default or Event of Insolvency with respect to the issuer of one or more portfolio securities (other than an immaterial default unrelated to the financial condition of the issuer) or any issuer of a Demand Feature or Guarantee to which one or more portfolio securities is subject, and the actions the money market fund intends to take in response to such event, where immediately before default the securities (or the securities subject to the Demand Feature or Guarantee) accounted for ½ of 1 percent or more of the money market fund's Total Assets; or

(B) Purchase of a security from the fund by an affiliated person, promoter, or principal underwriter of the fund, or an affiliated person of such a person, in reliance on § 270.17a–9, including identification of the security, its amortized cost, the sale price, and the reasons for such purchase.

(iv) *Defaults for Purposes of Paragraphs (c)(7)(ii) and (iii).* For purposes of paragraphs (c)(7)(ii) and (iii) of this section, an instrument subject to a Demand Feature or Guarantee shall not be deemed to be in default (and an Event of Insolvency with respect to the security shall not be deemed to have occurred) if:

(A) In the case of an instrument subject to a Demand Feature, the Demand Feature has been exercised and the fund has recovered either the principal amount or the amortized cost of the instrument, plus accrued interest; or

(B) The provider of the Guarantee is continuing, without protest, to make payments as due on the instrument.

(8) *Required Procedures: Amortized Cost Method.* In the case of a money market fund using the Amortized Cost Method:

(i) *General.* In supervising the money market fund's operations and delegating special responsibilities involving portfolio management to the money market fund's investment adviser, the money market fund's board of directors, as a particular responsibility within the overall duty of care owed to its shareholders, shall establish written procedures reasonably designed, taking into account current market conditions and the money market fund's investment objectives, to stabilize the money market fund's net asset value per share, as computed for the purpose of distribution, redemption and repurchase, at a single value.

(ii) *Specific Procedures.* Included within the procedures adopted by the board of directors shall be the following:

(A) *Shadow Pricing.* Written procedures shall provide:

(*1*) That the extent of deviation, if any, of the current net asset value per share calculated using available market quotations (or an appropriate substitute that reflects current market conditions) from the money market fund's amortized cost price per share, shall be calculated at such intervals as the board of directors determines appropriate and reasonable in light of current market conditions;

(*2*) For the periodic review by the board of directors of the amount of the

deviation as well as the methods used to calculate the deviation; and

(*3*) For the maintenance of records of the determination of deviation and the board's review thereof.

(B) *Prompt Consideration of Deviation.* In the event such deviation from the money market fund's amortized cost price per share exceeds ½ of 1 percent, the board of directors shall promptly consider what action, if any, should be initiated by the board of directors.

(C) *Material Dilution or Unfair Results.* Where the board of directors believes the extent of any deviation from the money market fund's amortized cost price per share may result in material dilution or other unfair results to investors or existing shareholders, it shall cause the fund to take such action as it deems appropriate to eliminate or reduce to the extent reasonably practicable such dilution or unfair results.

(9) *Required Procedures: Penny-Rounding Method.* In the case of a money market fund using the Penny-Rounding Method, in supervising the money market fund's operations and delegating special responsibilities involving portfolio management to the money market fund's investment adviser, the money market fund's board of directors undertakes, as a particular responsibility within the overall duty of care owed to its shareholders, to assure to the extent reasonably practicable, taking into account current market conditions affecting the money market fund's investment objectives, that the money market fund's price per share as computed for the purpose of distribution, redemption and repurchase, rounded to the nearest one percent, will not deviate from the single price established by the board of directors.

(10) *Specific Procedures: Amortized Cost and Penny-Rounding Methods.* Included within the procedures adopted by the board of directors for money market funds using either the Amortized Cost or Penny-Rounding Methods shall be the following:

(i) *Securities for Which Maturity is Determined by Reference to Demand Features.* In the case of a security for which maturity is determined by reference to a Demand Feature, written procedures shall require ongoing review of the security's continued minimal credit risks, and that review must be based on, among other things, financial data for the most recent fiscal year of the issuer of the Demand Feature and, in the case of a security subject to a Conditional Demand Feature, the issuer of the security whose financial condition must be monitored under paragraph (c)(3)(iv) of this section, whether such data is publicly available or provided under the terms of the security's governing documentation.

(ii) *Securities Subject to Demand Features or Guarantees.* In the case of a security subject to one or more Demand Features or Guarantees that the fund's board of directors has determined that the fund is not relying on to determine the quality (pursuant to paragraph (c)(3) of this section), maturity (pursuant to paragraph (d) of this section) or liquidity (pursuant to paragraph (c)(5) of this section) of the security subject to the Demand Feature or Guarantee, written procedures shall require periodic evaluation of such determination.

(iii) *Adjustable Rate Securities Without Demand Features.* In the case of a Variable Rate or Floating Rate Security that is not subject to a Demand Feature and for which maturity is determined pursuant to paragraphs (d)(1), (d)(2) or (d)(4) of this section, written procedures shall require periodic review of whether the interest rate formula, upon readjustment of its interest rate, can reasonably be expected to cause the security to have a market value that approximates its amortized cost value.

(iv) *Asset Backed Securities.* In the case of an Asset Backed Security, written procedures shall require the fund to periodically determine the number of Ten Percent Obligors (as that term is used in paragraph (c)(4)(ii)(D) of this section) deemed to be the issuers of all or a portion of the Asset Backed Security for purposes of paragraph (c)(4)(ii)(D) of this section; provided, however, written procedures need not require periodic determinations with respect to any Asset Backed Security that a fund's board of directors has determined, at the time of Acquisition, will not have, or is unlikely to have, Ten Percent Obligors that are deemed to be issuers of all or a portion of that Asset Backed Security for purposes of paragraph (c)(4)(ii)(D) of this section, and maintains a record of this determination.

(v) *Stress Testing.* Written procedures shall provide for:

(A) The periodic testing, at such intervals as the board of directors determines appropriate and reasonable in light of current market conditions, of the money market fund's ability to maintain a stable net asset value per share based upon specified hypothetical events that include, but are not limited to, a change in short-term interest rates, an increase in shareholder redemptions, a downgrade of or default on portfolio securities, and the widening or narrowing of spreads between yields on an appropriate benchmark the fund has selected for overnight interest rates and commercial paper and other types of securities held by the fund.

(B) A report on the results of such testing to be provided to the board of directors at its next regularly scheduled meeting (or sooner, if appropriate in light of the results), which report shall include:

(*1*) The date(s) on which the testing was performed and the magnitude of each hypothetical event that would cause the deviation of the money market fund's net asset value calculated using available market quotations (or appropriate substitutes which reflect current market conditions) from its net asset value per share calculated using amortized cost to exceed ½ of 1 percent; and

(*2*) An assessment by the fund's adviser of the fund's ability to withstand the events (and concurrent occurrences of those events) that are reasonably likely to occur within the following year.

(11) *Record Keeping and Reporting*—(i) *Written Procedures.* For a period of not less than six years following the replacement of such procedures with new procedures (the first two years in an easily accessible place), a written copy of the procedures (and any modifications thereto) described in paragraphs (c)(7) through (c)(10) and (e) of this section shall be maintained and preserved.

(ii) *Board Considerations and Actions.* For a period of not less than six years (the first two years in an easily accessible place) a written record shall be maintained and preserved of the board of directors' considerations and actions taken in connection with the discharge of its responsibilities, as set forth in this section, to be included in the minutes of the board of directors' meetings.

(iii) *Credit Risk Analysis.* For a period of not less than three years from the date that the credit risks of a portfolio security were most recently reviewed, a written record of the determination that a portfolio security presents minimal credit risks and the Designated NRSRO ratings (if any) used to determine the status of the security as an Eligible Security, First Tier Security or Second Tier Security shall be maintained and preserved in an easily accessible place.

(iv) *Determinations With Respect to Adjustable Rate Securities.* For a period of not less than three years from the date when the determination was most recently made, a written record shall be preserved and maintained, in an easily accessible place, of the determination

required by paragraph (c)(10)(iii) of this section (that a Variable Rate or Floating Rate Security that is not subject to a Demand Feature and for which maturity is determined pursuant to paragraphs (d)(1), (d)(2) or (d)(4) of this section can reasonably be expected, upon readjustment of its interest rate at all times during the life of the instrument, to have a market value that approximates its amortized cost).

(v) *Determinations with Respect to Asset Backed Securities.* For a period of not less than three years from the date when the determination was most recently made, a written record shall be preserved and maintained, in an easily accessible place, of the determinations required by paragraph (c)(10)(iv) of this section (the number of Ten Percent Obligors (as that term is used in paragraph (c)(4)(ii)(D) of this section) deemed to be the issuers of all or a portion of the Asset Backed Security for purposes of paragraph (c)(4)(ii)(D) of this section). The written record shall include:

(A) The identities of the Ten Percent Obligors (as that term is used in paragraph (c)(4)(ii)(D) of this section), the percentage of the Qualifying Assets constituted by the securities of each Ten Percent Obligor and the percentage of the fund's Total Assets that are invested in securities of each Ten Percent Obligor; and

(B) Any determination that an Asset Backed Security will not have, or is unlikely to have, Ten Percent Obligors deemed to be issuers of all or a portion of that Asset Backed Security for purposes of paragraph (c)(4)(ii)(D) of this section.

(vi) *Evaluations with Respect to Securities Subject to Demand Features or Guarantees.* For a period of not less than three years from the date when the evaluation was most recently made, a written record shall be preserved and maintained, in an easily accessible place, of the evaluation required by paragraph (c)(10)(ii) (regarding securities subject to one or more Demand Features or Guarantees) of this section.

(vii) *Reports with Respect to Stress Testing.* For a period of not less than six years (the first two years in an easily accessible place), a written copy of the report required under paragraph (c)(10)(v)(B) of this section shall be maintained and preserved.

(viii) *Inspection of Records.* The documents preserved pursuant to this paragraph (c)(11) shall be subject to inspection by the Commission in accordance with section 31(b) of the Act (15 U.S.C. 80a–30(b)) as if such documents were records required to be maintained pursuant to rules adopted under section 31(a) of the Act (15 U.S.C. 80a–30(a)). If any action was taken under paragraphs (c)(7)(ii) (with respect to defaulted securities and events of insolvency) or (c)(8)(ii) (with respect to a deviation from the fund's share price of more than ½ of 1 percent) of this section, the money market fund will file an exhibit to the Form N–SAR (17 CFR 274.101) filed for the period in which the action was taken describing with specificity the nature and circumstances of such action. The money market fund will report in an exhibit to such Form any securities it holds on the final day of the reporting period that are not Eligible Securities.

(12) *Web Site Disclosure of Portfolio Holdings.* The money market fund shall post on its Web site, for a period of not less than six months, beginning no later than the fifth Business Day of the month, a schedule of its investments, as of the last Business Day of the prior month, that includes the following information:

(i) With respect to the money market fund and each class thereof:

(A) The dollar-weighted average portfolio maturity; and

(B) The dollar-weighted average portfolio maturity determined without reference to the exceptions in paragraph (d) of this section regarding interest rate readjustments;

(ii) With respect to each security held by the money market fund:

(A) Name of the issuer;

(B) Category of investment (indicate the category that most closely identifies the instrument from among the following: Treasury Debt; Government Agency Debt; Variable Rate Demand Note; Other Municipal Debt; Financial Company Commercial Paper; Asset Backed Commercial Paper; Other Commercial Paper; Certificate of Deposit; Structured Investment Vehicle Note; Other Note; Treasury Repurchase Agreement; Government Agency Repurchase Agreement; Other Repurchase Agreement; Insurance Company Funding Agreement; Investment Company; Other Instrument);

(C) CUSIP number (if any);

(D) Principal amount;

(E) Maturity date as determined under this section;

(F) Final legal maturity date (taking into account any maturity date extensions that may be effected at the option of the issuer), if different from the maturity date as determined under this section;

(G) Coupon or yield; and

(H) Amortized cost value; and

(iii) A link to a Web site of the Securities and Exchange Commission where a user may obtain the most recent 12 months of publicly available information filed by the money market fund pursuant to § 270.30b1–7.

(13) *Processing of Transactions.* The money market fund (or its transfer agent) shall have the capacity to redeem and sell securities issued by the fund at a price based on the current net asset value per share pursuant to § 270.22c–1. Such capacity shall include the ability to redeem and sell securities at prices that do not correspond to a stable net asset value or price per share.

(d) *Maturity of Portfolio Securities.* For purposes of this section, the maturity of a portfolio security shall be deemed to be the period remaining (calculated from the trade date or such other date on which the fund's interest in the security is subject to market action) until the date on which, in accordance with the terms of the security, the principal amount must unconditionally be paid, or in the case of a security called for redemption, the date on which the redemption payment must be made, except as provided in paragraphs (d)(1) through (d)(8) of this section:

(1) *Adjustable Rate Government Securities.* A Government Security that is a Variable Rate Security where the variable rate of interest is readjusted no less frequently than every 397 calendar days shall be deemed to have a maturity equal to the period remaining until the next readjustment of the interest rate. A Government Security that is a Floating Rate Security shall be deemed to have a remaining maturity of one day.

(2) *Short-Term Variable Rate Securities.* A Variable Rate Security, the principal amount of which, in accordance with the terms of the security, must unconditionally be paid in 397 calendar days or less shall be deemed to have a maturity equal to the earlier of the period remaining until the next readjustment of the interest rate or the period remaining until the principal amount can be recovered through demand.

(3) *Long-Term Variable Rate Securities.* A Variable Rate Security, the principal amount of which is scheduled to be paid in more than 397 calendar days, that is subject to a Demand Feature, shall be deemed to have a maturity equal to the longer of the period remaining until the next readjustment of the interest rate or the period remaining until the principal amount can be recovered through demand.

(4) *Short-Term Floating Rate Securities.* A Floating Rate Security, the

principal amount of which, in accordance with the terms of the security, must unconditionally be paid in 397 calendar days or less shall be deemed to have a maturity of one day.

(5) *Long-Term Floating Rate Securities.* A Floating Rate Security, the principal amount of which is scheduled to be paid in more than 397 calendar days, that is subject to a Demand Feature, shall be deemed to have a maturity equal to the period remaining until the principal amount can be recovered through demand.

(6) *Repurchase Agreements.* A repurchase agreement shall be deemed to have a maturity equal to the period remaining until the date on which the repurchase of the underlying securities is scheduled to occur, or, where the agreement is subject to demand, the notice period applicable to a demand for the repurchase of the securities.

(7) *Portfolio Lending Agreements.* A portfolio lending agreement shall be treated as having a maturity equal to the period remaining until the date on which the loaned securities are scheduled to be returned, or where the agreement is subject to demand, the notice period applicable to a demand for the return of the loaned securities.

(8) *Money Market Fund Securities.* An investment in a money market fund shall be treated as having a maturity equal to the period of time within which the Acquired money market fund is required to make payment upon redemption, unless the Acquired money market fund has agreed in writing to provide redemption proceeds to the investing money market fund within a shorter time period, in which case the maturity of such investment shall be deemed to be the shorter period.

(e) *Delegation.* The money market fund's board of directors may delegate to the fund's investment adviser or officers the responsibility to make any determination required to be made by the board of directors under this section (other than the determinations required by paragraphs (a)(11)(i) (designation of NRSROs); (c)(1) (board findings); (c)(7)(ii) (defaults and other events); (c)(8)(i) (general required procedures: Amortized Cost Method); (c)(8)(ii)(A) (shadow pricing), (B) (prompt consideration of deviation), (C) (material dilution or unfair results); (c)(9) (required procedures: Penny Rounding Method); and (c)(10)(v)(A) (stress testing procedures) of this section; provided that:

(1) *Written Guidelines.* The Board shall establish and periodically review written guidelines (including guidelines for determining whether securities present minimal credit risks as required in paragraph (c)(3) of this section) and procedures under which the delegate makes such determinations.

(2) *Oversight.* The Board shall take any measures reasonably necessary (through periodic reviews of fund investments and the delegate's procedures in connection with investment decisions and prompt review of the adviser's actions in the event of the default of a security or Event of Insolvency with respect to the issuer of the security or any Guarantee to which it is subject that requires notification of the Commission under paragraph (c)(7)(iii) of this section) to assure that the guidelines and procedures are being followed.

■ 3. Section 270.17a–9 is revised to read as follows:

§ 270.17a–9 Purchase of certain securities from a money market fund by an affiliate, or an affiliate of an affiliate.

The purchase of a security from the portfolio of an open-end investment company holding itself out as a money market fund by any affiliated person or promoter of or principal underwriter for the money market fund or any affiliated person of such person shall be exempt from section 17(a) of the Act (15 U.S.C. 80a–17(a)); provided that:

(a) In the case of a portfolio security that has ceased to be an Eligible Security (as defined in § 270.2a–7(a)(12)), or has defaulted (other than an immaterial default unrelated to the financial condition of the issuer):

(1) The purchase price is paid in cash; and

(2) The purchase price is equal to the greater of the amortized cost of the security or its market price (in each case, including accrued interest).

(b) In the case of any other portfolio security:

(1) The purchase price meets the requirements of paragraph (a)(1) and (2) of this section; and

(2) In the event that the purchaser thereafter sells the security for a higher price than the purchase price paid to the money market fund, the purchaser shall promptly pay to the fund the amount by which the subsequent sale price exceeds the purchase price paid to the fund.

■ 4. Section 270.22e–3 is added to read as follows:

§ 270.22e–3 Exemption for liquidation of money market funds.

(a) *Exemption.* A registered open-end management investment company or series thereof ("fund") that is regulated as a money market fund under § 270.2a–7 is exempt from the requirements of section 22(e) of the Act (15 U.S.C. 80a–22(e)) if:

(1) The fund's board of directors, including a majority of directors who are not interested persons of the fund, determines pursuant to § 270.2a–7(c)(8)(ii)(C) that the extent of the deviation between the fund's amortized cost price per share and its current net asset value per share calculated using available market quotations (or an appropriate substitute that reflects current market conditions) may result in material dilution or other unfair results to investors or existing shareholders;

(2) The fund's board of directors, including a majority of directors who are not interested persons of the fund, irrevocably has approved the liquidation of the fund; and

(3) The fund, prior to suspending redemptions, notifies the Commission of its decision to liquidate and suspend redemptions by electronic mail directed to the attention of the Director of the Division of Investment Management or the Director's designee.

(b) *Conduits.* Any registered investment company, or series thereof, that owns, pursuant to section 12(d)(1)(E) of the Act (15 U.S.C. 80a–12(d)(1)(E)), shares of a money market fund that has suspended redemptions of shares pursuant to paragraph (a) of this section also is exempt from the requirements of section 22(e) of the Act (15 U.S.C. 80a–22(e)). A registered investment company relying on the exemption provided in this paragraph must promptly notify the Commission that it has suspended redemptions in reliance on this section. Notification under this paragraph shall be made by electronic mail directed to the attention of the Director of the Division of Investment Management or the Director's designee.

(c) *Commission Orders.* For the protection of shareholders, the Commission may issue an order to rescind or modify the exemption provided by this section, after appropriate notice and opportunity for hearing in accordance with section 40 of the Act (15 U.S.C. 80a–39).

■ 5. Section 270.30b1–6T is amended by revising paragraph (d) to read as follows:

§ 270.30b1–6T Weekly portfolio report for certain money market funds.

* * * * *

(d) *Expiration.* This section will expire on December 1, 2010.

■ 6. Section 270.30b1–7 is added to read as follows:

§ 270.30b1–7 Monthly report for money market funds.

(a) *Report.* Every registered open-end management investment company, or

series thereof, that is regulated as a money market fund under § 270.2a–7 must file with the Commission a monthly report of portfolio holdings on Form N–MFP (§ 274.201 of this chapter), current as of the last business day of the previous month, no later than the fifth business day of each month.

(b) *Public availability.* The Commission will make the information filed on Form N–MFP available to the public 60 days after the end of the month to which the information pertains.

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

■ 7. The authority citation for Part 274 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78*l,* 78m, 78n, 78o(d), 80a–8, 80a–24, 80a–26, and 80a–29, unless otherwise noted.

* * * * *

■ 8. Section 274.201 and Form N–MFP (referenced in § 274.201) are added to read as follows:

§ 274.201 Form N–MFP, portfolio holdings of money market funds.

This form shall be used by registered open-end management investment companies that are regulated as money market funds under § 270.2a–7 of this chapter to file reports pursuant to § 270.30b1–7 of this chapter no later than the fifth business day of each month.

Note: The text of Form N–MFP will not appear in the Code of Federal Regulations.

FORM N–MFP

MONTHLY SCHEDULE OF PORTFOLIO HOLDINGS OF MONEY MARKET FUNDS

Form N–MFP is to be used by registered open-end management investment companies, or series thereof, that are regulated as money market funds pursuant to rule 2a–7 under the Investment Company Act of 1940 ("Act") (17 CFR 270.2a–7) ("money market funds"), to file reports with the Commission pursuant to rule 30b1–7 under the Act (17 CFR 270.30b1–7). The Commission may use the information provided on Form N–MFP in its regulatory, disclosure review, inspection, and policymaking roles.

GENERAL INSTRUCTIONS

A. Rule as to Use of Form N–MFP

Form N–MFP is the public reporting form that is to be used for monthly reports of money market funds required by section 30(b) of the Act and rule 30b1–7 under the Act (17 CFR 270.30b1–7). A money market fund must report information about the fund and its portfolio holdings as of the last business day of the preceding month. The Form N–MFP must be filed with the Commission no later than the fifth business day of each month, but may be filed any time beginning on the first business day of the month. Each money market fund, or series of a money market fund, is required to file a separate form. If the money market fund does not have any classes, the fund must provide the information required by Part I.B for the series.

A money market fund may file an amendment to a previously filed Form N–MFP at any time, including an amendment to correct a mistake or error in a previously filed form. A fund that files an amendment to a previously filed form must provide information in response to all items of Form N–MFP, regardless of why the amendment is filed.

B. Application of General Rules and Regulations

The General Rules and Regulations under the Act contain certain general requirements that are applicable to reporting on any form under the Act. These general requirements should be carefully read and observed in the preparation and filing of reports on this form, except that any provision in the form or in these instructions shall be controlling.

C. Filing of Form N–MFP

A money market fund must file Form N–MFP in accordance with rule 232.13 of Regulation S–T. Form N–MFP must be filed electronically using the Commission's EDGAR system.

D. Paperwork Reduction Act Information

A registrant is not required to respond to the collection of information contained in Form N–MFP unless the Form displays a currently valid Office of Management and Budget ("OMB") control number. Please direct comments concerning the accuracy of the information collection burden estimate and any suggestions for reducing the burden to the Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549–1090. The OMB has reviewed this collection of information under the clearance requirements of 44 U.S.C. 3507.

E. Definitions

References to sections and rules in this Form N–MFP are to the Investment Company Act of 1940 [15 U.S.C. 80a] (the "Investment Company Act"), unless otherwise indicated. Terms used in this Form N–MFP have the same meaning as in the Investment Company Act or related rules, unless otherwise indicated.

As used in this Form N–MFP, the terms set out below have the following meanings:

"Class" means a class of shares issued by a Multiple Class Fund that represents interests in the same portfolio of securities under rule 18f–3 [17 CFR 270.18f–3] or under an order exempting the Multiple Class Fund from sections 18(f), 18(g), and 18(i) [15 U.S.C. 80a–18(f), 18(g), and 18(i)].

"Fund" means the Registrant or a separate Series of the Registrant. When an item of Form N–MFP specifically applies to a Registrant or a Series, those terms will be used.

"Master-Feeder Fund" means a two-tiered arrangement in which one or more Funds (each a "Feeder Fund") holds shares of a single Fund (the "Master Fund") in accordance with section 12(d)(1)(E) [15 U.S.C. 80a–12(d)(1)(E)].

"Money Market Fund" means a Fund that holds itself out as a money market fund and meets the maturity, quality, and diversification requirements of rule 2a–7 [17 CFR 270.2a–7].

"Securities Act" means the Securities Act of 1933 [15 U.S.C. 77a–aa].

"Series" means shares offered by a Registrant that represent undivided interests in a portfolio of investments and that are preferred over all other series of shares for assets specifically allocated to that series in accordance with rule 18f-2(a) [17 CFR 270.18f–2(a)].

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC 20549

FORM N–MFP MONTHLY SCHEDULE OF PORTFOLIO HOLDINGS OF MONEY MARKET FUNDS

Report for [Month, Day, Year]
CIK Number of Registrant:
EDGAR Series Identifier:
Total number of share classes in the series:
Do you anticipate that this will be the fund's final filing on Form N–MFP? [Y/N]
Is the fund liquidating? [Y/N]
Is the fund merging with, or being acquired by, another fund? [Y/N]

If so, identify the successor fund by CIK, Securities Act file number, and EDGAR series identifier.

If this is not a final filing: has the fund acquired or merged with another fund since the last filing? [Y/N]

If so, identify the acquired or merged fund by CIK, Securities Act file number, and EDGAR series identifier.

Part I: Information about the Fund

A. Series-Level Information

Item 1. Securities Act File Number.
Item 2. Investment Adviser.
a. SEC file number of investment adviser.
Item 3. Sub-Adviser. If a fund has one or more sub-advisers, disclose the name of each sub-adviser.
a. SEC file number of each sub-adviser.
Item 4. Independent Public Accountant.
a. City and state of independent public accountant.
Item 5. Administrator. If a fund has one or more administrators, disclose the name of each administrator.
Item 6. Transfer Agent.
a. CIK Number.
b. SEC file number of transfer agent.
Item 7. Master-Feeder Funds. Is this a feeder fund? [Y/N]
a. Identify the master fund by CIK.
b. Securities Act file number of the master fund.
c. EDGAR series identifier of the master fund.
Item 8. Master-Feeder Funds. Is this a master fund? [Y/N]
a. If this is a master fund, identify all feeder funds by CIK or, if the fund does not have a CIK, by name.
b. Securities Act file number of each feeder fund.
c. EDGAR series identifier of each feeder fund.
Item 9. Is this series primarily used to fund insurance company separate accounts? [Y/N]
Item 10. Category. Indicate the category that most closely identifies the money market fund from among the following: Treasury, Government/Agency, Prime, Single State Fund, or Other Tax Exempt Fund.
Item 11. Dollar weighted average portfolio maturity.
Item 12. Dollar weighted average life maturity. Calculate the dollar weighted average portfolio maturity without reference to the exceptions in rule 2a–7(d) regarding interest rate readjustments.
Item 13. Total value of portfolio securities at amortized cost, to the nearest cent.
Item 14. Total value of other assets, to the nearest cent.
Item 15. Total value of liabilities, to the nearest cent.
Item 16. Net assets of the series, to the nearest cent.
Item 17. 7-day gross yield. Based on the 7 days ended on the last day of the prior month, calculate the fund's yield by determining the net change, exclusive of capital changes and income other than investment income, in the value of a hypothetical pre-existing account having a balance of one share at the beginning of the period and dividing the difference by the value of the account at the beginning of the base period to obtain the base period return, and then multiplying the base period return by (365/7) with the resulting yield figure carried to at least the nearest hundredth of one percent. The 7-day gross yield should not reflect a deduction of shareholders fees and fund operating expenses.
Item 18. Shadow Price of the Series.
a. The net asset value per share most recently calculated using available market quotations (or an appropriate substitute that reflects current market conditions), including the value of any capital support agreement, to the nearest hundredth of a cent;
b. The date as of which the market-based net asset value disclosed in Item 18a was calculated;
c. The net asset value per share most recently calculated using available market quotations (or an appropriate substitute that reflects current market conditions), excluding the value of any capital support agreement, to the nearest hundredth of a cent; and
d. The date as of which the market-based net asset value disclosed in Item 18c was calculated.

B. Class-Level Information. For each Class of the Series, disclose the following:

Item 19. EDGAR Class identifier.
Item 20. Minimum initial investment.
Item 21. Net assets of the Class, to the nearest cent.
Item 22. Net asset value per share for purposes of distributions, redemptions, and repurchase, to the nearest cent.
Item 23. Net shareholder flow activity for the month ended (subscriptions less redemptions), to the nearest cent.
a. Gross subscriptions for the month ended (including dividend reinvestments), to the nearest cent.
b. Gross redemptions for the month ended, to the nearest cent.
Item 24. 7-day net yield, as calculated under Item 26(a)(1) of Form N–1A.
Item 25. Shadow Price of each Class.
a. The net asset value per share most recently calculated using available market quotations (or an appropriate substitute that reflects current market conditions), including the value of any capital support agreement, to the nearest hundredth of a cent;
b. The date as of which the market-based net asset value disclosed in Item 25a was calculated;
c. The net asset value per share most recently calculated using available market quotations (or an appropriate substitute that reflects current market conditions), excluding the value of any capital support agreement, to the nearest hundredth of a cent; and
d. The date as of which the market-based net asset value disclosed in Item 25c was calculated.

Part 2: Schedule of Portfolio Securities. For each security held by the money market fund, disclose the following:

Item 26. The name of the issuer.
Item 27. The title of the issue (including coupon or yield).
Item 28. The CUSIP. If the security has a CUSIP, filers must provide the security's CUSIP pursuant to this Item and may skip Items 29 and 30.
Item 29. Other unique identifier, if the security has a unique identifier. If a CUSIP is provided pursuant to Item 28, skip this Item.
Item 30. The CIK of the issuer, if the issuer has a CIK. If a CUSIP is provided pursuant to Item 28, skip this Item.
Item 31. The category of investment. Indicate the category that most closely identifies the instrument from among the following: Treasury Debt; Government Agency Debt; Variable Rate Demand Note; Other Municipal Debt; Financial Company Commercial Paper; Asset Backed Commercial Paper; Other Commercial Paper; Certificate of Deposit; Structured Investment Vehicle Note; Other Note; Treasury Repurchase Agreement; Government Agency Repurchase Agreement; Other Repurchase Agreement; Insurance Company Funding Agreement; Investment Company; Other Instrument. If Other Instrument, include a brief description.
Item 32. If the security is a repurchase agreement: is the fund treating the acquisition of the repurchase agreement as the acquisition of the underlying securities (*i.e.,* collateral) for purposes of portfolio diversification under rule 2a–7? [Y/N]

For repurchase agreements, describe the securities subject to the repurchase agreement, including:

a. The name of the issuer;
b. Maturity date;
c. Coupon or yield;
d. The category of investments, selected from Item 31 above;
e. The principal amount, to the nearest cent;
f. Value of collateral, to the nearest cent.

If multiple securities of an issuer are subject to the repurchase agreement, the securities may be aggregated, in which case disclose: (a) the total principal amount and value and (b) the range of maturity dates and interest rates.

Item 33. Rating. Indicate whether the security is a rated First Tier Security, rated Second Tier Security, an Unrated Security, or no longer an Eligible Security.

Item 34. Name of each Designated NRSRO.
a. For each Designated NRSRO, disclose the credit rating given by the Designated NRSRO. If the instrument and its issuer are not rated by the Designated NRSRO, indicate "NR."

Item 35. The maturity date as determined under rule 2a–7. Determine the maturity date, taking into account the maturity shortening provisions of rule 2a–7(d).

Item 36. The final legal maturity date, taking into account any maturity date extensions that may be effected at the option of the issuer.

Item 37. Does the security have a Demand Feature? [Y/N]
a. The identity of the Demand Feature issuer.
b. Designated NRSRO(s) for the Demand Feature or provider of the Demand Feature.
c. For each Designated NRSRO, disclose the credit rating given by the Designated NRSRO. If there is no rating given by the Designated NRSRO, indicate "NR."

Item 38. Does the security have a Guarantee? [Y/N]
a. The identity of the Guarantor.
b. Designated NRSRO(s) for the Guarantee or Guarantor.
c. For each Designated NRSRO, disclose the credit rating given by the Designated NRSRO. If there is no rating given by the Designated NRSRO, indicate "NR."

Item 39. Does the security have any enhancements, other than those identified in Items 37 and 38 above, on which the fund is relying to determine the quality, maturity or liquidity of the security? [Y/N]
a. The type of enhancement.
b. The identity of the enhancement provider.
c. Designated NRSRO(s) for the enhancement or enhancement provider.
d. For each Designated NRSRO, disclose the credit rating given by the Designated NRSRO. If there is no rating given by the Designated NRSRO, indicate "NR."

Item 40. The total principal amount of the security held by the series, to the nearest cent.

Item 41. The total current amortized cost, to the nearest cent.

Item 42. The percentage of the money market fund's net assets invested in the security, to the nearest hundredth of a percent.

Item 43. Explanatory notes. Disclose any other information that may be material to other disclosures related to the portfolio security.

Item 44. Is this an Illiquid Security as of the date of this report? [Y/N]

Item 45. The value of the security, calculated using available market quotations (or an appropriate substitute that reflects current market conditions), including the value of any capital support agreement, to the nearest cent.

Item 46. The value of the security, calculated using available market quotations (or an appropriate substitute that reflects current market conditions), excluding the value of any capital support agreement, to the nearest cent.

Dated: February 23, 2010.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–4059 Filed 3–3–10; 8:45 am]

BILLING CODE 8011–01–P

Federal Register

Thursday,
March 4, 2010

Part IV

Department of Agriculture

Agricultural Marketing Service

7 CFR Parts 1000, 1001, 1005, et al.
Milk in the Northeast and Other Marketing Areas; Final Decision on Proposed Amendments to Tentative Marketing Agreements and Orders; Proposed Rule

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 1000, 1001, 1005, 1006, 1007, 1030, 1032, 1033, 1124, 1126 and 1131

[Doc. No. AMS–DA–09–0007; AO–14–A78, et al.; DA–09–02]

Milk in the Northeast and Other Marketing Areas; Final Decision on Proposed Amendments to Tentative Marketing Agreements and Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This decision proposes that the producer-handler definitions of all Federal milk marketing orders be amended to limit exemption from pooling and pricing provisions to those with total route disposition and sales of packaged fluid milk products to other plants of 3 million pounds or less per month. The exempt plant definition would continue to limit route disposition and sales of packaged fluid milk products to other plants to 150,000 pounds or less per month. This final decision is subject to producer approval by referendum.

FOR FURTHER INFORMATION CONTACT: Gino M. Tosi or Jack Rower, Senior Marketing Specialists, Order Formulation and Enforcement Branch, USDA/AMS/Dairy Programs, Stop 0231–Room 2971, 1400 Independence Avenue, SW., Washington, DC 20250–0231, (202) 720–7183, e-mail addresses: *gino.tosi@ams.usda.gov* and *jack.rower@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: This decision proposes that the producer-handler provisions of all Federal milk marketing orders be amended to limit exemption from pooling and pricing to those with total route disposition and sales of packaged fluid milk products to other plants of 3 million pounds or less per month. The exempt plant definition would continue to limit route disposition and sales of packaged fluid milk products to other plants to 150,000 pounds or less per month.

This administrative action is governed by the provisions of sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

The amendments to the rules proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have a retroactive effect. The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674) (AMAA), provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the AMAA, any handler subject to an order may request modification or exemption from such order by filing with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, USDA would rule on the petition. The AMAA provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review USDA's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601–612), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a "small business" if it has an annual gross revenue of less than $750,000, and a dairy products manufacturer is a "small business" if it has fewer than 500 employees. For the purpose of determining which dairy farms are "small businesses," the $750,000 per year criterion was used to establish a milk marketing guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most "small" dairy farms. For purposes of determining a handler's size, if the plant is part of a company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

Producer-handlers are dairy farms that process their own milk production. These entities must operate one or more dairy farms as a pre-condition to operating processing plants as producer-handlers. The size of the dairy farm(s) determines the production level of the operation and is a controlling factor in the capacity of the processing plant and possible sales volume associated with the producer-handler entity. Determining whether a producer-handler is considered a small or large business is therefore dependent on the capacity of its dairy farm(s), where a producer-handler with annual gross revenue in excess of $750,000 is considered a large business.

The proposed amendments would obligate some large producer-handlers under the Federal milk marketing order system to the same terms as other fully regulated handlers of their respective orders provided they meet the criteria for qualification as fully regulated plants. Entities currently defined as producer-handlers under the terms of their order will be subject to the pooling and pricing provisions of the order if their total route disposition and sales of packaged fluid milk products to other plants is more than 3 million pounds per month.

Producer-handlers with total route disposition and sales of packaged fluid milk products to other plants of 3 million pounds or less during the month will not be subject to the pooling and pricing provisions of any order as a result of this rulemaking. To the extent that current producer-handlers have route disposition and sales of packaged fluid milk products to other plants outside of the order's marketing areas, such route disposition and sales of packaged fluid milk products to other plants will be subject to the pooling and pricing provisions of the orders if such measure causes them to become fully regulated.

If current producer-handlers have total route disposition and sales of packaged fluid milk products to other plants of more than 3 million pounds during a month, such producer-handlers will be regulated under the pooling and pricing provisions of the orders like other fully regulated handlers. Such large producer-handlers will account to the pool for their uses of milk at the applicable minimum class prices and pay the difference between their use-value of milk and the blend price of the order to that order's producer-settlement fund.

While this may cause an economic impact on those entities with more than three million pounds of total monthly sales that are currently considered producer-handlers under the Federal order system, the impact is offset by the benefit to other small businesses. With respect to dairy farms whose milk is pooled on Federal marketing orders, such dairy farms who have not heretofore shared in the additional revenue that accrues from the marketwide pooling of Class I sales by producer-handlers will share in such revenue. All producer-handlers who dispose of more than 3 million pounds

of fluid milk, including sales of packaged fluid milk products to other plants per month will account to all market participants at the announced Federal order Class I price for such use.

To the extent that some large producer-handlers become subject to the pooling and pricing provisions of Federal milk marketing orders, such will be determined in their capacity as handlers. Such entities will no longer have restrictions applicable to their business operations that were conditions for producer-handler status and exemption from the pooling and pricing provisions of the orders. In general, this includes being able to buy or acquire any quantity of milk from dairy farmers or other handlers instead of being limited by the current constraints of the orders. Additionally, the burden of balancing their milk production is relieved. Milk production in excess of what is needed to satisfy their Class I route disposition and sales of packaged fluid milk products to other plants may receive the minimum price protection established under the terms of the Federal milk marketing orders. The burden of balancing milk supplies will be borne by all producers who are pooled and handlers who are regulated under the terms of the orders.

During May 2009 the Northeast order had 57 pool distributing plants, 10 pool supply plants, 16 partially regulated distributing plants, 13 producer-handler plants and 40 exempt plants. Of the 83 regulated plants, 49 plants or 59 percent were considered large businesses. Of the 13,050 dairy farmers whose milk was pooled on the order, 628 farms or 5 percent were considered large businesses and 12,422 farms or 95 percent of dairy farms in the Northeast order were considered small businesses. Most of these dairy farms, large and small, could benefit by receiving a higher blend price, if the recommended 3-million pound monthly Class I route disposition limitation for producer-handlers is adopted.

During May 2009, the Appalachian order had 21 pool distributing plants, 1 pool supply plant, 2 partially regulated distributing plants, 1 producer-handler plant and 4 exempt plants. Of the 24 regulated plants, 21 plants or 88 percent were considered large businesses. Of the 2,516 dairy farmers whose milk was pooled on the order, 159 farms or 6 percent were considered large businesses and 2,357 farms or 94 percent of dairy farms in the Appalachian order were considered small businesses. Most of these dairy farms, large and small, could benefit by receiving a higher blend price, if the recommended 3-million pound monthly Class I route disposition limitation for producer-handlers is adopted.

During May 2009, the Florida order had 11 pool distributing plants, 5 partially regulated distributing plants and 2 exempt plants. The order had no pool supply plants or producer-handler plants as of May 2009. Of the 16 regulated plants, 12 plants or 75 percent were considered large businesses. Of the 249 dairy farmers whose milk was pooled on the order, 105 farms or 42 percent were considered large businesses and 144 farms or 58 percent of dairy farms in the Florida order were considered small businesses. Most of these dairy farms, large and small, could benefit by receiving a higher blend price, if the recommended 3-million pound monthly Class I route disposition limitation for producer-handlers is adopted.

During May 2009, the Southeast order had 22 pool distributing plants, 3 pool supply plants, 6 partially regulated distributing plants and 12 exempt plants. The order had no producer-handler plants as of May 2009. Of the 31 regulated plants, 28 plants or 90 percent were considered large businesses. Of the 2,992 dairy farmers whose milk was pooled on the order, 187 farms or 6 percent were considered large businesses and 2,805 farms or 94 percent of dairy farms in the Southeast order were considered small businesses. Most of these dairy farms, large and small, could benefit by receiving a higher blend price, if the recommended 3-million pound monthly Class I route disposition limitation for producer-handlers is adopted.

During May 2009, the Upper Midwest order had 24 pool distributing plants, 53 pool supply plants, 2 partially regulated distributing plants, 5 producer-handler plants and 11 exempt plants. Of the 79 regulated plants, 37 plants or 47 percent were considered large businesses. Of the 15,336 dairy farmers whose milk was pooled on the order, 1,001 farms or 7 percent were considered large businesses and 14,335 farms or 93 percent of dairy farms in the Upper Midwest order were considered small businesses. Most of these dairy farms, large and small, could benefit by receiving a higher blend price, if the recommended 3-million pound monthly Class I route disposition limitation for producer-handlers is adopted.

During May 2009, the Central order had 30 pool distributing plants, 12 pool supply plants, 1 partially regulated distributing plant, 7 producer-handler plants and 19 exempt plants. Of the 43 regulated plants, 35 plants or 81 percent were considered large businesses. Of the 3,600 dairy farmers whose milk was pooled on the order, 413 farms or 11 percent were considered large businesses and 3,187 farms or 89 percent of dairy farms in the Central order were considered small businesses. Most of these dairy farms, large and small, could benefit by receiving a higher blend price, if the recommended 3-million pound monthly Class I route disposition limitation for producer-handlers is adopted.

During May 2009, the Mideast order had 22 pool distributing plants, 2 pool supply plants, 4 partially regulated distributing plants, 1 producer-handler plant and 17 exempt plants. Of the 28 regulated plants, 8 plants or 29 percent were considered large businesses. Of the 7,238 dairy farmers whose milk was pooled on the order, 504 farms or 7 percent were considered large businesses and 6,734 farms or 93 percent of dairy farms in the Mideast order were considered small businesses. Most of these dairy farms, large and small, could benefit by receiving a higher blend price, if the recommended 3-million pound monthly Class I route disposition limitation for producer-handlers is adopted.

During May 2009, the Pacific Northwest order had 15 pool distributing plants, 8 pool supply plants, 13 partially regulated distributing plants, 5 producer-handler plants and 2 exempt plants. Of the 36 regulated plants, 20 plants or 56 percent were considered large business. Of the 657 dairy farmers whose milk was pooled on the order, 326 farms or 50 percent were considered large businesses. Because the Pacific Northwest order already fully regulates producer-handlers with monthly route distribution in excess of three million pounds per month, the proposed action will have a minimal effect on small farmers whose milk is pooled on the order.

During May 2009, the Southwest order had 19 pool distributing plants, 2 pool supply plants, 1 partially regulated distributing plant, 5 producer-handler plants and 2 exempt plants. Of the 79 regulated plants, 19 plants or 24 percent were considered large businesses. Of the 588 dairy farmers whose milk was pooled on the order, 318 farms or 54 percent were considered large businesses and 270 farms or 46 percent of dairy farms in the Southeast order were considered small businesses. Most of these dairy farms, large and small, could benefit by receiving a higher blend price, if the recommended 3-million pound monthly Class I route disposition limitation for producer-handlers is adopted.

During May 2009, the Arizona order had 5 pool distributing plants, 1 pool supply plant, 15 partially regulated distributing plants and 1 exempt plant. The order had no producer-handler plants as of May 2009. Of the 21 regulated plants, 13 plants or 62 percent were considered large businesses. Of the 100 dairy farmers whose milk was pooled on the order, 95 farms or 95 percent were considered large businesses. Because the Arizona order already fully regulates producer-handlers with monthly route distribution in excess of 3 million pounds, the proposed action will have a minimal effect on small farmers whose milk is pooled on the order.

As of May 2009, in their capacity as producers, 15 producer-handlers would be considered large producers as their annual marketings exceed 6 million pounds of milk (500,000 pounds per month). During the same month, 22 producer-handlers would be considered small producers. Record evidence indicates that as of March 2009, seven large producer-handlers had total route sales of two million pounds or more per month. Therefore, seven or fewer large producer-handlers could potentially become subject to the pooling and pricing provisions of Federal milk marketing orders because of route disposition of more than three million pounds per month.

A review of reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). It was determined that these proposed amendments would have minimal impact on reporting, recordkeeping, or other compliance requirements for entities currently considered producer-handlers under Federal milk marketing orders because they would remain identical to the current requirements applicable to all other regulated handlers who are subject to the pooling and pricing provisions. No new forms are proposed and no additional reporting requirements would be necessary.

This notice does not require additional information collection that requires clearance by the Office of Management and Budget (OMB) beyond currently approved information collection. The primary sources of data used to complete the forms are routinely used in most business transactions. Forms require only a minimal amount of information that can be supplied without data processing equipment or a trained statistical staff. Thus, the information collection and reporting burden is relatively small. Requiring the same reports for all handlers does not significantly disadvantage any handler that is smaller than the industry average.

Interested parties are invited to submit comments on the probable regulatory and informational impact of this proposed rule on small entities.

Prior Documents in This Proceeding

Notice of Hearing: Issued April 3, 2009; published April 9, 2009 (74 FR 16296).

Recommended Decision: Issued October 15, 2009; published October 21, 2009 (74 FR 54383).

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this final decision with respect to proposed amendments to the tentative marketing agreement and the order regulating the handling of milk in the Northeast and all other marketing areas. This notice is issued pursuant to the provisions of the AMAA and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

A public hearing was held upon proposed amendments to the marketing agreements and the orders regulating the handling of milk in all Federal milk marketing orders. The hearing was held pursuant to the provisions of the AMAA, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

The proposed amendments set forth below are based on the record of a public hearing held in Cincinnati, Ohio, on May 4–20, 2009, pursuant to a notice of hearing published April 9, 2009 (74 FR 16295); and a recommended decision published October 21, 2009 (74 FR 54383).

The material issues on the record of hearing relate to:

1. Producer-handler and exempt plant definitions in all Federal milk marketing orders.

Findings and Conclusions

All orders should be amended to limit producer-handlers to total Class I route disposition and packaged sales of fluid milk products to other plants to not more than 3 million pounds per month as a condition for exemption from pooling and pricing provisions. The exempt plant definition of all orders continues to limit disposition of Class I milk products, including sales of packaged fluid milk products to other plants to 150,000 pounds or less per month.

The Regulatory Status of Producer-Handlers

Currently, several orders define and describe a special category of handler known as producer-handler. Under the Pacific Northwest and Arizona orders (Orders 124 and 131, respectively) producer-handlers are subject to provisions that limit Class I route disposition to 3 million pounds or less per month within the respective marketing areas. The other 8 orders have no similar route disposition limit. The 3 southeastern orders (Orders 5, 6 and 7) do not allow producer-handlers to purchase supplemental milk while the remaining 5 orders provide producer-handlers the opportunity to purchase limited amounts. With noted exceptions, the producer-handler definitions of all Federal milk marketing orders exempt producer-handlers from the pooling and pricing provisions.

As a result of their exemption from pooling and pricing, producer-handlers, as handlers, are not required to pay the minimum class prices established under the orders nor are they, as producers, granted minimum price protection for disposal of surplus milk. Producer-handlers, in their capacity as handlers, are not obligated to equalize their use-value of milk through payment of the difference between their use-value of milk and the respective order's blend price into the producer-settlement fund. As such, producer-handlers retain the full value of milk processed and disposed of as fluid milk products by their operation within the marketing areas.

Entities defined as producer-handlers must adhere to strict criteria that limit certain business practices including the purchase of supplemental milk. Given these limitations, producer-handlers bear the full burden of balancing their milk production between fluid and other uses. Milk production in excess of their Class I route disposition does not enjoy minimum price protection under the orders and may be sold at whatever price is obtainable in the market.

Producer-handlers are required to submit reports to the Market Administrator to ensure compliance with the requirements for their regulatory status as producer-handlers. In this sense, producer-handlers are regulated under the orders but are not "fully regulated" as are other handlers who are subject to an order's pooling and pricing provisions.

The Regulatory Status of Exempt Plants

The current exempt plant definition was implemented in January 2000 and is uniform across all orders. Exempt

plants are not subject to full regulation on the basis of size. At or below the monthly Class I disposition threshold, including sales of packaged fluid milk products to other plants for exempt plants, these entities do not impact competitive relationships among handlers in the market such that full regulation is warranted. Exempt plants may operate solely as processing operations or may have the structure of producer-handlers. Operational structure is irrelevant insomuch as qualification for exempt plant status is based solely upon Class I sales volume. Exempt plants are required to occasionally submit reports and information to the Market Administrator to ensure compliance with the exempt plant definition.

Summary of Testimony

Overview of Proposals

This proceeding was held in response to two proposals jointly submitted by the National Milk Producers Federation (NMPF) and the International Dairy Foods Association (IDFA). These proposals, marked as Proposals 1 and 2 would: (1) Eliminate the producer-handler provision from all Federal milk orders; (2) Increase the exempt plant monthly limit on disposition of fluid milk products from 150,000 to 450,000 pounds; and (3) Require unique labeling for fluid milk products distributed by exempt plants.

This proceeding also considered 17 alternative proposals received in response to the initial proposals. These proposals suggested a range of amendments to the producer-handler, exempt plant and pooling provisions.

The following summary of evidence presented during the proceeding is organized as follows:

1. Elimination of the producer-handler provisions and amendment of the exempt plant definition to include an increased limit on monthly Class I disposition.

2. Elimination of the producer-handler provisions and adoption of grandfathering.

3. Adoption of producer-handler provisions to include a limit on monthly Class I disposition.

4. Exemption of vertically integrated operations with retail and home delivery distribution.

5. Exemption of own-farm milk.

6. Establishment of individual handler pools.

Elimination of the Producer-Handler Provisions and Amendment of the Exempt Plant Definition to Include an Increased Limit on Monthly Class I Disposition

Proposed by NMPF and IDFA, proposals published in the hearing notice as Proposal 1 and Proposal 2, seek to simultaneously eliminate the producer-handler definition from all Federal milk orders and increase the monthly Class I route disposition limit from the current 150,000 pounds to 450,000 pounds and require unique labeling for fluid milk products distributed by exempt plants. Proposals published in the hearing notice as 19 and 22 reiterated the positions contained in Proposals 1 and 2.

Representative members and supporters of NMPF including dairy farmer members, employees and representatives of Dairy Farmers of America (DFA), Mid-West Dairymen's Company (Mid-west), Lakeshore Federated Dairy Cooperative (Lakeshore), Michigan Milk Producers Association (MMPA), Prairie Farms Dairy (Prairie Farms), Maryland & Virginia Milk Producers Cooperative Association, Inc. (MD&VA), United Dairymen of Arizona (UDA), Northwest Dairy Association-Darigold (NDA–Darigold), and St. Albans Cooperative Creamery, Inc. (St. Albans) supported either the elimination of the producer-handler provisions or an increase in the exempt plant Class I route disposition limit, or both during the hearing.

A representative of NMPF testified in support of Proposals 1 and 2. NMPF is a trade association that represents 31 dairy farmer cooperatives. The witness was of the opinion that the exemption for producer-handlers was originally based upon the assumption that producer-handlers have limited sales of fluid milk products and little influence in the market. Using USDA data, the NMPF witness demonstrated that producer-handlers have a growing share of fluid milk sales in the markets that do not restrict the Class I disposition of producer-handlers. Given that some producer-handlers now sell large volumes of fluid milk products and significantly impact the market, larger producer-handlers should not be exempt from pooling and pricing, the witness asserted.

According to the NMPF witness, large producer-handlers have a regulatory advantage associated with the price at which they acquire milk for processing and the sales revenues they retain because of the exemption they enjoy. Specifically, the witness testified that producer-handlers are essentially able to acquire their milk at the uniform price rather than the Class I price and as a result, enjoy a cost advantage over fully regulated handlers in procuring milk. The witness asserted that the uniform price is effectively the market price for producer milk and as such, the appropriate transfer price (the price at which producer-handlers transfer their internal milk supply to their plant) for analysis of the regulatory impact of producer-handlers. Additionally, producer-handlers' exemption from payment into the producer-settlement fund deprives Federal order pools of money that would otherwise be distributed among producers, the witness stated. Producer-handlers, the witness asserted, encounter the same costs from cow to bottle as other enterprises but are exempt from pool payment.

The NMPF witness testified that the potential exists for large dairy farms to become large producer-handlers. A more than 100 percent increase in dairy farms with more than 2,000 cows from 1998 to 2007 has occurred, the witness stated, noting that the monthly milk production of a 2,000-cow dairy is nearly 4 million pounds. Collectively, farms at this level of production, upon conversion to producer-handler status, could capture a large share of the Class I sales in an individual market, or nationally, the witness asserted. The witness testified that both dairy farms and handler operations are threatened by the potential for large farms to become producer-handlers. According to the witness, producer-handlers are already disruptive in most Federal order marketing areas and particularly in the Central order (Order 32) marketing area. The witness acknowledged that producer-handlers are not currently disruptive in all orders but asserted that the preemptive adoption of some uniform standards regarding producer-handler operations is necessary.

The NMPF witness explained that Proposal 2, seeking an increase in the exempt plant limit on monthly Class I disposition from 150,000 to 450,000 pounds, is based in part on a three-fold increase in milk production at the farm-level since the time when the current exempt plant limit was set. The witness testified that plants with less than 450,000 pounds of route distribution per month have trouble competing with larger plants on a cost basis even when exempt from full regulation because the milk procurement price advantage is outweighed by higher processing costs. The witness also testified that farm size and economies-of-scale should be considered in setting an exempt plant limit, citing evidence of cost

disadvantages for producer-handlers with less than 500,000 pounds of monthly production.

The NMPF witness testified that the unique labeling provision of Proposal 2 is designed to prevent milk buyers from exploiting exempt plants' price advantage through the purchase of a large supply of identically labeled milk at prices lower than those of other, fully regulated plants. Additionally, the witness testified that NMPF intends the 450,000-pound monthly limit on Class I disposition for exempt plants to apply to total sales rather than sales in a single market. According to the witness, Proposals 1 and 2 in combination would allow all but the largest producer-handlers to retain an exemption from pooling and pricing while newly exempting an additional 30 to 35 regulated or partially regulated plants. Furthermore, the witness asserted, adoption of Proposals 1 and 2 would establish more equitable rules for dairy farmers whose milk is pooled and priced under the terms of Federal milk orders.

A panel of three dairy farmer members of DFA, a separate witness representing DFA, and a witness representing both Mid-West and Lakeshore testified separately in support of Proposals 1 and 2. The DFA dairy farmer panelists own and operate separate farms in Wisconsin, Texas and Kentucky. DFA is a Capper-Volstead cooperative of approximately 10,500 farms that produce milk in 49 States. Mid-West is a Capper-Volstead cooperative representing 163 dairy farms. Lakeshore is comprised of Manitowoc Milk Producers Cooperative, Milwaukee Cooperative Milk Producers, Mid-West and Scenic Central Milk Producers Cooperative. Mid-West and Lakeshore are located primarily in Illinois and Wisconsin.

Both the DFA dairy farmer panel and the Mid-West-Lakeshore witness testified that the producer-handler exemption reduces revenues for all dairy farmers whose milk is pooled on Federal orders. The DFA witness and the Mid-West-Lakeshore witness asserted that producer-handlers also disadvantage fully regulated handlers. Specifically, the DFA witness and the Mid-West-Lakeshore witness explained that producer-handlers retain the difference between the minimum Class I price and the statistical uniform price while fully regulated handlers that are similarly situated are required to account for milk at minimum class prices and pay into the producer-settlement fund. The Mid-West-Lakeshore witness added some dairy cooperatives that own and operate fluid milk plants have assumed the same risk as producer-handlers without enjoying the ability producer-handlers have, because of their exemption, to balance surplus production by adjusting packaged milk prices relative to production volume. The Mid-West-Lakeshore witness asserted that a producer-handler in the Upper Midwest (Order 30) marketing area, for example, has a $0.14 per gallon "advantage," on average, over fully regulated handlers due to its pool exemption. Similarly, the DFA witness testified that since a producer-handler in Order 32 began supplying a regional grocer about a year ago, its milk has consistently been the lowest priced brand. In some of the markets where DFA markets milk, price concessions, including premium discounts, have been needed to meet competition from producer-handlers, and some of DFA's processor-customers have expressed concern that producer-handlers are marketing milk at such low prices that it is difficult to compete, the DFA witness stated.

The DFA dairy farmer panel stated that if fully regulated processing plants were closed due to unfair producer-handler competition, outlets for milk would become fewer and located further away from producers, which would result in higher hauling costs. Ultimately, the DFA dairy farmer panel was of the opinion that the integrity of the order system would be undermined, and the future of dairy farmers jeopardized, if the producer-handler provisions were allowed to remain. The Mid-West-Lakeshore witness echoed this position, noting that while Mid-West and Lakeshore do not currently compete with any producer-handlers, a large farm under construction near a Mid-West plant was identified as a potential producer-handler whose operations could lower the revenues of Lakeshore dairy farmers. The DFA witness provided data on the number of "larger" dairy farms across the country, estimating the potential negative impacts on producer minimum blend prices if these farms were to become producer-handlers. Accordingly, the DFA witness asserted that Proposals 1 and 2, if adopted, would add stability to the order system, and assure regulated handlers that their competitors pay the same minimum prices.

The DFA witness testified that many producer-handlers have maintained their businesses within the 150,000-pound per month exempt plant limit on Class I disposition and the proposal to triple this size limit for the exempt plant provision would allow a reasonable expansion path for many of these operations. Furthermore, the DFA dairy farmer panel and the DFA witness asserted that a 450,000-pound per month limit would provide a majority of dairy farmers the opportunity to try on-farm processing and marketing, and if an operation is successful enough to grow the business beyond this level it would become fully regulated. The DFA witness also testified that the unique labeling component of Proposal 2 is essential because without it an incentive would exist for an integrator to "daisy-chain" a group of plants to process and package under the same label for the same customer. The DFA witness agreed with the position of NMPF and IDFA that the unique labeling provision would still allow for bottling under multiple labels as long as the labels were not shared across processors.

Witnesses representing MMPA, Prairie Farms and MD&VA testified separately in support of Proposals 1 and 2. MMPA is Capper-Volstead cooperative in Michigan. Prairie Farms is a Capper-Volstead cooperative, based in Illinois, operating 35 fluid milk and dairy product processing plants, 26 of which are regulated under 5 Federal orders. MD&VA is a Capper-Volstead cooperative with more than 1,500 members, marketing member and non-member milk in 3 Federal orders in the Mid-Atlantic and Southeast. MD&VA owns and operates three fully regulated fluid milk plants, one balancing plant and has a majority interest in a second balancing plant.

The MMPA, Prairie Farms and MD&VA witnesses provided testimony that was largely in agreement with the testimony of the DFA dairy farmer panel, and the DFA and Mid-West-Lakeshore witnesses. The MMPA witness testified specifically to the increased average size of Michigan dairy farms and the possibility that these larger dairy farms may become producer-handlers. The Prairie Farms witness joined in this concern, stating that while there are currently only a few "large" producer-handlers in operation across the country, the potential for new ones exists. Similarly, the MD&VA witness asserted that despite the relatively small number of producer-handlers in the Appalachian and Southeast (Orders 5 and 7) marketing areas, the potential for growth in producer-handler numbers still exists. The MD&VA witness explained that the combined growth of large farms and discontinuation of smaller farm operations has created the potential for construction of bottling plants on large farms. Additionally, the MD&VA witness testified that the Appalachian and Southeast marketing areas, as deficit markets that source out-of-area

milk, face the possibility of large farms located outside of the marketing areas obtaining producer-handler status and gaining advantages over fully regulated handlers who consistently supply the two markets. The MD&VA witness was of the opinion that producer-handlers should pay the same minimum prices as MD&VA's customers.

The Prairie Farms witness testified that as a fully regulated handler, Prairie Farms can compete with any other fully regulated handler but not with a producer-handler that has an unfair advantage owed to its exemption from full regulation. The MD&VA witness stated that MD&VA is billed on a monthly basis because of its pool obligation while producer-handlers are exempt, the MD&VA witness stated. Producer-handlers' exemption from pool payment is equivalent to a price advantage of $0.23 per gallon in the areas in which MD&VA markets milk, according to the MD&VA witness.

The Prairie Farms witness testified that adoption of Proposals 1 and 2 would not harm those that want to process, package and sell own-farm milk. Rather, the proposed changes recognize that when a handler reaches a certain size, the size of that operation could negatively impact fully regulated handlers and producers alike. Similarly, the MD&VA witness noted that the adoption of the NMPF proposals would provide protection to the pool which is necessary because marketwide pooling is the only way all producers and cooperatives share in the higher value associated with Class I products.

The MMPA witness also testified that an increase in the exempt plant Class I route disposition limit to 450,000 pounds per month would allow relatively small processors to meet the needs of niche markets without causing disorder, and increase overall consumer demand for dairy products and encourage the development of new dairy products.

A dairy farmer witness representing UDA testified in support of Proposals 1 and 2. UDA is the only Capper-Volstead cooperative in the State of Arizona. The witness testified in support of Proposal 1 as a preventative measure, and noted that producers in the Arizona (Order 131) marketing area have realized higher blend prices since a cap was placed on producer-handler Class I dispositions in a prior rulemaking. The UDA witness stated that plants with 450,000 pounds or less of monthly Class I disposition serve small niche markets, are not disruptive and should not be subject to full regulation.

A witness representing NDA and Darigold testified in support of Proposals 1 and 2. NDA is a Capper-Volstead cooperative comprised of 530 producers located in Washington, Oregon, Idaho, Utah, and California. NDA and Darigold Inc., wholly owned by NDA, own and operate bottling plants and manufacturing plants in the Pacific Northwest (Order 124) marketing area and Idaho.

The NDA-Darigold witness testified that the buyers in the region where NDA and Darigold operate are sophisticated and price conscious. Drawing from conversations with milk buyers, the witness illustrated that when buyers are presented the opportunity to buy Class I milk at a lower price, ruinous competition between fully regulated and unregulated handlers develops. The witness went on to explain that the combination of a buyer's desire for lower prices and the occurrence of similarly situated handlers competing on an uneven playing field creates disorderly marketing conditions within the market which drive prices below commercially reasonable levels.

The NDA-Darigold witness stated that the disorderly marketing and unfair competition that led to the changes in Orders 124 and 131 no longer exist since the implementation of the 3-million–pound limit on monthly Class I disposition in the marketing areas. The witness also noted that producers now receive a slightly higher blend price and three of the producer-handler operations affected by the rulemaking continue to operate.

The NDA-Darigold witness testified that handlers with 450,000 pounds or less of Class I sales per month should be treated uniformly under the exempt plant provision. The witness asserted that this proposed change closely reflects the AMAA's intent that regulation should apply equally to all handlers. The witness offered that aside from grandfathering certain current producer-handlers, the exempt plant provision should be the only basis for exemption from pooling and pricing in the future.

A witness appeared on behalf of St. Albans in support of Proposals 1 and 2. St. Albans is a dairy Capper-Volstead cooperative based in Vermont that processes and markets milk pooled on the Northeast order (Order 1). The witness testified that the Northeast order has more producer-handlers and exempt plants than any other order. Relying on the Order 1 Annual Statistical Bulletin for 2008, the witness stated that the Class I sales from 15 producer-handlers and 46 exempt plants are not included in the marketwide pool. The witness was of the opinion that most of the exempt plants are also producer-handlers.

The St. Albans witness testified that large producer-handlers impact Federal order pools and a producer-handler located outside the Northeast marking area marketed milk into that area during every month of 2008 in direct competition with fully regulated plants supplied by local producers. The witness asserted that while St. Albans currently faces no competition from producer-handlers located in the Northeast marketing area, the location of the producer-handler is irrelevant since milk shipped from outside the order competes with local production. As such, the witness stated that the rapid growth in volume of producer-handler milk sales represents a potential market disruption.

The following handler members and other supporters of IDFA including the Northeast Dairy Foods Association (NDFA), Worcester Creameries (Worcester), Elmhurst Dairy (Elmhurst), Mountainside Farms (Mountainside), Steuben Foods (Steuben), Harrisburg Dairies (Harrisburg), the Pennsylvania Association of Milk Dealers (PAMD), Anderson Erickson Dairy (AE), Price's Creameries (Price's), and Bareman Dairy (Baremen) testified in support of either the elimination of the producer-handler provisions or the increase of the exempt plant limit on Class I route disposition, or both.

A witness appeared on behalf of IDFA in support of Proposals 1 and 2. According to the witness, IDFA is a trade association representing manufacturers, marketers, distributors and suppliers of fluid milk and related products including ice cream, frozen dairy desserts and cheese. The witness noted that most of the milk purchased and processed by IDFA members is regulated under the Federal order system.

The IDFA witness testified that the elimination of the producer-handler provisions is necessary for a number of reasons, all of which give rise to disorderly marketing. According to the witness, exemption from pooling and pricing allows producer-handlers to, in effect, pay the uniform price rather than the Class I price for own-farm milk. As a result, producer-handlers have a milk acquisition cost advantage over fully regulated plants, solely on the basis of a regulatory exemption, the witness stated. The witness asserted that disorderly marketing conditions arise when some but not all handlers are subject to payment of the Class I minimum price. According to the witness, handlers not subject to full regulation can use their artificial cost

advantage to offer customers a lower price than can be offered by a fully regulated handler.

The IDFA witness also asserted that the need for the elimination of the producer-handler exemption stems from significant structural changes which have occurred at all levels of the dairy industry. The witness explained that in 1998 only 235 farms reportedly had more than 2,000 cows and by 2008 that number had increased to 730 and accounted for 30.5 percent of all U.S. milk production. Providing additional perspective, the witness noted that farms with more than 500 milk cows accounted for 58.5 percent of U.S. milk production in 2008. Cows in the top 5 milk producing States now produce on average, 23,000 pounds of milk per year, the witness stated. The witness illustrated that a 500-cow farm in these States could have monthly production of, on average, nearly 1 million pounds. Additionally, the witness explained that a 2,000-cow herd with the same average would be expected to produce nearly 46 million pounds annually, or 4 million pounds monthly. The witness was of the opinion that large farms, with milk production levels never contemplated when producer-handlers first became exempt from pooling and pricing, are present in the marketplace today.

With regard to Proposal 2, the IDFA witness asserted that IDFA and NMPF jointly support an increase of the limit on Class I disposition for exempt plants. The witness further explained that an increase in the exempt plant limit is intended to preserve regulatory exemption for those plants too small to cause material market disruption, including those small plants previously exempted as producer-handlers. The current 150,000 pounds per month threshold was adopted in all Federal orders as part of Federal order reform as it was the highest volume threshold in existence at the time, the witness noted. Furthermore, the witness asserted that since 1990, the time period for which data was available when the exempt plant provision was adopted, the average volume of fluid milk products produced by U.S. fluid milk bottling plants operated by commercial processors has roughly doubled, from 93.9 million pounds annually in 1990 to 189.8 million pounds in 2007. The witness noted that while the data might suggest a doubling of the threshold, the overall upward trend clearly shows that average fluid milk bottling plant volumes continue to increase over time, which warrants the adoption of a limit that allows for future growth while remaining tied to the structural trends of the industry.

Proposal 2, according to the IDFA witness, also requires that an exempt plant sell its fluid milk products using unique labels, lest this exemption be abused through the establishment of numerous "small" plants effectively linked together to market their milk jointly and to garner the advantages of a large plant without being subject to full regulation. The witness noted that this particular feature is not intended to prevent an exempt plant from marketing packaged fluid milk products under more than one label. The witness provided the example of an exempt plant with its own label and other labels distributed to a local grocery store and via home delivery to illustrate this assertion. Ultimately, the witness stated that an exempt plant should not be able to distribute fluid milk products under the same name used by any other handler.

A witness appeared on behalf of NDFA in support of Proposal 22 seeking elimination of the producer-handler provisions. NDFA is a trade association based in New York, representing dairy processors, manufacturers and distributors The NDFA witness provided testimony similar to others regarding the outdated nature of the producer-handler exemption. The NDFA witness added that an exemption for both producer-handlers and exempt plants is inappropriate because producer-handlers and exempt plants are in direct competition with fully regulated handlers. The witness cited the procurement of raw milk at lower prices, ease of balancing and the ability to make pricing adjustments more quickly as advantages that accrue to exempt handlers. Furthermore, the NDFA witness asserted that exempt handlers retain the difference between the Class I price and uniform price which reduces the blend price to producers. However, the NDFA witness was not opposed to the current exempt plant provision.

A witness appeared on behalf of Worcester, Elmhurst, Mountainside and Steuben (Worcester *et al.*). With the milk of approximately 200 producers and additional purchases of cooperative milk, Worcester supplies Elmhurst, Mountainside and Steuben, all of which are fluid milk plants. The witness echoed the testimony of the NDFA witness in support of the elimination of producer-handler and exempt plant provisions. The Worcester *et al.* witness testified in exclusive support of Proposal 1 in the event that the exempt plant provision was not eliminated.

By example, the Worcester *et al.* witness asserted that an existing New York producer with 4 million pounds of monthly production would have a cost advantage as a producer-handler and would reduce the amount of business that proximate fully regulated handlers could secure. The witness also testified that any increase in exempt plant volume would further contribute to handler inequity.

A witness representing Harrisburg and PAMD testified in support of Proposals 1 and 19. Proposal 19 would adopt the 450,000 pound per month limit on Class I disposition for exempt plants as proposed jointly by NMPF and IDFA. The witness testified that Harrisburg is a member of PAMD. Harrisburg is fully regulated under Order 1 with monthly Class I route distribution of 4 to 6 million pounds.

The Harrisburg witness stated that Harrisburg Dairies is not presently in direct competition with producer-handlers. The witness asserted that there is a threat presented by Western Pennsylvania producer-handlers servicing the same type of retail chains as Harrisburg Dairies. The witness testified that their operation would not survive in its current form if producer-handlers move into eastern Pennsylvania. Based on Harrisburg Dairies' experience as a regulated handler, the witness estimated that a producer-handler of similar size would have an average cost advantage of $100,000 per month over a fully regulated plant because of the pool payment exemption. The witness testified that Harrisburg Dairies was recently asked to become a producer-handler and declined. The witness asserted that it is not reasonable for some processors to enjoy regulatory privileges that other processors do not.

A consultant witness,[1] a witness representing AE and a witness representing Price's, each testified to the characteristics and impacts of producer-handlers. The consultant witness appeared on behalf of Prairie Farms, Dairy Institute of California, NDFA, AE, PAMD, Dean Foods Company (Dean), National Dairy Holdings, LP, Shamrock Foods Company (Shamrock), Shamrock Farms and partner farms.

The consultant witness stated that he has been involved in the dairy industry for more than two decades and is currently a shareholder in Wilcox Farms (Wilcox), a former large fluid milk processor that discontinued its dairy operations and the witness' former employer. AE is private family business with 525 full-time employees and a processing plant in the Central Order (Order 32) marketing area. AE offers

[1] Corrections to the Wilcox witness's testimony are reflected in this Final Decision.

fluid milk and other dairy products that are distributed in Iowa and portions of six other States. Price's, a division Dean, has 170 employees and serves the El Paso, Texas, area.

The consultant witness and the AE and Price's witnesses did not testify in specific support or opposition to any proposals under consideration. Rather, each of the witnesses provided examples of producer-handler competition with fully regulated handlers. The consultant witness testified that in 1974, a large regional grocery chain asked Wilcox, which had dairy production operations at the time, to build a fluid processing plant and qualify as a producer-handler as a means of supplying the customer at a lower cost. During the period that Wilcox was a producer-handler, the grocer was able to balance supply through another source, the consultant witness stated. The consultant witness further testified as to the nature of customer-driven competition, noting that after conversion to fully regulated status in 1987, Wilcox was occasionally asked to lower its price to meet a competitor even when the competitor could serve only a small number of stores.

The Price's witness testified to having recently lost business to a producer-handler in the El Paso area. The Price's witness opined that the producer-handler's processing capacity to be as much as 752,000 gallons per week—enough to supply 80 percent of the demand in the area. In March and April 2009, Price's stopped supplying several stores in the El Paso area when an operation that had gained producer-handler status in January 2009 assumed that portion of a national retailer's business, the witness testified. According to the witness, the national retailer had been purchasing 66,000 gallons per week from Price's before it switched to the producer-handler supplier. The witness was of the opinion that Price's lost business to the producer-handler solely on the basis of price. The witness further stated that after Price's lost the account, a Price's employee observed a $0.34 per gallon reduction in the customer's retail price, translating to a wholesale loss of about $4 per hundredweight (cwt) However, the Price's witness acknowledged that lower milk prices in El Paso were not solely attributable to the producer-handler in the area.

The AE witness testified that AE shares a large customer in the Kansas City area with Heartland Creamery (Heartland), a producer-handler. The witness went on to explain that the shared customer traditionally uses a bid process to secure a supply of milk for two private labels and in 2007, AE successfully bid on the account consisting of the two private labels in addition to the branded product account AE already held. According to the AE witness, the customer's pricing scheme is such that the brand name product is priced about $0.10 above the private label product displaying the store's name while the private label product with the more generic name is priced about $0.20 below the store name product. Based on observations of the dairy cases in a number of locations and additional knowledge as to purchasing practices of the customer, the witness offered that AE continued supplying the customer with the generic label product until it was gradually replaced by Heartland's branded product at a lower price point. The witness testified that AE went from annualized sales of 185,000 to 40,000 gallons of the generic label in one year, and the generic label product is now no longer produced.

It was noted by the AE witness that the replacement of a low-cost generic labeled product with a branded product is somewhat unusual. Given that AE continues to supply the customer with the AE branded product and the private label store name product, the fact that, the AE generic label product was replaced by the Heartland branded product and the AE generic label product was in the most price sensitive category, the witness concluded that Heartland's ability to obtain the customer's business was solely on the basis of price not quality or service. In addition, based on AE employee conversations with the retailer, the witness asserted that the retailer account was lost on the basis of price, and in particular because of Heartland's pricing strategy of supplying the account at a lower price than the AE price.

The AE witness further asserted that sales of the AE-produced private label store name product have decreased approximately 200,000 gallons annually since the Heartland product was introduced. The witness estimated that Order 32 has lost approximately 3.25 million pounds from the pool due to the discontinuation of the AE private label generic name product and the reduction in sales of the AE private label store name product attributable to Heartland's direct competition.

The consultant witness and the AE witness both testified that regulated handlers are able to compete with producer-handlers in terms of service, quality, advertising and packaging, but producer-handlers have a clear advantage in terms of price. The AE witness specifically noted that AE is able to respond to more efficient operations but the presence of regulation which creates inequality is not something that can necessarily be overcome.

The consultant witness went on to testify regarding producer-handler proliferation. For a producer with 10,000 cows it is comparatively easier to add a processing plant than for a processor with the capacity to process the milk of 10,000 cows to add dairy cattle, the consultant witness stated. In support of this assertion, the consultant witness testified that in the late 1990s, Wilcox built a plant with capacity for the milk of 5,000 cows for less than $7 million, and the investment to double that capacity would likely have been less than $3 million. The consultant witness stated that a recent University of Florida study found construction of a processing plant for the milk of a 10,000-cow herd would require about $40 million.

The consultant witness described several recent trends that enhance producer-handler viability: Many dairy farms are large enough to exclusively supply a processing plant; producer-handlers are attractive investments; and many milk buyers have multiple suppliers capable of balancing producer-handlers' supply. The witness testified that uncertainty of the future regulation of very large producer-handlers has constrained investment in these businesses, but if USDA does not modify the producer-handler provisions as a result of this proceeding, the number of producer-handlers will grow.

A witness representing Bareman, a fluid processer in Michigan, testified in support of Proposals 1 and 2. According to the witness, Bareman purchases milk from cooperatives and is fully regulated under the Mideast order (Order 33). The witness noted that Bareman competes against a number of large fluid milk processors and Country Dairy, a producer-handler.

The Bareman witness reiterated the testimony of others regarding the advantage created by the producer-handler exemption and its associated effects on pooled producers and fully regulated handlers. The witness added that Bareman, as a fully regulated handler, is assured that other fully regulated handlers pay minimum prices in the same manner that it does.

The Bareman witness testified to having lost some accounts to a producer-handler, often on the basis of price. The witness provided an example wherein Bareman engaged in price competition with Country Dairy (a producer-handler) for a convenience

store account during the spring flush. Bareman, the witness testified, was ultimately unable to meet the low price offered by the producer-handler. The disruption noted in this example, the witness asserted, arises because of producer-handlers' need to balance sales with milk production and their resultant willingness to turn to "fire sales" for established customers and any others that might be receptive.

Additionally, representatives of the Federation of Organic Dairy Farmers (FOOD), Cornucopia Institute (Cornucopia), National All Jersey (NAJ), and the State Departments of Agriculture in New Hampshire (NH), New York (NY), Pennsylvania (PA), Vermont (VT), and Wisconsin (WI), testified in support of the elimination of the producer-handler provisions, the increase of the exempt plant limit on Class I route disposition, or both.

A panel of three dairy farmers representing FOOD and a witness on behalf of Cornucopia testified in support of Proposal 2. FOOD is an umbrella organization that represents the Western Organic Dairy Producers Alliance (WODPA), the Midwest Organic Dairy Producers Alliance (MODPA) and the Northeast Organic Dairy Producers Alliance (NODPA). According to the panel, FOOD represents nearly two-thirds of the organic dairy farmers in the country. The Cornucopia witness testified that the Cornucopia Institute is a charitable organization serving the organic industry.

By example, the Cornucopia witness illustrated the ways that Aurora Organic Dairy's (Aurora) exempt status as a producer-handler is disruptive. The Cornucopia witness was of the opinion that Aurora used the regulatory loophole to establish one of the largest market shares in the organic dairy industry. The witness testified that adoption of a limit of 450,000 pounds of Class I sales per month for exempt plants, as suggested by Proposal 2, would be reasonable and sufficiently large to accommodate "legitimate" family farmers seeking to engage in processing and marketing dairy products, while minimizing disruption associated with the current producer-handler provisions.

The FOOD panel testified in support of a hard-cap limit of 450,000 pounds of Class I route disposition per month for both producer-handlers and exempt plants. The FOOD panel was of the opinion that a 450,000-pound per month limit on Class I disposition would honor the original intent of the producer-handler exemption. Furthermore, the FOOD panel testified, an exempt plant limit of 450,000 pounds of Class disposition per month would ensure a level playing field while allowing small scale operations to package and sell their product locally.

The FOOD panel also testified that Aurora has been able to use the scale of its operation in combination with its exemption from full regulation to capture a great deal of the organic market in the Northeast. According to the FOOD panel, Aurora's significant presence in the Northeast marketing area has negatively impacted the price local organic producers receive for their milk and threatened the viability of the handlers that purchase local milk supplies.

A witness representing NAJ testified in agreement with Proposal 2. The witness testified that NAJ is a membership organization that represents over 1,100 dairy producers and is an affiliate member of both NMPF and IDFA. The NAJ witness testified that the current Federal order producer-handler and exempt plant provisions are inequitable. The witness was of the opinion that handlers with own-farm milk production can be treated very differently for outside purchases of milk depending on the marketing area where they have disposition. The witness testified that some Class I milk should be exempt from Federal order pooling and pricing, and as such, NAJ supports Proposal 2.

A panel of witnesses on behalf of the New Hampshire Department of Agriculture, Markets and Food; the New York Department of Agriculture and Markets; the Pennsylvania Department of Agriculture; the Vermont Agency of Agriculture, Food and Markets; and the Wisconsin Department of Agriculture, Trade and Consumer Protection (State Departments of Agriculture); and 19 producer-handlers and exempt plants located in Wisconsin adopted Proposal 2 in lieu of Proposal 9.

The State Departments of Agriculture panel supported the unique labeling provision of Proposal 2. The panel was of the opinion that this provision is necessary to prevent the aggregation of exempt milk for mass distribution, but was not in support of the adoption of any other labeling restrictions.

Conversely, a panel of consultant witnesses representing the American Independent Dairy Alliance (AIDA) and representatives of Braum's Ice Cream and Dairy Stores (Braums), Kreider Farms (Kreider), Aurora Organic Dairy (Aurora), GH Dairy—El Paso (GH Dairy), Heartland Creamery (Heartland), Snowville Creamery (Snowville), Northeastern State legislators, Shamrock, Diamond D Dairy (Diamond D), a Southeastern dairy farm, Shatto Farms, Inc. (Shatto), Country Dairy, Mallorie's Dairy (Mallorie's), Hatchland Dairy (Hatchland), Dunajski Dairy (Dunajski), NDFA and Country Morning Farms (Country Morning) testified in opposition to the elimination of the producer-handler provisions, an increase in the exempt plant monthly Class I disposition limit, or both.

The panel of consultants testifying on behalf of the American Independent Dairy Alliance (AIDA) provided testimony as to the lack of foundation for Proposals 1 and 2. The panel testified that producer-handlers do not create disorderly marketing conditions since they supply only 1.46 percent of the national fluid milk market. The significant concentrations of market power enjoyed by cooperatives and processors result in producer-handler market share that is minuscule by comparison, the panel asserted. The panel further asserted that a primary objective of the AMAA is the consistent supply of fluid milk to consumers and given the Class I utilization levels of the orders it would appear there is no disruption present in the marketing areas.

Furthermore, the AIDA consultant panel asserted there is no realistic threat that producer-handlers will ever achieve such a scale of operation to become a source of disorder as defined by the AMAA. The panel was also of the opinion that if producer-handlers had a substantial competitive advantage as alleged, there would be more new producer-handlers. The panel acknowledged that one factor influencing the decision to become a producer-handler is the regulatory risk associated with the elimination or amendment of the provision. In addition, the panel provided its opinion of conditions which could be considered disorderly and those which could not and asserted that producer-handlers are not causing disorder. The panel was of the opinion that the crucial issue is whether treatment is equitable in light of the objectives of the AMAA.

The AIDA consultant panel stated that its analysis revealed a number of relevant considerations. The panel identified these considerations as follows: producer-handlers are frequently engaged in the production of unique and growing niche market products such as organic, kosher, and grass-fed milk, which are inherently much more costly to produce; some producer-handlers continue the tradition of home delivery; producer-handlers adjust their production patterns to minimize surplus production, which would otherwise be sold at a substantial loss; the managers

of producer-handler operations have to divide their attention between both the farming and the processing sides of the operation and as such, do not realize cost advantages associated with specialization; and producer-handlers have substantial capital investments in their production, processing and distribution. The panel asserted that ignorance of these realities would lead conclusions about producer-handlers to be drawn without foundation. The panel also explained that niche market products can take many forms, primarily based on the unique consumer preferences associated with a given product and a product can lose the "niche" categorization as it becomes relatively less unique due to a greater availability of products with similar attributes. The panel asserted that even producer-handlers who do not serve a niche market remain constrained by the costs of their operation and that producer-handler status is the only way they can compete in a monopolistic market situation.

The AIDA consultant panel was of the opinion that its survey of AIDA producer-handler members revealed a great level of diversity across the operations. More specifically, the panel noted that AIDA producer-handlers members: Are all small businesses relative to many cooperatives and processors; each have their own market niches that serve particular consumer tastes and preferences reflective of the ever increasing diversity of the consumer market; sometimes provide home delivery services; sometimes operate their own stores; market to smaller wholesale outlets with smaller volumes per account; market products with consumer prices that generally exceed those of conventional products; and provide necessary competition.

Based on analysis performed using USDA data, the AIDA consultant panel concluded that the average producer-handler increase in size lies between that of the producer and processor size increases between 1969 and 2008. Furthermore, the panel noted that USDA plant structure data shows that of the 45 producer-handlers in May 2008, 40 had sales volume of less than 2 million pounds and 5 had volume of over 2 million pounds. In comparison, 46 conventional pool plants had a volume of less than 2 million pounds and 210 had volume of over 2 million pounds—73 of which had volume of over 20 million pounds. The panel asserted that these figures clearly indicate that producer-handler growth is constrained, and the requirement that producer-handlers must maintain sole ownership and control over their operations places a de facto limit on the size of producer-handlers dictated by the realities of integrated operations. However, the panel acknowledged that those producers who recently constructed bottling plants and intend upon seeking producer-handler status were not known at the time the analysis was conducted and as such, were not included. The panel also acknowledged that both producer and processor operations could realize lower costs with scale.

The AIDA consultant panel noted that USDA data indicates that producer-handler numbers have decreased from 421 in 1969 to 37 in March 2009. Additionally, the panel was of the opinion that USDA data does not indicate an increasing trend in producer-handler sales volumes. However, the panel acknowledged that the calculations used to arrive at these conclusions were for total volumes not Class I volumes, although the panel asserted that specific concentration on Class I volumes was not a necessary condition of a complete analysis. The panel also acknowledged that the analysis did not represent a scenario in which figures related to sales volumes for entities that had producer-handler status prior to the rulemaking in the Pacific Northwest and Arizona marketing area, which limited producer-handlers with a volume cap.

Cost-of-production, the AIDA consultant panel asserted, is the only figure relevant in assessing the cost of raw milk faced by the handler portion of producer-handler operations. The panel further asserted that the appropriate transfer price for use in any analysis of producer-handler impacts should be based on costs of production, not the difference between the blend price and Class I price. The panel testified that in general, the cost of milk production for all size farms exceeds the uniform price by $5 to $8 per cwt. The panel did not utilize specific producer-handler data in the cost-of-production research presented, and the panel was of the opinion that producer-handler data would not be substantially different from other dairy farm sector data. The panel noted that the prices analyzed were selected arbitrarily and the panel was not aware of the locations from which they were collected. The panel further stated that regardless of herd size, dairy farmers cannot rely on simply marketing their raw milk to ensure long-term economic viability. The producer-handler exemption helps farmers who opt to process their own milk compete with large fluid plants, the panel asserted. However, the panel asserted that producer-handlers do not have a price advantage as a result of their regulatory status. The AIDA consultant panel stated that disorder existed during the period when the AMAA was enacted due to the relatively few number of milk buyers and a large number of producers seeking outlets. The panel further asserted that a lack of marketing alternatives is currently an issue in some areas where producers are reduced to either marketing milk through a single cooperative or marketing as a producer-handler. By example, the panel provided the opinion that two producers in the same market may not equivalently enjoy the benefits of the pool, despite the fact that each producer delivers to the same cheese plant, because one producer markets through a cooperative classified as a buyer, while the other remains independent. The panel was also of the opinion that Federal orders do not provide uniform prices to producers because prices vary based on component values, over-order premiums and hauling charges. However, the panel testified that the analysis of producer prices presented did not take into account the formulas used to calculate paychecks based on the various factors. Ultimately, the panel asserted that if producer equity is a goal of Federal milk marketing orders, producer-handlers do not inhibit realization of such a goal.

According to the AIDA consultant panel, pooling producer-handler milk would add $0.01 to $0.02 per cwt to the average statistical uniform price, an amount the panel described as insignificant. The panel also asserted that uniform and Class I prices could not be used as a basis for determining disorder. The panel arrived at this conclusion based on the opinion that prices determined via regulation are not real; instead prices determined in the marketplace are real and should be the basis for examination and identification of disorderly conditions. Furthermore, the panel testified that the additional burden of paying into the pool and completing associated paperwork would put some producer-handlers out of business, although the panel did not provide a characterization of those that would be expected to go out of business.

The AIDA consultant panel addressed concerns that producer-handlers shift balancing costs. The panel argued that cooperative balancing is not just a service to the market because it is an integral part of cooperatives' marketing strategy. As part of that strategy, cooperatives gain market power from performing the balancing function as it provides the benefit of milk supply control, which allows for the

negotiation of full supply contracts, the panel asserted. It was the opinion of the panel that without balancing, cooperatives could not negotiate either full supply contracts or premiums. Based on its survey of AIDA members and USDA data, the panel concluded that producer-handlers manage production levels to correspond with product sales plus a sufficient surplus capacity and producer-handlers bear the burden of selling their small surpluses on the market at a price that is almost always at a loss.

Witnesses representing Braums, Kreider, Aurora, GH Dairy, Heartland and Snowville testified separately as members of AIDA. The AIDA members all testified in opposition to amendments to the current producer-handler provisions. Braums, a producer-handler, milks 12,000 cows with Class I utilization of about 50 percent and operates retail stores in Oklahoma, Texas, Arkansas, Kansas and Missouri. Kreider is a family operation located in Order 1 and has been a producer-handler since 1972. Aurora, a producer-handler, has 345 employees and is a national supplier of private-label and store-brand organic milk and butter. Aurora milks about 12,000 cows every day at 5 farms in Colorado and Texas, and is treated as a partially-regulated distributing plant under Order 131. GH Dairy, a producer-handler, with a plant located El Paso, Texas, sells milk to distributors and national retailers. Heartland is a producer-handler located in Missouri with distribution in Missouri, Kansas, Iowa, and Illinois. Snowville is an exempt plant located in Pomeroy, Ohio.

The Kreider witness testified that Kreider produces less than 2.5 million pounds of Class I products per month and has Class I utilization between 64 and 77 percent. The witness expanded upon the characteristics of Kreider's operation noting that surplus milk is often marketed to an ice cream plant or to a cheese manufacturer. While Kreider is currently below the level of 3 million pounds of monthly Class I disposition, the implementation of a 3-million pound per month cap on Class I disposition may work for Kreider in the short-run but would not be sustainable or profitable in the long-run, the witness stated. The witness revealed that Kreider temporarily lost producer-handler status at one time, and that the associated pool obligations precluded its profit-making ability. Ultimately, the witness asserted, the processing portion of the enterprise would likely cease operations should Kreider have to make payments into the pool.

The Kreider witness asserted that Kreider fluid products are often priced at a premium to the store brand price. The witness testified that Kreider operates in a niche market within its local region, selling milk to customers at above-average prices based on the perceived value of the product. Kreider markets both non-kosher and kosher milk. According to the witness, Kreider products are higher quality because they are locally and sustainably produced, chilled rapidly, rbST-free and produced on a farm that allows for consumer visits, the witness asserted. All of these characteristics, the witness explained, add to operating costs.

According to the witness, Kreider produces kosher milk for Jewish communities in several East Coast States, and is under rabbinical supervision at the farm and in the plant and the same individual supervises both facilities. The witness was of the belief that while pool plants possess the ability to produce kosher milk, producer-handler operations are better suited to kosher milk production as a result of, in Kreider's case, smaller scale and vertical integration. The witness elaborated on this point, explaining that a pool plant with multiple lines and sources of milk would require kosher supervision of a greater magnitude than is the case for producer-handler operations wherein the plant and the farm are more proximate and under identical control.

The Aurora witness testified that one of the responsibilities of a producer-handler is to balance its own-farm milk supply. The witness indicated that Aurora balances through careful management of its finished goods inventory, powder and butter production with co-packers, bulk sales and farm production. The witness further explained that Aurora uses its longer life finished goods inventory to even out the peaks and valleys of customer orders relative to farm production. The witness noted that powder and butter serve as medium and long-term balancers as their shelf lives are substantially longer than that of fluid milk.

The Aurora witness testified that their cost-of-production is considerably higher relative to conventional producers because Aurora does not produce anything other than certified organic milk. The witness testified that a producer-handler acquires milk at the cost-of-production on the farm, and that the cost-of-production for organic milk always exceeds Federal order class and uniform prices. The witness testified that Aurora has a $30 per cwt cost-of-production, and that this figure includes the capital and operating expenses of the farms, but does not include transportation of milk from the farms to the processing plant or capital and operating costs associated with the processing plant. The witness also noted Aurora is not similarly situated to others in the organic marketplace because of the operation's investment in both organic dairy farming and processing, and the burden associated with the full risk and responsibilities of both.

According to the Aurora witness, retailers select private label suppliers who have the ability to provide the needed product and volume; prioritize the customer's business to meet all expectations and challenges; and deliver product orders reliably. The witness also noted that customers want private label suppliers that demonstrate rigorous quality assurance capabilities, maintain supply chain control and can implement corrective action effectively and quickly. The witness testified that one of the benefits of being vertically integrated is the ability to provide traceability and complete control of organic milk, characteristics that are important to Aurora's clientele. To demonstrate the importance of good customer service, the witness noted two examples in which acquisition and maintenance of customer accounts is not a function of price.

The Aurora witness indicated that in the organic market, the marketwide pool does not facilitate the balancing function due to the fragmented and dispersed nature of organic milk supplies and plants. The witness asserted that if the proposal to eliminate producer-handlers is adopted, Aurora would have to restructure and essentially completely revise its business model.

The Aurora witness was of the opinion that it is not possible to determine the presence or absence of orderly marketing conditions without considering the actual prices being paid to producers and the actual cost of milk incurred by handlers. The witness testified that based on the actual prices and costs, Aurora has not observed any unfair competition or the creation of any disruption in the market as a result of producer-handlers, nor has Aurora observed any producer-handlers with a price advantage that resulted in a competitive advantage.

The Aurora witness was of the opinion that any national policy that is adopted should preserve options and not foreclose them. The witness suggested that some of the proposals punish vertical integration in any form other than a cooperative, which is anticompetitive and bad for consumers.

The witness asserted that some of the proposals pick one business model as the winner, stifle entrepreneurial enterprises, and eliminate independent vertically-integrated operations that meet changing consumer demand.

The GH Dairy witness strongly opposed elimination of the producer-handler provisions and was of the opinion that producer-handlers are more diversified, innovative and responsive than cooperatives. The witness testified that GH Dairy's customers appreciate the source verification they get as a result of GH Dairy having its own dedicated milk supply. Additionally, the witness noted the benefits of total control over processing and milk quality.

The witness testified that GH Dairy's major competitor has 86 or 87 plants, while the witness's portfolio includes only 3. The witness asserted that producer-handlers are good for consumers because they bring competition to the marketplace. The witness further stated that dairy farmers have only two options, become a producer-handler or join a cooperative. The witness was of the opinion that while deregulation of the milk industry is preferable, most producers want regulation. The witness further testified that a producer-handler is not competitive until it distributes 1 million gallons per week (approximately 34 million pounds per month) so 34 million pounds of Class I disposition per month should be the limit for the producer-handler exemption. The witness affirmed that the transition of Sarah Farms, another entity owned by the witness, from producer-handler to fully regulated plant did not put the operation out of business. The witness testified that after becoming a fully regulated plant in April 2006, Sarah Farms underwent restructuring to increase production capacity and lower its costs.

The GH Dairy witness also offered rebuttal to the testimony of the Price's witness. According to the GH Dairy witness, GH Dairy was not a producer-handler at the time it successfully bid on school district business that had previously been held by Price's. Furthermore, the witness noted, the fluid products being supplied to the school districts originated at the Anderson plant in Nevada and were being transported by the witness' firm to the El Paso area. The witness also explained that the several El Paso area stores in which GH Dairy replaced Price's as the supplier belong to a national retailer that uses one of the witness's other fluid processing operations, Sarah Farms (a fully regulated handler) as a supplier in another part of the country.

A panel of witnesses representing Heartland provided details regarding its operation. The panel noted that Heartland is a diversified operation which includes a goat dairy, a cow dairy and a milk plant.

The Heartland panel noted that Heartland recently obtained kosher certification to produce 11 products. Echoing the Kreider witness' testimony, the panel stated that Heartland was sought out by the kosher certification body, in part because of the dairy's proximity to the plant and the associated potential for a single individual to supervise both operations. The panel further elaborated that Heartland's kosher products could be marketed anywhere in the United States through the broker and distribution center that Heartland uses.

The Heartland panel testified that as a producer-handler, Heartland faces competitive constraints that regulated handlers do not; and alternatively, regulated handlers face competitive constraints that Heartland does not. To this point, the panel explained that Heartland is unable to purchase milk while regulated handlers can. More specifically, the panel was of the opinion that Heartland does not have a disruptive impact on the market, as the operation has neither an effect on blend price to the farmers nor an unfair competitive advantage relative to fully regulated processing plants. The panel further asserted that Heartland is at a substantial disadvantage when compared with regulated processors paying Class I prices because Heartland acquires milk at its internal cost-of-production. It was also the opinion of the panel that Heartland has no advantage of size or scale. The panel further noted that in a recent attempt to secure a new customer, Heartland was refused because the customer conveyed it was not worth the effort to switch suppliers based on a $0.02 difference.

The Snowville witness was of the opinion that the operation of a fluid milk plant with only 450,000 pounds of Class I route distribution per month would not be feasible and as such, a 1 million pound per month limit on Class I disposition is more realistic.

The Snowville witness recounted earlier testimony that smaller dairy farmers have a $4 to $5 per cwt disadvantage, and speculated that if these farms are able to survive into the future, it would be through adding value or government subsidies. The witness was of the opinion that if the option to become a producer-handler were to be eliminated, all small dairy farms below 1,000 cows would effectively disappear.

A panel testified on behalf of two dairy farms and Homestead. Homestead is a regulated plant located in the Order 5 marketing area. The panel testified in support of an increase in the exempt plant monthly Class I disposition limit. Homestead, according to the panel, is a family run operation that primarily packages milk in glass bottles and distributes, in part, via home delivery. The panel noted that Homestead also has limited arrangements with Kroger.

The Homestead panel suggested that 450,000 pounds of Class I disposition as the standard for the exempt plant provision is not high enough, and instead suggested a limit of 1 million pounds of Class I disposition per month. The panel acknowledged that the cumulative effect of numerous 1000-cow operations would be disruptive, but that numerous 100-cow operations would not be due to the financial constraints associated with such smaller operations.

A witness appearing on behalf of several Northeastern legislators testified in opposition to the elimination of the producer-handler provisions. The witness testified that the national impact of producer-handler dairy operations is very small and producer-handlers bear the true costs of production and delivery in the production of products that meet the demands of their consumers. In fact, the witness noted, State legislators have significant concerns about consolidation and concentration among the largest cooperatives and handlers and the associated impacts on the marketplace. Finally, the witness asserted that the problems in the dairy industry are not the result of a small number of producer-handlers, regardless of the sizes of the operations. The witness asserted that legislators in the Northeast think that a lack of competition in the dairy processing sector is damaging to both consumers and dairy producers in the Northeast.

A witness on behalf of Shamrock,[2] an Arizona milk processor, testified in support of the limits on route distribution currently in place for producer-handlers under Order 131. According to the witness, Shamrock is unique in that it owns a dairy farm, Shamrock Farms, aside from its milk processing business.

The Shamrock witness testified that there are four primary fluid milk processors in Arizona. According to the witness, Shamrock's primary competitor

[2] Corrections to the Shamrock witness's testimony are reflected in this Final Decision.

is a former producer-handler out of Yuma, Arizona. The witness testified that this former producer-handler is Shamrock's primary competitor because two of the other processors are primarily focused on own-store sales, leaving the balance of the retail supermarket channel, the mass merchandiser channel, convenience stores and foodservice operations to Shamrock and Sarah Farms.

The Shamrock witness stated that they are not particularly averse to the producer-handler exemption. However, the witness was of the opinion that the exemption is incompatible with having a market order system that all other players are required to operate under. The witness was also of the opinion that producer-handlers have a competitive advantage over regulated handlers because they do not pay the Class I price. The Shamrock witness testified that prior to the rulemaking which capped producer-handler's Class I sales in the Pacific Northwest and Arizona marketing areas, Shamrock supplied an identical private label as was also supplied by a producer-handler. The witness noted that producer-handlers' ability to share identical labels creates a situation in which regulation can be evaded.[3] However, the witness testified that the elimination of the entire producer-handler provisions is not particularly necessary.

A witness appeared on behalf of Diamond D Dairy, a dairy farm with a fluid milk processing plant in Colorado. The witness urged USDA to leave the current producer-handler regulations unchanged. The witness testified that Diamond D services 1,200 home delivery customers and 175 wholesale accounts in Colorado.

The Diamond D witness testified that approximately 50 percent of the Diamond D operation's milk is processed by its on-farm plant and the balance is sold to DFA. The witness indicated that Diamond D is currently a producer and fully regulated distributing plant intent upon, should business continue to grow, conversion to producer-handler status. According to the witness, Diamond D is both a producer member and a processor customer of DFA. The witness testified to paying DFA all of the normal fees and charges associated with milk marketing. The witness stated that those charges include balancing, milk hauling, forward haul, administrative and milk promotion fees, handling and services charges including over-order premiums. The witness testified that DFA charges approximately $5 per cwt for certain services, which is an out-of-pocket cost. The witness also indicated that as a processor customer, Diamond D must purchase own-farm milk back from DFA for bottling. The witness stated that Diamond D's cost-of-production is around $17 per cwt.

The Diamond D witness testified that rising costs left few options for survival. The witness further explained that they either had to become larger and presumably more efficient or increase revenues from the current operation. The witness stated that the first option was unrealistic for a number of reasons including land constraints, and taking on responsibility of bottling and marketing was the only way to grow the bottom line. The witness testified that the operation's survival now is conditioned upon the option to become a producer-handler. Additionally, the witness was of the opinion that there exists no need to change producer-handler regulations under Order 32.

A dairy farmer witness, a member of DFA, testified in support of the current producer-handler provisions. The witness testified to operating a dairy farm in Southeast Florida and milking over 1,400 cows. The witness' operation opened a bottling plant in March 2009.

The operation does not currently have producer-handler status and is not causing any market disruption, the Southeast Florida dairy farmer witness stated. The witness was of the opinion that producer-handlers can better meet the demands of niche markets than fully regulated handlers. The witness testified that one of the reasons to become a producer-handler is to avoid payment into the marketwide pool. The witness was of the opinion that everyone should have the opportunity to be able to produce and bottle milk within the same operation. The witness testified to investments made in pursuit of qualification for producer-handler status.

A witness representing Shatto, a producer-handler located in Missouri, testified in opposition to any changes to the producer-handler provisions. The witness stated that Shatto milks 300 cows and distributes fluid products in the Kansas City area. The witness noted that Shatto constructed an on-farm bottling facility in 2003, and became a producer-handler as a means of adding value and selling locally. The witness testified that Shatto's small family operation does not compete with any other organization serving the area, and that its pricing is not comparable to others in the market. According to the witness, Shatto's pricing is higher across the board because of the premium, niche products it markets.

The Shatto witness was of the opinion that disorderly market conditions do not exist, and that Shatto's small operation, in particular, does not create disruption. The witness further asserted that Shatto does not obtain any price advantage over any other cooperative or similar sized producer-handler, and would not do so even with Class I disposition of one million pounds per month. Furthermore, the witness noted, Shatto does not have problems balancing supply with demand.

The Shatto witness testified that Shatto faces additional costs resulting in higher production costs than those faced by other operations. Further, the witness stated the level of these costs remove Shatto from competition on the basis of "milk cost-of-production by size" as referenced in Proposal 1. Thus, the ability to suggest that a limit should be based upon some average economies of scale has been eliminated, the witness asserted. Additionally, the witness asserted that the economies of scale rationale employed by NMPF is misleading and unjust in light of the actual costs related to production, since a farm cannot significantly reduce production costs without transitioning away from best management practices. The witness testified that Shatto's per cwt on-farm cost, with nearly 300 cows, far exceeds the $18 noted in Proposal 1, and is likely closer to $25 or $30 per cwt. As such, the witness explained that Shatto is at a significant cost disadvantage compared to not only operations of a similar size, but also cooperatives of all sizes.

The Shatto witness was of the opinion that the proposal to eliminate the producer-handler provision is unjust and inconsistent with the original intent of exempting producer-handlers serving small niche markets that would otherwise be left alone by large entities. The witness also asserted that the proposal will eliminate many small operations like Shatto, and reduce one component USDA claims is necessary for perfect competition.

The witness testified that Shatto would be unable to absorb the cost of regulation associated with NMPF's proposals and Shatto would be required to pay into the pool for use of own-farm milk. The witness testified that overall, Proposal 1 penalizes operations for taking steps to save the small family farm with an on-the-farm bottling facility. The witness testified that small family farms would be unable to expand relative to increased customer demand and meet rational business goals, and a large number of producer-handlers,

[3] Corrections to the Shamrock witness's testimony are reflected in this Final Decision.

specifically those with fewer than 600 cows, would go out of business if the NMPF proposals are adopted. The witness was of the opinion that this would shift more sales to large, multistate operations and cooperatives.

A witness representing Country Dairy, a producer-handler, testified in opposition to any changes to the producer-handler provisions. Country Dairy, located in Michigan, has monthly production of 2.4 to 2.6 million pounds and markets through Cedar Crest Dairy.

In the 1990s, Country Dairy's milk was sold at a $0.15 to $0.25 premium because it was rbST-free and an account was secured based on its rbST-free milk supply, the Country Dairy witness stated. The witness was also of the opinion that Country Dairy's products are sold at retail for a premium because consumers perceive the products to be of a higher quality. The witness revealed that 93 to 98 percent of Country Dairy's production is Class I, and that Country Dairy has had an exclusive distribution agreement with Cedar Crest Dairy, a dealer, since 2001. According to the witness, most of Country Dairy's milk is sold under the Country Dairy label although some is store branded. The witness acknowledged that some of the store branded milk is also supplied by another processor within the same market, through Cedar Crest.

The Country Dairy witness testified that Country Dairy bears all risks of milk production and processing. The witness explained that Country Dairy's prices tend to follow Class I prices, but at times of high production, prices are reduced to sell milk and further establish retail relationships. The witness noted that in the past, when Country Dairy was responsible for product distribution, this high production discount ranged from $0.10 up to $0.20 per gallon. The witness testified that Country Dairy competes with regulated processors to supply the same kinds of retailers. Michigan retailers, even those supplied by fully regulated handlers, advertise and sell milk at very low prices, the witness asserted. The witness was of the opinion that this practice may reflect retailers' willingness to sell at a loss. Ultimately, the witness asserted that producer-handlers are not a disruptive factor and should not be subject to limitations on monthly Class I disposition.

A panel of witnesses testified on behalf of Mallorie's, a producer-handler located in Oregon. The panel testified that Proposals 1 and 2 should be rejected, and if some rules are necessary to regulate large producer-handlers, the existing rules in Order 124 should be used as a model for other milk orders.

The Mallorie's panel stated that the decision to regulate producer-handlers with Class I disposition in excess of 3 million pounds per month in the Pacific Northwest required Mallorie's to significantly restructure its operation and lay off a number of employees. The panel further asserted that the complete elimination of the producer-handler provisions would likely disadvantage small stores dependent on producer-handlers to supply their limited needs, which are not attractive to larger, fully regulated handlers. The panel asserted that Mallorie's operation, with Class I disposition below 3 million pounds per month, is too small to solicit larger accounts. The panel further testified that Mallorie's faces costs much higher than those faced by larger fluid milk processors, and as a producer-handler, nets $2.50 to $3.50 below the Class IV price for surplus milk.

A witness testified on behalf of Brunton Dairy Farm (Brunton), a producer-handler located in Pennsylvania, milking 106 cows. According to the witness, Brunton consists primarily of a glass bottle home delivery component and an on-farm retail store. The witness testified that producer-handlers do not have any price advantage over fully regulated handlers, and that any advantage producer-handlers have over fully regulated handlers is on the basis of product quality. The witness testified to producing products priced above other brands of milk, and to replacing other brands in the marketplace because consumers desire better milk not cheaper milk. The witness was of the opinion that amendment to the producer-handler provisions could change the way in which Brunton conducts business, resulting in a change in the quality of product produced. As such, the witness testified that the current regulations should not be changed. The witness was also of the opinion that increased regulation for producer-handlers, or the complete elimination of the producer-handler provisions, would increase the costs of certain niche products such as those produced by Brunton.

Witnesses representing Hatchland, Mountain Dairy and Dunajski testified in support of the current producer-handler provisions. Hatchland, a producer-handler located in New Hampshire; Mountain Dairy, a producer-handler located in Connecticut; and Dunajski, a producer-handler located in Massachusetts all market milk in the Order 1 marketing area. The Hatchland witness and the Dunajski witness testified in specific opposition to Proposals 1 and 2. The NDFA witness testified in opposition to Proposal 2. The NDFA witness testified that the pooling and pricing exemption for plants with less than 150,000 pounds of Class I route disposition should be maintained.

A witness testified on behalf of Country Morning, a producer-handler located in Othello, Washington. The witness testified in support of the current producer-handler provisions. The witness acknowledged that Country Morning is subject to the 3-million pound cap on producer-handlers under Order 124. The witness testified that Country Morning is the only processing plant in Washington State that markets milk directly from the farm to the consumer without blending milk from other farms. The witness testified that Country Morning bottles milk under a private label owned by a distributor, and acknowledged that the same label may be used for milk from other plants. The witness indicated Country Morning does not actively seek sales under a particular label or sell surplus through co-labeling.

The Country Morning witness testified that if it lost producer-handler status, Country Morning would owe between $50,000 and $60,000 to the pool each month, and neither the farm nor the plant would survive. The witness further testified that the producer-handler issue was debated and settled in the Pacific Northwest decision three years ago and does not need to be revisited.

Elimination of the Producer-Handler Provisions and Adoption of Grandfathering

Proposals 17 and 26 were offered by NMPF and Mallorie's, respectively, as applicable should the producer-handler provisions be eliminated. These proposals seek to "grandfather" the exemption from pooling and pricing for operations that currently have producer-handler status, provided they are compliant with certain limitations. NMPF was joined by MD&VA, UDA, NDA–Darigold, the DFA dairy farmer panel and a DFA representative in support of Proposal 26. Proposal 17 was supported by NAJ, with modifications.

Proposal 20, proposed on behalf of Continental Dairy Products, Inc. and Select Milk Producers, Inc., was withdrawn on the basis that it was closely related to Proposal 17.

Those in opposition to either Proposal 17 or Proposal 26, or both, included Aurora, Snowville, Kreider, Mountain Dairy, the FOOD panel, Dunajski, the State Departments of Agriculture, Hatchland, Diamond D, the

Southeastern Florida dairy farmer, MMPA, Bareman and Cornucopia.

NMPF testified that taken together, Proposals 1, 2, and 26 would only regulate 3 to 5 of the largest producer-handlers in the country, all of whom have estimated annual sales of at least $10 million and packaged fluid milk product sales in excess of 15 million pounds per month. The NMPF witness stated that it is necessary to both regulate all producer-handlers distributing more than 3 million pounds of packaged fluid milk products per month, and limit the proliferation of producer-handlers marketing between 450,000 and 3 million pounds per month. The witness testified that if adopted, Proposal 26 would reduce the regulatory impact of Proposal 1 on existing producer-handlers that fall within the range of 450,000 to 3 million pounds of monthly Class I disposition.

Several witnesses representing cooperatives testified in support of Proposal 26. The MD&VA witness testified in support of Proposal 26 as a part of the package of proposals offered by NMPF. The UDA witness explained that UDA supports the creation of a new category of exempt plant to include plants with producer-handler status in 2008, providing those plants have 3 million pounds or less of Class I sales of uniquely branded products. The St. Albans witness supported the right of small, existing producer-handlers to continue operation. The NDA–Dairgold witness testified in support of "grandfathering" provided that it only applies to current producer-handler operations under 3 million pounds of monthly Class I disposition, and the producer-handler exemption is phased out. The NDA–Darigold witness also asserted that if a provision allowing entities with producer-handler status as of the date of enactment of the new regulation was adopted then a significant number of entities may engage in a quick shift to obtain producer-handler status prior to the regulatory change.

The DFA dairy farmer panel and the DFA witness testified in support of Proposal 26. The panel further stated that allowing an existing producer-handler to retain their status up to the 3-million pound limit on monthly Class I disposition would be fair and have little impact on the market provided that if the business exceeds 3 million pounds of Class I disposition per month it will be treated as a fully regulated handler.

Proposal 17 received supporting testimony by the Mallorie's panel. The panel testified that if Proposals 1 and 2 are adopted, existing producer-handlers should be able to retain their exemption through grandfathering, as suggested in Proposal 17. The panel testified that during 2008, Mallorie's milk production averaged 3.1 million pounds per month, with average Class I utilization of 63 percent; average Class II use of 15 percent; and Class IV utilization ranging from 9 to 29 percent, with an average of 22 percent for the year.

The Mallorie's panel testified that the producer-handler provisions were reviewed extensively in Orders 124 and 131, and limits on Class I disposition went into effect in 2006. The panel testified that producer-handlers in these orders have adjusted to the new rules and that there is no reason to readdress the subject. The panel was of the opinion that a growing number of consumers are concerned about where their milk comes from and how it is produced. The panel asserted that larger processors cannot meet these concerns, but operations like Mallorie's, as a producer-handler, can.

The Mallorie's panel further testified that if its operation were to become fully regulated the effect would be catastrophic. The panel testified that when the Federal Order 124 producer-handler exemption was set at a maximum of 3 million pounds, Mallorie's responded with a herd size reduction, and discontinuation of both a heifer raising facility and a leased 300-cow dairy. The panel stated that about 25 employees lost their jobs and purchases of feed, other supplies and services were reduced by nearly one-third or over $3 million a year. The panel also testified that if Mallorie's were to go out of business, the local and Oregon State economies would lose over $6 million per year.

The Mallorie's panel submitted a modification to Proposal 17, explaining that if it is adopted, then a limit of 6 million pounds of monthly Class I route disposition should become the point at which a grandfathered producer-handler loses the exemption from pooling and pricing.

The NAJ witness testified that NAJ supports Proposal 17 with some suggested modifications. According to the witness, NAJ suggests the replacement of language that calculates a volume of exempt own-farm milk dependent on historical sales limited to 3 million pounds per month, with a simple limit on the exemption at 3 million pounds per month of own-farm production.

The NAJ witness testified in opposition to the portion of Proposal 17 that outlines the calculation of the amount of own-farm milk production to be considered exempt, and all of Proposals 20 and 26, because these proposals advocate using a handler's historical processing and sales of own-farm milk to establish an exemption from future pool obligations. These proposals, the witness noted, would penalize handlers beyond a given point in time. This would also be the case, added the witness, for new processors without previous sales figures to establish a base, despite planning for bottling operations that occurred under existing provisions. The witness was also of the opinion that it is inequitable to treat existing producer-handlers differently from producers with the desire to become future producer-handlers.

As members of AIDA, the Aurora and Snowville witnesses testified in specific opposition to Proposal 26, and the Kreider witness testified in opposition to all proposed grandfathering of the producer-handler exemption. The Hatchland witness also testified in specific opposition to Proposal 26. The FOOD panel testified in opposition to any type of "grandfathering" provisions for either producer-handlers or exempt plants. The State Departments of Agriculture panel also testified in opposition to any grandfathering provisions. The MMPA and the Bareman witnesses testified in opposition to any proposals that would allow for the grandfathering of producer-handlers should the exemption be eliminated.

The Mountain Dairy and Dunajski witnesses testified in opposition to the adoption of grandfather clauses on the basis that these types of proposals would limit exempt status to include only those operations currently classified as producer-handlers. The Diamond D witness and the Southeast dairy farmer witness testified in opposition to grandfathering clauses. The Diamond D witness asserted that grandfathering would exclude Diamond D from becoming a producer-handler in the future. The Southeast dairy farmer witness testified that such clauses would prevent new producer-handlers from entering the market. Similarly, the Homestead panel testified in opposition to Proposal 26 and was of the opinion that future generations should have the ability to become producer-handlers.

The Cornucopia witness testified in opposition to "grandfathering" existing producer-handlers unless qualification for grandfathering included a 3-million pound per month limit on route disposition and packaged fluid sales.

Adoption of Producer-Handler Provisions To Include a Limit on Monthly Class I Disposition

Many hearing participants were in support of maintaining the producer-handler provision but limiting the Class I disposition a producer-handler could have to remain exempt. There were 10 proposals that would meet this intent, published in the hearing notice as Proposals 3, 4, 7, 8, 9, 11, 12, 13, 14 and 21. The proposed changes regarding Class I sales limits for producer-handlers were recommended as either "hard-caps" or "soft-caps." Hard-caps would limit the Class I route disposition of producer-handlers, and if exceeded, would fully regulate the producer-handler on their entire volume of Class I sales. Soft-caps would only regulate the producer-handler on the volume of Class I sales over a certain limit. Hatchland, Lochmead Dairy (Lochmead), FOOD, Monument Farms (Monument), Mountain Dairy, Dunajski, Shatto, the State Departments of Agriculture, Homestead, Country Morning and NDFA all testified in support of amending the current producer-handler provisions to include a Class I sales volume limitation.

Opposition to either general limitations of, or the specific application of soft-cap limitations to, the producer-handler provisions was expressed on behalf of IDFA, Diamond D, the Dairy Institute of California (DIOC), NMPF, DFA and NDA–Darigold.

The Hatchland witness testified as the proponent of Proposal 3, which would regulate producer-handlers in the Northeast order with more than 3 million pounds of monthly Class I route disposition. Hatchland, according to the witness, produces nearly 800,000 pounds of milk per month. As such, the witness testified, a 3-million pound limit on monthly route disposition by producer-handlers would allow Hatchland to grow in the future.

The witness testified that Hatchland is a unique dairy operation with an on-farm store and delivery business providing milk in glass bottles to homes throughout the Northeast. The witness emphasized that Hatchland occasionally buys from, or sells to, a cooperative, but ultimately must balance own-farm production. The witness was of the opinion that given the extra costs incurred by Hatchland's unique operation, the exemption from the pooling and pricing provisions does not result in a competitive advantage over regulated handlers.

A witness representing Lochmead, a producer-handler, testified in support of Proposal 4. Lochmead, based in Oregon, has average monthly sales of nearly 1 million pounds and operates 42 Dari-Mart retail stores.

The Lochmead witness testified that both producers and producer-handlers have increased in size since the producer-handler provisions were first established. According to the witness, this increase in size necessitates a limit on monthly route disposition to remain exempt from pooling and pricing provisions. The witness testified that Lochmead would be unable to compete with the larger, more efficient bottlers and would go out of business, were it to become fully regulated.

The FOOD panel testified in support of establishing a 450,000-pound hard-cap on monthly Class I route disposition for producer-handlers. The panel testified that this proposed change honors the original intent and purpose of the exemption.

The FOOD panel testified that WODPA, MODPA and NODPA members face unfair competition from a large producer-handler that sells organic milk nationally. The FOOD panel testified that this producer-handler sells milk through national supermarket chains, thereby competing with locally produced organic milk at an economic advantage based on the pooling and pricing exemption. The FOOD panel was of the opinion that the regulatory exemption for large organic producer-handlers lowers the prices received by organic dairy farmers whose milk is pooled and priced under the terms of Federal milk orders. The FOOD panel testified in opposition to any type of soft-cap limitations for either producer-handlers or exempt plants.

A witness appeared on behalf of Monument, a Vermont-based producer-handler, in support of establishing a 3-million pound per month exemption on Class I route distribution for producer-handlers. The witness also testified in support of Proposal 13 submitted by the New England Producer-Handler Association, Inc.

The witness testified that Monument produces approximately 1 million pounds of milk per month. The witness stated that Monument does not have any advantage over fully regulated handlers due to costs of production that typically exceed the Class I price. The witness added that Monument must continually balance demand with available supply, pay a premium to purchase additional milk if necessary, and receive the lowest class price or less to sell excess milk.

As a proponent of Proposal 13, the witness for Mountain Dairy expressed support for a 3-million pound limit on the monthly volume of milk a producer-handler may distribute while retaining a regulatory exemption. The witness testified that Mountain Dairy delivers milk to individual homes and also supplies retail customers. The witness testified that Mountain Dairy milks about 500 cows. The witness was of the opinion that the exemption of producer-handlers from the pooling and pricing provisions of Federal milk orders is not contributing to disorderly marketing conditions in the Order 1 marketing area.

Proposal 7 received supporting testimony by the Dunajski witness. The witness testified that Dunajski Dairy is located and markets nearly 350,000 pounds of Class I products per month in the Greater Boston area. The witness was of the opinion that Dunajski Dairy does not compete with large bottlers on the basis of price, and is not disruptive in Order 1.

The Dunajski witness was of the opinion that the current producer-handler exemption should not be changed. However, the witness was also of the opinion that three million pounds of Class I sales per month would be an acceptable cap on the producer-handler exemption providing that no labeling restrictions accompany the cap.

The Shatto witness presented testimony as the proponent of Proposals 11 and 12. The witness stated that Shatto's proposals address the reduction in competition, the negative impact on small businesses, and the overall regulation of the dairy industry as alternatives to Proposal 1. The witness proposed the producer-handler exemption be kept in place with a limit of 1 million pounds of Class I sales per month because, according to the witness, producer-handlers under this limit are not disruptive to the market, and would be unable to survive the financial impact if the producer-handler exemption were to be eliminated entirely. The witness asserted that the effects of Proposals 11 and 12 on small business are more appropriate than Proposal 1.

The Homestead panel of witnesses testified in support of a 3-million pound per month limit on the Class I sales of producer-handlers. The Homestead panel testified that Homestead Creamery and the two associated farms supplying its milk are collectively recognized as a producer-handler by the State of Virginia but not by the Federal order system. Homestead Creamery, according to the panel, is currently a regulated handler. The panel was of the opinion that the producer-handler definition should change to accommodate Homestead, a processor that has farms operated in common rather than owned in common.

The Country Morning witness testified that a limit of 3 million pounds on monthly Class I sales volume for retention of producer-handler status would be acceptable. Similarly, the Shamrock witness did not object to establishment of an upper limit on the route disposition of producer-handlers.

Proposal 8 was testified to by the panel representing the State Departments of Agriculture. The panel testified that farmers in NH, NY, PA, VT, and WI, are moving toward vertical integration, particularly with regard to cheese manufacturing. The panel testified that the producer-handler provision is important in those States because consumers have shown significant interest in the locally-produced, niche products producer-handlers provide.

The State Departments of Agriculture panel testified that total producer-handler volume in NH, NY, PA, VT, and WI is small relative to total milk production, and that producer-handlers do not create disorderly marketing conditions. The panel asserted that one producer-handler with production greater than three million pounds of route disposition per month could be disruptive. The panel provided specific examples to justify their position that producer-handlers need room to grow. The panel stated that a 2-million pound per month figure is appropriate as it appears to be the level at which economies of scale are realized. The panel further stated that three million pounds per month would be the absolute upward bound as a cap on the producer-handler exemption.

The State Departments of Agriculture panel also testified that marketwide pooling is crucial to dairy farms in the five States represented, and an unlimited producer-handler exemption will ultimately destroy Federal order pooling as it erodes minimum prices and sharing of Class I revenues. The panel advocated a 2-million pound per month limit on producer-handler route disposition.

The NDFA witness suggested that if the producer-handler provisions were not eliminated and a limit was established on the Class I sales volume of producer-handlers, Order 1 should have a lower limit than other Federal orders. The witness supported this assertion by noting that in Order 1 there are significant differences in geographic size and population, and a relatively high number of producer-handlers and exempt plants. Based on a characterization of general statistics, the witness asserted that from 2002 to 2008, total fluid milk sales for producer-handlers across 8 of the 10 Federal orders has increased by over 60 percent and fluid milk sales from exempt plants increased by over 20 percent, while at the same time, total fluid milk sales from fully regulated plants decreased nearly 4 percent. Similarly, for Order 1, total fluid milk sales from producer-handlers from 2000 to 2008 increased nearly 106 percent, and total fluid milk sales from exempt plants increased nearly 44 percent. The witness also testified that dairy farms managed by governments and colleges should be excluded from any hard-cap on the volume of Class I route disposition to maintain an exemption from the pooling and pricing provisions of Federal orders.

The IDFA witness argued that the proposals seeking to continue the producer-handler exemption from pooling and pricing provisions with some volume limit could, in effect, continue the problem of disorderly marketing created by this exemption.

The Diamond D witness testified in opposition to limitations to the producer-handler exemption on the basis that a 3-million pound cap on route disposition may affect Diamond D in the future if the operation grows.

A witness representing the Dairy Institute of California (DIOC) appeared at the request of NMPF for the purpose of describing the producer-handler exemption under California's State milk pooling system. According to the witness, DIOC is a California based trade association representing fluid milk handlers and dairy product processors. The witness opined that USDA may find California's experience with producer-handlers relevant in formulating Federal order policy.

The DIOC witness stated that there are two regulatory schemes for producer-handlers in California. According to the witness, the first option, the "exempt producer-handler," allows for the pool exemption of own-farm production provided that both milk production and sales average less than 500 gallons per day (129,000 pounds) and 95 percent of both production and sales are disposed to retail/wholesale outlets. The second option, the "option exempt producer-handler," effectively operates under a soft-cap, allowing for deduction of exempt milk volume from any Class I pool obligation in a similar manner as suggested by Proposal 17.

The DIOC witness provided opinion and evidence as to producer-handlers' raw milk cost advantage compared to fully regulated handlers. The witness, using data provided by the California Department of Food and Agriculture (CDFA), calculated the advantage for California milk testing 3.5 percent butterfat and 8.7 percent nonfat solids by subtracting the quota price per cwt from the Class I price. The witness stated that the raw product cost advantage for producer-handlers was calculated by dividing the advantage per cwt by the number of whole milk gallons in a cwt of milk. The witness noted that this cost advantage varies greatly depending on the relationship between the Class I price and the pool quota price. For the period of January 2000 to March 2009, stated the witness, the raw milk cost advantage for producer-handlers averaged $0.113 per gallon. The witness added that for the most recent 12-month period, the cost advantage averaged $0.177 per gallon. Overall, the witness was of the opinion that producer-handlers have a lower raw milk cost than fully regulated handlers, leading to a producer-handler competitive advantage.

The DIOC witness testified that producer-handlers have increased their share of Class I sales at the expense of fully regulated competitors. Relying on CDFA data, the witness compared the "option exempt producer-handler" share of the California Class I market with the share attributed to regulated handlers from July 1995 to August 2008. The witness testified that the producer-handler share of the Class I market increased from 14.8 to 23.4 percent.

In summary, the DIOC witness testified that the soft-cap type producer-handler exemption in California has significantly advantaged producer-handlers and disadvantaged fully regulated handlers. The witness was of the opinion that the provision has created a dilemma for policy makers who struggle to reconcile the goal of providing equal prices to competing handlers.

A second witness appeared on behalf of DIOC[4] to provide a description of soft-cap producer-handler provisions, similar to those advanced in Proposal 17, and the resultant impact on the competitive landscape in the northern California milk market.

The second DIOC witness testified that the Crystal Cream and Butter Company, the witness's former employer, was a regional milk processor that operated out of Sacramento, California until its assets were sold to HP Hood in 2007. The witness testified that Crystal Cream and Butter Company repeatedly lost business to producer-handlers who could sell milk at a lower price. The witness testified that the exemption for producer-handlers under the California milk pooling plan has

[4] Corrections to the second DIOC witness's testimony are reflected in this Final Decision.

decreased the revenues of producers whose milk is pooled and allowed producer-handlers to increase their share of the California Class I market. The witness noted that the intent of government-controlled dairy pricing systems should be to provide market stability for both producers and processors and avoid the creation of opportunities for one party to benefit at the expense of another.

The NMPF witness echoed testimony provided by the DIOC witnesses, noting that soft-caps have been problematic in California. The witness was of the opinion that soft-caps, applied in the Federal order system, would have a negative effect on uniform pricing.

The DFA witness and the NDA–Darigold witness testified in opposition to all proposals seeking establishment of soft-caps regulating only a portion of a producer-handler's sales. The DFA witness stated that minimum order prices would be unclear to buyers, causing them to wonder if competitors had access to lower priced milk due to the soft-cap. The DFA witness also asserted that a soft-cap would require a greater level of administration. The NDA–Darigold witness stated that the adoption of soft-cap provisions would further increase the advantages associated with producer-handler status.

Exemption of Vertically Integrated Operations With Retail and Home Delivery Distribution

Proposal 24 would exempt from regulation milk sold by producer-handlers through "handler-controlled retail channels" including home delivery and handler-controlled retail outlets, regardless of sales volume.

The AIDA consultant panel testified that Proposal 24 is intended for adoption only if USDA amends the producer-handler provisions. The rationale for this proposal, the panel explained, is that sales through home delivery and handler-controlled retail outlets are entirely controlled by the handler and do not have an impact on the pool.

The Braums witness testified in support of Proposal 24. The Braums witness testified that Braums' business model is unique, as the company sells own-farm milk and related dairy products in company-owned retail stores that do not carry any other fluid milk brand. The witness further testified that Braums serves a niche market that other fluid milk retailers do not. According to the witness, as a producer-handler, Braums must self-balance and cannot use outside suppliers. The witness further asserted that Braums' supply is limited to only what its farm is able to produce.

The witness testified that Braums' products are not available anywhere other than Braum's retail stores, and the operation has never been approached to begin supplying milk to other retailers. The witness noted that no other operation produces or sells Braums' branded milk products, and since Braums sells its product all the way through to the retail level, the operation incurs all the same costs and risks of other producer-handlers along with the additional costs and risks associated with its exclusive distribution and retail business. The witness also stated that Braums does not enjoy a price advantage because the operation has had to make substantial investments in the milk production side of the business.

The Braums witness was of the opinion that they are not a disruption in the market, and that depooling has had a far greater impact on blend prices in Order 32 than the exemption of producer-handlers from pooling and pricing provisions. The witness added that if Braums were to become fully regulated, the blend price in Order 32 could actually decrease based on Braums' utilization.

The Kreider witness testified in opposition to Proposal 24. The witness did not support an exemption from pool obligation for volumes of milk sold at retail by producer-handlers. Kreider, the witness testified, does not currently sell to retail customers, direct to consumers through home delivery, or via farm store.

The IDFA witness noted that the adoption of Proposal 24 would create new incentives for existing regulated handlers to invest in dairy farms and retail stores for the sole purpose of gaining an exemption from pooling and pricing regulations. The Shamrock witness agreed with the IDFA witness, stating that the adoption of a retail and home delivery exemption may result in the creation of a loophole that would possibly need to be revisited in the future.

The NMPF witness stated that an exemption granted for handler sales conducted exclusively through handler-controlled outlets, as advocated by Proposal 24, is inequitable and would allow those handlers to balance their supply through the rest of the market. The DFA witness echoed the NMPF witness' position, adding that an Order 32 producer-handler selling milk entirely through its own retail outlets currently aggressively competes for retail sales, which has lead to disorderly marketing.

Exemption of Own-Farm Milk

Proposal 23, proposed by AIDA, would remove the producer-handler provision from all milk orders and exempt from regulation milk procured from a farm owned by a handler. Additionally, this proposal would treat handlers with own-farm production as partially regulated distributing plants.

The AIDA consultant panel testified that under Proposal 23, handlers with own-farm milk would be allowed to down-allocate the volumes of own-farm milk to their lowest value of use in their producer-settlement fund obligation calculation. Additionally, the panel stated that adoption of this proposal would allow handlers with own-farm production to purchase milk from pool sources, providing that all purchased milk would be up-allocated to the handler's highest value use. The panel also offered that handlers with own-farm production could elect partially-regulated distributing plant status for own-farm milk volume as an alternative to full exemption of own-farm milk. The panel concluded that adoption of this proposal would allow producer-handlers to remain in business and compete in an orderly manner.

The Braums, Kreider, Aurora, GH Dairy, Heartland and Snowville witnesses testified in conditional support of Proposal 23. The witnesses supported its adoption should the current producer-handler provisions be eliminated or restricted.

The NAJ witness testified in support of Proposal 23, with the modification that own-farm milk production should be exempt up to 3 million pounds per month, and any additional own-farm or purchased volume should be subject to pooling and pricing. The witness testified that expansion of the existing partially-regulated distributing plant provisions to include an exemption of the first 3 million pounds of own-farm milk would be equitable for producer-handlers with less than 3 million pounds of own-farm milk, those with more than 3 million pounds of own-farm milk, and those with a combination of own-farm and purchased milk.

The NMPF, IDFA and DFA witnesses testified in opposition to Proposal 23. The NMPF witness stated that the exemption of own-farm milk would disproportionately benefit large producer-handlers, while the IDFA witness noted that the adoption of Proposal 23 would create new incentives for existing regulated handlers to invest in dairy farms.

Establishment of Individual Handler Pools

Proposal 25, as proposed by the members of AIDA, would establish individual handler pooling provisions in all Federal milk orders. The AIDA consultant panel was of the opinion that adoption of individual handler pools would encourage milk in higher class uses to move where needed and assure that Class I revenues accrue to producers serving the Class I market. Additionally, the panel asserted that there would be little incentive for the supply area to expand beyond what is sufficient to serve the needs of the market, thus saving transportation costs. The panel concluded that Proposal 25 would treat producer-handlers the same as any other handler because producer-handlers would function as a regulated handler under the order, and would be able to buy milk from other producers at the blend price. Finally, adoption of Proposal 25 would allow producer-handlers to compete in an orderly manner, and allow producers and cooperatives to benefit from producer-handlers' sales in excess of own-farm production, the panel asserted. The panel acknowledged reliance on the Nourse Commission Report (Nourse Report) in the preparation of its testimony, and encouraged USDA to reference it in making a determination. The panel represented that its heavy reliance on the Nourse Report in lieu of past decisions of the Secretary stemmed from its useful guidance on disorderly conditions.

The Braums, Kreider, Aurora, GH Dairy, Heartland and Snowville witnesses testified in conditional support of Proposal 25. The witnesses advocated its adoption in the event that the current producer-handler exemption be eliminated or restricted.

The Aurora witness acknowledged that if Proposal 25 were adopted, Aurora could continue to operate as a vertically-integrated business, although some modification might be necessary. The witness testified in support of individual handler pools on the basis that organic producers and processors obtain very limited benefits from the marketwide pooling system. The witness was also of the opinion that this is also true of other differentiated milk markets such as grass-fed and kosher. Individual handler pools would result in differentiated producers and processors gaining equity with respect to pooling, the witness asserted.

A witness representing Oberweis Dairy (Oberweis) testified in specific support of Proposal 25. Oberweis operates a distributing plant in Order 30 with 3 to 5 million pounds of monthly Class I disposition and home delivery.

The Oberweis witness testified that individual handler pools would benefit Oberweis and its producer suppliers. The witness testified that Oberweis competes with producer-handlers in the Virginia and Detroit markets. The witness stated that it is perfectly acceptable for regulated plants to compete with producer-handlers. The witness also testified that the government should not set minimum milk prices because prices are better determined in the marketplace.

The St. Albans witness testified in opposition to individual handler pools. The witness was of the opinion that individual handler pools would only benefit producers in close proximity to fluid plants. The witness stated that marketwide pooling is crucial to the economic survival of St. Alban's members because St. Albans is based in a rural area where most of the milk goes into manufactured products not fluid milk products.

The NDA–Darigold witness, the NAJ witness and State Departments of Agriculture panel testified in opposition to all individual handler pool proposals. The NDA–Darigold witness was of the opinion that individual handler pools would damage the marketwide pooling system—a system NDA and Darigold have found to be essential for producer support of Federal orders. The NAJ witness asserted that the establishment of individual handler pools would lead to disorderly marketing conditions because returns generated by sales of higher priced Class I milk would only be shared among those producers with access to a Class I processing plant.

The NMPF, DFA, IDFA, Mid-West-Lakeshore and UDA witnesses also testified in opposition to individual handler pooling. The DFA witness testified that individual handler pools should not be adopted because handlers operating fluid plants would gain market power and increase competition for access to the Class I market. Furthermore, the DFA witness was of the opinion that individual handler pooling is not compatible with the AMAA's basic tenet of minimum order prices for both producers and handlers. The IDFA witness echoed the DFA witness, noting that rather than being innovative, Proposal 25 instead proposes going back many years despite the findings of a number of hearings over the years which found individual handler pools contribute to disorderly marketing. The NMPF witness testified that individual handler pools threaten the Federal order system because producers supplying milk that balances the market would not benefit from Class I revenues.

Post-Hearing Briefs

Post-hearing briefs filed on behalf of proponents and opponents for the elimination of or amendment to the producer-handler definitions in all Federal milk marketing orders reiterated testimony and provided legal arguments as to why producer-handlers should or should not be fully regulated under the orders. Proponents and opponents alike stressed testimony and evidence purported to strengthen their specific positions. Presented below is a summary of the briefs as they related to the economic and marketing conditions in all marketing areas.

A brief filed on behalf of the New England Producer-Handlers Association, Inc., Willard J. Stearns & Sons dba Mountain Dairy, Monument Farms, Inc. and Homestead Creamery (New England Producer-Handlers Association, Inc. *et al.*) reiterated positions given at the hearing: producer-handlers in Order 1 do not give rise to disruption resulting from a significant impact on the blend price paid to producers; there exists no evidence to support the conclusion that producers with a large number of cows intend to construct bottling facilities and seek producer-handler status; consumer interest is a factor to be weighed during the determination of the regulatory treatment of producer-handlers; the producer-handler definition should be broadened to include entities operating in common; the exempt plant limit of 150,000 is inadequate and should be increased to 1 million pounds per month; and the exempt plant limit should be increased to 3 million pounds of monthly Class I route disposition in the event that the producer-handler provisions are eliminated.

In their brief, New England Producer-Handlers Association *et al.* requested that findings regarding the regulatory treatment of producer-handlers be separate for each of the Federal milk marketing orders. New England Producer-Handlers Association *et al.* argued that record evidence indicates that each order's findings should be based upon existing conditions within that order's marketing area. Specifically, it was argued that the circumstances that existed prior to amendment of the producer-handler provisions of Order 131, and the circumstances that currently exist in the Order 126 marketing area, do not exist in either the Order 1 or 5 marketing areas. Accordingly, the position taken in the New England Producer-Handler Association *et al.* brief was that

proposals to eliminate the producer-handler provisions of Orders 1 and 5 are not relevant to the prevailing conditions in either of the two marketing areas.

A brief filed on behalf of Land O'Lakes, Inc (LOL) agreed with testimony given in support of Proposals 1 and 2. LOL is a Capper-Volstead cooperative with more than 4,000 dairy farmer members marketing in and pooling milk on 5 Federal orders. The LOL brief also detailed support for the grandfathering of existing producer-handler operations at a level to be determined by the Secretary and opposition to Proposals 23, 24 and 25.

In their brief, LOL noted that record evidence regarding the entrance of GH Dairy into the El Paso market supports the conclusion that a producer can transition their farm into a producer-handler operation with relative ease in a short period of time. LOL identified testimony that the conversion of a dairy farm into a producer-handler operation is more favorable, given the economics of market entry, than the conversion of a dairy processing plant into a producer-handler operation.

The LOL brief also detailed market disorder associated with the current producer-handler provisions. LOL stressed that the impact of producer-handler operations varies by size of order and the number of producer-handlers selling into a given marketing area. LOL further noted that record evidence indicates an impact on the blend price of as much as $0.12 per cwt for Order 32. LOL identified testimony that shows disorderly marketing exists as a result of pricing inequity between producer-handlers and fully regulated handlers. Previously, according to LOL, pricing discrepancies were not as significant when producer-handler operations were smaller, and larger regulated handlers could compete through increased plant efficiency but as producer-handler operations have grown, regulated handlers' advantage based on scale efficiency has eroded.

A brief filed on behalf of a Florida dairy producer reiterated testimony given on the record in support of maintaining producer-handler provisions in Federal orders and detailed the producer's opposition to Proposals 1 and 26.

A brief filed on behalf of Midwest and Lakeshore reiterated Midwest and Lakeshore's support for Proposals 1 and 2 and opposition to all other proposals presented at the hearing. In their brief Midwest-Lakeshore noted by illustration that raw milk production cost differences are not relevant to an operation's status as a producer-handler. Midwest-Lakeshore concluded that a distinct exemption for producers who elect to bottle their own milk is not necessary, instead an exemption for all handlers with 500,000 or fewer pounds of monthly Class I disposition is sufficient to accommodate vertically integrated entities and others whose presence does not give rise to disorderly marketing conditions.

A brief filed on behalf of NAJ reiterated and clarified positions taken by NAJ at the hearing. NAJ claimed in its brief that NAJ's modification to Proposal 17 would result in the addition of at least 17 million pounds of milk to Federal order pools each month. In brief, NAJ reasserted that the exemption of producer-handler's first three million pounds of own-farm milk disposed of as Class I during the month is equitable for producer-handlers who use less or more than three million pounds of own-farm, or use a combination of own-farm and purchased milk.

A brief filed on behalf of Select and Continental articulated support for the goals of Proposals 1, 2 and 26, albeit with certain noted exceptions to Proposal 26. In their brief, Select and Continental highlighted evidence presented by proponents and opponents and offered current and historical overviews regarding the regulatory treatment of producer-handlers. Select and Continental supported their position that producer-handlers should not gain economic advantage as a result of their exemption from pooling and pricing. Select and Continental asserted that amendments to the regulations governing producer-handlers should be based upon economic fundamentals.

The Select and Continental brief included details regarding the important role played by producer-handlers in the marketplace through their service of a full range of consumer demands and provision of competition to markets that would otherwise be characterized by imbalances in market power. The brief detailed a number of arguments supportive of the use of transfer prices faced by producer-handlers as the basis for determining competitiveness with fully regulated handlers. Select and Continental asserted that any limit on the monthly Class I sales volume of producer-handlers should be determined according to the level of advantage enjoyed by producer-handlers. The level of this advantage, according to Select and Continental, can be identified by comparing producer-handler transfer prices and the Class I price. Select and Continental further argued that while the determination of an appropriate limit on the producer-handler provisions is necessary because economic advantages accrue with increased size, a finite limit number cannot be determined on basis of the hearing record. However, Select and Continental asserted that an appropriate limit would allow producer-handlers with less than 3 million pounds of monthly Class I route disposition to continue operations with exemption from pooling and pricing. Select and Continental also asserted that the adoption of a limit on the basis of total producer-handler sales rather than merely in-area sales is justifiable and warranted.

In their brief, Select and Continental also opposed the adoption of an exempt plant threshold in excess of 450,000 pounds of monthly Class I route disposition. The rationale for the exemption of "exempt plants" is distinct from the rationale for the exemption of producer-handlers and as such, a single definition intended to encompass the two types of entities would be inappropriate, Select and Continental argued. In this regard, the Select and Continental also pointed out that the exempt plant threshold limit is not based on farm size or production but on the level of Class I distribution. The rationale underlying the exemption of plants with 450,000 or fewer pounds of monthly Class I disposition relates, at least in part, to administrative convenience, asserted Select and Continental.

The Select and Continental brief detailed arguments in opposition to using retail price data in the determination of disorderly marketing conditions and the amendment of the producer-handler provisions to include labeling restrictions. Select and Continental argued that the analysis of retail price data does not provide a clear illustration of disorder due to handler inequity because such analysis is unable to disaggregate handler pricing to consumers from other factors involved in setting retail prices. As to proposed unique labeling restrictions, Select and Continental asserted that since any relative advantage between producer-handlers and regulated handlers should be determined on the basis of the regulatory treatment of producer-handlers, there is no need for adoption of labeling restrictions.

Furthermore, Select and Continental argued in their brief that when average dairy farm size data is compared with producer-handler numbers, opposite trends are revealed and as such, there is insufficient basis for concern that the growth in the number of large farms suggests the potential for the growth in the number of producer-handlers. The brief also indicated that the presence of organic producers and organic

producer-handlers in the market should not result in different regulatory treatment by marketing orders as production methods are not relevant.

The Select and Continental brief detailed agreement with the adoption of provisions that would provide for a "grandfathering" clause to be applied to current producer-handlers. Continental and Select asserted that such a clause should allow entities classified as producer-handlers prior to July 1, 2009, with monthly Class I route disposition of no more than 3 million pounds to retain their exemption from pooling and pricing. According to Select and Continental, whatever method is selected for limiting producer-handler disposition of Class I sales, it is more important that current producer-handlers operations within the proposed limit not be fully regulated.

A brief was filed on behalf of Upstate Niagara Cooperative, Inc. (Upstate Niagara). Upstate Niagara is a Capper-Volstead cooperative that owns fluid processing and manufacturing plants regulated under several Federal orders, including Orders 1 and 33. Their brief detailed support of the positions taken by NMPF and IDFA.

A brief filed on behalf of the State Departments of Agriculture of New York, Pennsylvania, New Hampshire, Vermont and Wisconsin (State Departments of Agriculture) stressed support for a 3-million pound limit on monthly Class I route disposition for producer-handlers. The State Departments of Agriculture also detailed opposition to an unlimited pooling and pricing exemption for Class I sales through producer-handler-controlled retail channels, and the adoption of a producer-handler grandfather clause.

According to the State Departments of Agriculture brief, a limit on producer-handler Class I sales volume is necessary as it would allow producers processing own-farm milk to continue to meet growing demand for locally produced, single-source milk while also preventing the erosion of the value of marketwide pools. In their brief, the State Departments of Agriculture stressed that any limitation on producer-handler Class I sales volume should apply to total sales. The State Departments of Agriculture also indicated that producer-handlers with three million or fewer pounds of monthly Class I route sales should be allowed to make temporary purchases of limited amounts of supplemental milk from other sources without loss of producer-handler status.

A brief filed was on behalf of DIOC. In their brief, DIOC provided analysis of specific proposals and testimony presented during the hearing. More specifically, the DIOC discussed the impact of California's producer-handler provisions that allow for soft-cap limits on Class I sales volume. The brief also stressed the relevance of California's producer-handler experiences to the current proceeding, the concept of transfer pricing as related to producer-handlers' cost advantage and the concept of economic rents.

In their brief, DIOC reiterated its testimony given on the substantial negative effects of producer-handlers in the California milk marketing system. Producer-handlers, according to DIOC, realize greater economic returns than similarly situated farms and plants that are not fully integrated. DIOC went on to assert that advantage arises because of producer-handler exemption from pooling and pricing. That exemption, DIOC stressed, allows the integrated producer-handler firm to either earn a greater return at the farm level by paying itself the Class I price, or earn a greater return at the plant level by paying the farm side of the operation less than the Class I value for milk supplied. DIOC concluded that the advantage enjoyed by producer-handlers is not a direct result of realized scale economies but rather is the result of revenue that is not shared with the pool.

A brief filed on behalf of Mallorie's Dairy, Nature's Dairy and Country Morning Farms (Mallorie's Dairy *et al.*) reiterated arguments against the adoption of Proposal 1 and for the adoption of Proposal 17 should Proposal 1 be adopted. The majority of these arguments rest upon the opinion that proponents lack evidence supporting adoption of their proposals. Mallorie's Dairy *et al.* also proposed that should the Secretary determine that changes to the producer-handler definitions are necessary, then the current size limitation on producer-handlers in Orders 124 and 131 should be adopted in other markets as dictated by record evidence of the need for change in those orders.

In their brief, Mallorie's Dairy *et al.* stressed that calculation of producer-handler advantage as the difference between the Class I price and the blend price is in error. Rather, Mallorie's Dairy *et al.* asserted that producer-handlers, like fully regulated handlers, use own-farm milk in other classes and as such, their pool obligation would likely be something less than the Class I price minus the blend price applied to total production. Mallorie's *et al.* further stated that proponents' use of erroneous calculations resulted in an overstatement of producer-handlers' purported competitive advantage.

The Mallorie's Dairy *et al.* brief also articulated additional factors determinant in producer-handlers competitive position relative to fully regulated handlers. According to the brief, smaller producer-handlers' processing, balancing and distribution costs exceed those of larger pool distributing plants and as a result, smaller producer-handlers are unable to compete with fully regulated plants, or to cause disruption in the fluid market on the basis of price.

A brief filed on behalf of IDFA reiterated its support for Proposals 1 and 2 exclusively, and highlighted testimony supportive of its position. IDFA also purported a lack of evidence supporting other proposals and detailed its opposition to the adoption of any proposals other than Proposals 1 and 2. IDFA asserted that the adoption of Proposal 1 is warranted based on the testimony of dairy farmers, cooperative representatives, and regulated fluid milk processors that provided numerous examples of producer-handlers' presence giving rise to disorderly marketing in several Federal milk marketing orders.

In its brief, IDFA stressed that significant structural changes within the dairy industry have nullified any historical justification of the producer-handler exemption from pooling and pricing provisions. Movements toward concentration and consolidation in the dairy farm sector combined with unbounded producer-handler provisions in many Federal orders, has caused producer-handlers to have a significant negative impact on orderly marketing conditions and the potential for an even greater negative impact is present, according to IDFA.

IDFA also asserted in its brief that the adoption of Proposal 2 is warranted. IDFA revealed that an increase of the exempt plant qualification threshold from 150,000 pounds to 450,000 pounds of monthly Class route disposition will allow small handlers, including previously exempt small producer-handlers, to enjoy an exemption from pooling and pricing provisions because they are too small to cause material market disruption. IDFA further asserted that Proposal 2 should be adopted in its entirety. According to the IDFA brief, the unique labeling restriction feature in Proposal 2 is necessary to avoid linking together the sales of numerous small exempt plant handlers in an effort to gain the volume advantages of larger, fully regulated handlers.

A brief filed on behalf of AE, Dean, National Dairy Holdings, NDFA, PAMD, Parker Farms, Shamrock and Shamrock

Farms (AE *et al.*) articulated collective support for Proposal 1. In their brief, AE *et al.* also noted that all parties represented in brief except NDFA support Proposal 2. The brief detailed opposition to an increased exempt plant Class I distribution limit should USDA decline adoption of any proposals under consideration in this proceeding or if USDA adopts any proposal other than Proposal 1. AE *et al.* also detailed specific opposition to any proposals that include soft-cap provisions. Finally, AE *et al.* acknowledged that certain parties represented in their brief could accept an amendment of the orders that would establish a 3-million pound hard-cap limit on monthly Class route sales for producer-handlers. Adoption of this limit, according to AE *et al.,* would restore orderly conditions in most circumstances.

In their brief, AE *et al.* asserted that record evidence reflects the threat of producer-handler proliferation. In particular, AE *et al.* argued that recent growth in producer-handler volumes, retailing customers search for producer-handler suppliers and the presence of producers actively structuring their operations with the express intent of becoming a producer-handler, is precisely the sort of evidence indicative of a potential threat to the maintenance of orderly marketing conditions. AE *et al.* also argued on behalf of NDFA that the exempt plant qualification threshold in Order 1 should not be increased due to the potential aggregate impact of such an amendment. According to the brief, record evidence shows a substantially larger number of exempt plants in Order 1 than in any other order.

The AE *et al.* brief detailed a number of reasons to support its position that Federal orders should include unique label requirements in the event that the exempt plant qualification threshold is increased or the producer-handler provisions are not entirely eliminated. Requirements for the unique labeling of packaged fluid milk products, according to the brief, will prevent the Class I sales volumes of exempt handlers, used in aggregate, from being balanced against the Class I sales volumes of fully regulated handlers. AE *et al.* provided several illustrations in support of this assertion and noted that unique labeling requirements would not prevent an exempt handler from bottling under several labels or bottling under a label other than one bearing its own name. Rather, the brief related that the only circumstance which would be prevented by unique labeling requirements is when any exempt handler or producer-handler bottles milk under the same label used by other handlers.

The AE *et al.* brief cited several examples from the record that they assert establish the presence of producer-handler driven disorderly marketing conditions in individual orders as well as across all orders. AE *et al.* further asserted that producer-handlers do not actually face balancing costs high enough to eliminate the price discrepancy between their operation and fully regulated handlers. The testimony of regulated handlers and producer-handlers alike, according to the AE *et al.,* addressed this very issue. AE *et al.* furthered this assertion, noting examples where producer-handlers were balanced by fully regulated suppliers, or supplied fluid milk products at retail under a label used by another [fully regulated] handler. Producer-handlers have a market impact across multiple marketing areas because some producer-handlers have distribution that is national, noted AE *et al.* The effect of producer-handler's multi-order distribution, according to AE *et al.,* is amplified by retailers' common practice of requiring fully regulated handlers to match producer-handler low-cost competing offers in an entire region.

In their brief, AE *et al.* also asserted that record evidence supports the conclusion that producer-handlers' market share has increased even as the number of producer-handlers in operation has decreased. AE *et al.* stressed that this trend leads to concluding that producer-handlers, as individual entities, have grown in size and that they present a greater potential for further growth and disorderly marketing. In this regard, the brief cited testimony provided by two dairy farmers who recently constructed processing plants with the intent of seeking producer-handler status. The potential for growth in producer-handler market share combined with retailers' knowledge of the pricing advantage enjoyed by producer-handlers is indicative of existing and future disorder, according to AE *et al.* Furthermore, AE *et al.* asserted, if producer-handlers' cost of surplus disposal exceeded the advantage of their exemption from full regulation, then it would be irrational for those operations to continue. AE *et al.* concluded that if no action is taken to limit or eliminate the producer-handler definitions in all orders, then fully regulated handlers will be put at further disadvantage and the benefits of marketwide pooling will be threatened.

A brief submitted on behalf of NMPF summarized its position and highlighted record evidence in support of adopting Proposals 1, 2 and 26. In its brief, NMPF stated that the adoption of Proposals 1, 2 and 26 would: allow plants meeting a small business definition to continue operations with an exemption from the pooling and pricing provisions of the Orders; prevent the aggregation of exempt plant Class I sales to circumvent regulation; improve revenues paid to producers via increased blend prices; and allow handlers to face uniform classified prices. According to NMPF, any provisions regarding exempt handlers adopted as a result of this proceeding should apply to total sales and not only to sales in a particular marketing area, and should include unique labeling restrictions to prevent integration of many small exempt handlers in search of a cost advantage based upon exempt milk supplies. NMPF further asserted that the amendments presented in Proposals 1, 2 and 26 are warranted given current and potential disorder, and taken collectively would restore orderly conditions within the system. NMPF reiterated its opposition to Proposals 3, 4, 5, 7, 8, 11, 13, 15, 17, 18, 20, 21, 23, 24, 25, 27 and 28.

In its brief, NMPF asserted that both farm sizes and handler operations are growing and the increasing availability of new technologies has drawn the industry to seek scale efficiencies. This new climate presents greater potential for producer-handler proliferation since many dairy farms are now large enough to enjoy economies of scale in milk production and processing and the cost advantage associated with the producer-handler exemption, NMPF emphasized. Some producer-handlers, according to NMPF, have already reached the size and scale necessary to compete directly with fully regulated handlers and that some current producer-handlers have grown to distribute nationally and internationally. Additionally, NMPF stressed in its brief that producer-handlers in low- and high-Class I utilization marketing areas, exhibit Class I utilization significantly in excess of area averages of fully regulated distributing plants. Record evidence, the brief asserted, indicates that producer-handler sales comprise a significant and growing share of the Class I sales in several markets. Furthermore, when full regulation occurs, producer-handlers can and do survive.

In brief, NMPF pointed out that producer-handlers' costs-of-production are not relevant in assessing their impact on orderly marketing conditions. NMPF further asserted that establishment of a transfer price at which producer-handlers acquire own-

farm milk is unnecessary because the correct comparison is between the regulatory costs of producer-handlers and similarly situated plants and the farms that supply them. On this basis, producer-handlers face costs that are no different, except that producer-handlers have obligation to the producer-settlement fund, NMPF concluded.

In its brief, NMPF reiterated that producer-handlers are a cause of disorderly marketing conditions because their exemption from pooling and pricing regulation decreases revenue that is otherwise paid to producers and interferes in setting uniform class prices to handlers. NMPF furthered this position noting that marketwide pooling is necessary for the integrity of the Federal order system and the exemption from pooling and pricing of producer-handlers erodes its effectiveness. The larger individual producer-handler operations become, the more a producer-handler's exempt status undermines producer equity, NMPF indicated. The cost advantage of producer-handlers, according to NMPF, equals the difference between the average value of milk used and the uniform price. This advantage is significant in an industry where bids are often considered and awarded on differences of less than a penny, NMPF maintained. The magnitude of producer-handlers' impact revealed by record evidence to be as high as $0.12 during certain months in Order 32, NMPF noted in its brief. The brief cited other record testimony revealing that producer-handlers also impact the blend price in Order 1.

The NMPF brief articulated the fiercely competitive nature of the retail-level grocery market. According to NMPF, retailers have sought to gain producer-handlers as suppliers in search of price advantages at retail, and producer-handlers can effectively avoid balancing their production when retailers first rely on all of the milk that a producer-handler can offer by meeting the remainder of their needs through other regulated sources. NMPF also noted the testimony of a producer-handler with national distribution which revealed that producer-handlers balance against alternative suppliers.

NMPF, in its brief, explained how the adoption of any proposals other than Proposals 1, 2 and 26 would be ineffective in addressing the current disorderly marketing conditions caused by producer-handlers. Specifically, NMPF stands in opposition to all other proposals. NMPF noted particular concern that the adoption of individual handler pooling in lieu of marketwide pooling would result in disorderly marketing and be detrimental to the Federal order system. In this regard, NMPF explained that individual handler pooling would reward handlers who can selectively recruit larger producers to supply milk needed for Class I use without acknowledging the balancing services provided by other handlers in the market.

In its brief, NMPF argued that the record supports grandfathering current producer-handlers with no more than three million pounds of monthly Class I route disposition provided grandfathering also includes provisions requiring unique labeling of package fluid milk products and farm and plant ownership exclusive of ownership in other farms or distributing plants. According to NMPF, these conditions collectively ensure the independent nature of producer-handlers as was intended when this category of handler was first created.

NMPF concluded in its brief that adoption of their package of proposals on a national basis is appropriate and is required to correct current disorderly marketing conditions and to preempt future disorder, noting adoption would eliminate the need for numerous and redundant hearings. With a national view, NMPF asserted that the collective adoption of Proposals 1, 2, and 26 would likely result in the full regulation of not more than five current producer-handler entities.

A brief submitted on behalf of AIDA reiterated the testimony of AIDA members and further articulated AIDA members' positions. AIDA asserted that Proposals 1 and 26 and other proposals that would eliminate or restrict producer-handler operations should be denied and the status quo maintained. Should the Secretary find that change to the producer-handler provisions is necessary, AIDA asserted, only Proposals 23, 24, and 25 should be considered for adoption.

In their brief, AIDA asserted that the preemptive regulation of producer-handlers and measures to prevent their proliferation are not warranted. In this regard, AIDA highlighted testimony that producer-handler competition is not currently an issue. AIDA concluded that the decreasing number of producer-handlers should be evidence enough that no threat of proliferation exists. Furthermore, the AIDA also concluded, while the volume of producer-handler milk has increased, the total percentage of Class I sales attributable to producer-handlers is at its lowest level in more than 40 years.

AIDA reiterated their assertion that the record supports concluding that producer-handler raw milk costs are equivalent to farm-level cost-of-production and not the Federal order blend price. In this regard, AIDA referenced USDA statistics that demonstrate farm-level cost-of-production exceeds both the blend price and the Class I price and as such, producer-handlers acquire own-farm milk at costs higher than either of these prices. Accordingly, AIDA asserted that the blend price is not the appropriate transfer price of milk from a producer-handler's farm to its plant. Instead, AIDA asserted, the only economically rational transfer price is the farm cost-of-production incurred by the producer-handler. Among other things, AIDA maintained, without evidence of an unfair cost advantage, no basis can be established to conclude that producer-handlers give rise to disorderly marketing conditions.

Expanding upon the argument that disorderly marketing conditions are not evident, AIDA stressed in its brief that disorderly marketing can only be found when consumers are unable to obtain a sufficient supply of fluid milk at reasonable prices. Applying this definition to the current record, which AIDA asserts does not show any consumer inability in buying milk, AIDA concluded that disorderly marketing is not present. AIDA also referred to testimony of proponent witnesses that acknowledged that producer-handlers are not currently causing disorderly marketing conditions. AIDA went further to suggest that any decisions regarding the regulatory treatment of producer-handlers must be based upon economic conditions and equity rather than equality amongst regulated parties.

In their brief, AIDA indicated that producer-handlers do compete with fully regulated handlers on the basis of price, but also stressed that price alone is not the only determinant factor of competition and producer-handlers are evidence of nothing more than healthy competition. AIDA insisted that competition is not the same as disorderly marketing and asserted that Federal orders are not intended to limit or eliminate competition. AIDA relied on several examples from the record which they purport to show that producer-handlers do not compete solely on the basis of price and also countered testimony intended to show the competitive advantages producer-handlers enjoy by being exempt from pooling and pricing.

AIDA cited in their brief record testimony demonstrating that producer-handlers meet the regulatory test of bearing the burden of balancing their milk supply. Based on the testimony of

several producer-handlers, AIDA concluded that producer-handlers are price-takers when selling surplus milk and the price received for surplus milk is lower than the classified prices. In addition to bearing the burden of their surplus, producer-handlers do not enjoy the Federal order minimum prices for surplus milk as do pooled producers, AIDA asserted.

AIDA presented several arguments in their brief to demonstrate the irrelevance of the impact producer-handlers have on blend prices. While AIDA acknowledged an impact, they argued that the impact is not significant relative to the impact of several other marketing conditions tolerated by Federal orders, including the depooling of milk.

AIDA noted in their brief that the producer-handler model is, in many marketing areas, the only alternative for producers outside of marketing through a cooperative. AIDA also asserted that through the producer-handler option, producers are able to provide differentiated products through innovative methods and marketing channels that are best served by the producer-handler business model. In this regard, AIDA mentioned several prominent regulated handlers serving the current marketplace that began as producer-handlers. Accordingly, AIDA concluded that USDA should leave the producer-handler definition unchanged.

In the event USDA finds the need for changing the producer-handler provision, AIDA asserted in their brief that Proposals 23, 24, and 25 should be adopted because they are less-burdensome alternatives to the other proposals under consideration in this proceeding. According to AIDA, the two parts of Proposal 23 would allow handlers to exempt own-farm milk volumes from pool obligation while also allowing handlers with own-farm milk production to elect partially regulated distributing plant status.

In their brief, AIDA reasserted that Proposal 24 is primarily intended for adoption in the event that USDA determines that the producer-handler provisions need amending to include Class I disposition limits, while also maintaining that the proposal could be adopted even in the event that the producer-handler provisions were completely eliminated. AIDA reiterated that the proposal's intent is to exempt producer-handlers with handler-controlled retail channels because their control of milk is complete from production through to final disposition to the consumer and because there is no impact on the pool. AIDA noted that this provision is intended to be liberally construed so as to include independent contractor relationships within the handler-controlled retail channel.

In their brief, AIDA reiterated their position that individual handler pooling (Proposal 25) is an alternative to marketwide pooling as a means to address the producer-handler issue. According to AIDA, the adoption of individual handler pools would not only allow producer-handlers and regulated handlers to enjoy more equal treatment, it would also better reflect Class I market demands and the producers serving those demands. AIDA asserted that it would also eliminate the need for pooling standards and the hearings required to determine them, as well as eliminate the disorderly impacts of depooling. AIDA concluded that the possibility of unequal producer prices under individual handler pools would not be a great issue.

In their brief, AIDA also detailed support for increasing the exempt plant's limit on Class I distribution independent from consideration of the regulatory treatment of producer-handlers. Citing from the record, AIDA supported a Class I distribution limit of 1 million pounds per month.

Discussion and Findings

General

At issue in this proceeding is the reconsideration of the current exemption of certain handlers from pooling and pricing provisions of Federal milk marketing orders. All milk marketing orders provide for the exemption of handlers known as producer-handlers and plants that have less than 150,000 pounds of monthly Class I disposition and sales of packaged fluid milk products to other plants—commonly referred to as exempt plants. While exempt plants are limited to 150,000 pounds or less of monthly Class I sales, the producer-handler definitions, except in Orders 124 and 131, specify no sales volume limitations.

A proposal seeking elimination of the producer-handler definitions asserts that the pooling and pricing exemption of this category of handler has become a source of current or potential disorder in the marketplace and should be eliminated across all orders. A companion proposal to mitigate regulatory impacts associated with elimination of the producer-handler definitions was offered to be adopted simultaneously. This companion proposal seeks to increase the exempt plant limit of monthly Class I disposition and sales of packaged fluid milk products to other plants from 150,000 to 450,000 pounds. As proposed, it is intended to allow current small scale producer-handlers, those with less than 450,000 pounds of Class I sales per month, to be exempt from pooling and pricing provisions of the orders.

Numerous additional proposals were offered and considered as alternatives to these two proposals. While all producer-handlers endorse the status quo, the alternative proposals are offered in the event that USDA determines the producer-handler definitions should be amended. Several current producer-handlers and other interested parties offered proposals that would add a monthly Class I route disposition limit to the producer-handler definitions. Other proposals seek to prevent proliferation of new entrants under the producer-handler definition while allowing existing producer-handlers to retain their current status. One proposal seeks to recast the producer-handler definitions to exempt only those entities with the additional risk and burden of exclusive distribution through producer-handler-controlled retail channels. Another proposal seeks to change the method of pooling milk and the classified use-values of milk in the orders. Finally, proposals that seek to exempt handlers' own-farm milk production disposed of as packaged fluid milk products were offered.

The record reveals that there are currently over 100 entities across the Federal milk marketing order system meeting the current exempt plant definition. Many of these entities are operated by dairy farmers who bottle and sell their milk production as fluid milk products. If not for their monthly Class I route dispositions and sales of packaged fluid milk products to other plants being less than 150,000 pounds, these entities would likely meet the producer-handler definition of their respective orders. Although some exempt plant handlers fit the producer-handler definition, which requires handlers to have integrated production, processing and route disposition at their exclusive enterprise and risk, exempt plant handlers have no such restrictions. In other words, exempt plants may be exclusively supplied with milk purchased from dairy farmers. Irrespective of production, processing and route disposition, an exempt plant incurs no Federal order minimum payment obligation to the dairy farmer(s) from whom milk was purchased.

The AMAA requires the setting of uniform prices to producers regardless of how the milk of any single dairy farmer is used and uniform prices to

similarly situated handlers (section 608c(5)). Handlers who are similarly situated pay at least the class prices established under the orders for milk. Producers are paid at least the minimum uniform (blend) price that is determined through marketwide pooling. A marketwide pool, through the mechanism of a producer-settlement fund, equalizes the classified use-values of milk pooled on an order among handlers and determines a uniform price paid to producers. Marketwide pooling allows for equitable sharing of the cost of supplying and balancing the Class I market. These two key features of milk orders—classified pricing and marketwide pooling—provide the basic foundation for orderly marketing and address the AMAA's primary objective of ensuring orderly marketing.

There are currently four different producer-handler definitions used in Federal milk marketing orders. The three southeastern orders (Orders 5, 6 and 7) have no Class I route disposition limits and do not provide for the purchase of milk beyond the own-farm production of a producer-handler. The producer-handler definitions of 5 other orders also have no limit on Class I route disposition but provide for the limited purchase of milk of 150,000 pounds or less per month of pooled milk beyond own-farm production. Only Orders 124 and 131 have a limit on Class I route disposition in their marketing areas that, when exceeded, obligates producer-handlers to pooling and pricing provisions of these orders in the same manner as the fully regulated plants. The producer-handler definition of Order 131 differs from that of Order 124 in that it also places certain restrictions on product labeling. Nevertheless, the common criterion of all producer-handler definitions for all orders is the requirement that the entire operation be under the sole risk and enterprise of the producer-handler.

Despite previous rulemaking proceedings which considered full regulation of producer-handlers, it was not until 2006 that some producer-handlers became subject to pooling and pricing provisions under Orders 124 and 131. In that formal rulemaking proceeding, USDA adopted a 3-million pound per month Class I disposition limit in the marketing area that, when exceeded, results in the full regulation of producer-handlers. No changes were made with regard to the exempt plant definitions of the two orders. Shortly after implementation of the amended Orders 124 and 131, enactment of the Milk Regulatory Equity Act of 2005 required implementation of additional regulatory criteria affecting handlers and producer-handlers in *all* Federal milk marketing orders.

In the producer-handler proceeding for Orders 124 and 131, USDA found that the exemption of large scale producer-handlers from pooling and pricing disrupted the orderly marketing of milk. The record of that rulemaking found that large scale producer-handlers enjoyed a price advantage over regulated handlers while simultaneously decreasing blend (uniform) prices to dairy farmers. The record of this proceeding does not support the same findings. Of greater significance, the record of this proceeding indicates that all producer-handlers enjoy a competitive pricing advantage over fully regulated handlers because of their exemption from pooling and pricing provisions. This is not surprising as the exemption of any handler from the regulatory plan results in nonuniform prices to handlers and lower prices than would otherwise be uniform to producers. It is clear from this proceeding that as the Class I marketings of a producer-handler increase, the order's ability to set prices that are uniform to handlers and producers is eroded.

Depending on the volume of Class I disposition and sales of packaged fluid milk products to other plants, the exemption from obligation to account for milk at minimum classified prices, and the exemption from payment into the producer-settlement fund of the difference between a producer-handler's use-value of milk and the blend price become critical factors that give rise to disorderly marketing conditions. Large producer-handlers become increasingly able to market fluid milk at prices below those that can be offered by fully regulated handlers because the classified prices set by the order are not uniform. The exemption from payment to the producer-settlement fund renders the order unable to set uniform prices to producers.

Comments and exceptions to key findings were considered regarding producer-handlers' competitive pricing advantage and the inability of the orders to set uniform prices to producers that arises from the exemption from pooling and pricing. This final decision emphasizes that when any handler is exempted from pooling and pricing, regulated handlers and producers whose milk is pooled on an order are affected by that exemption. Regulated handlers are affected because they are obligated to make pool payments while producer-handlers are not obligated. Producers also are affected because handler exemption results in fewer dollars available in the pool, thus making the uniform price to producers lower. Market Administrator data in the record demonstrate this outcome. That data reveals that exclusion of producer-handler revenue affects the total pool value in any Federal order marketing area where producer-handlers are present. Total pool values are hundreds of thousands of dollars less every month than they would be which directly translates into lower uniform prices paid to producers. In markets where producer handlers are not present, no impact on total pool value occurs.

The record of this proceeding demonstrates that producer-handlers with monthly Class I route disposition and sales of packaged fluid milk products of 3 million pounds or less are not a serious cause of disorderly marketing conditions that warrant correction by eliminating the producer-handler definition across all Federal milk marketing orders. Accordingly, it is reasonable to conclude that the objectives of the AMAA can continue to be achieved without the complete elimination of the producer-handler definitions across the system of orders. It is also reasonable to conclude that all orders should be amended so that the producer-handler definitions include some limitation on the amount of Class I sales that a producer-handler may have before becoming obligated to the system's regulatory plan of pooling and pricing. Doing so is necessary to maintain the integrity of the Federal order system and orderly marketing conditions.

Elimination of the Producer-Handler Definition and Increasing the Exempt Plant Monthly Limitation of Class I Disposition and Sales of Packaged Fluid Milk Products to Other Plants

Record evidence reveals that the elimination of the producer-handler definitions of the orders is not necessary and an increase in the exempt plant threshold from the current 150,000 to 450,000 pounds on Class I route disposition and sales of packaged fluid milk products to other plants per month is not warranted. Nevertheless, testimony and evidence provided by proponents, most notably NMPF and IDFA and associated witnesses, identified shortcomings of the current producer-handler definitions.

Producer-handler exclusion from pooling and pricing has historically been based on the premise that the declared policy and objectives of the AMAA, namely orderly marketing, could be achieved without the extension of full regulation to this category of handler. USDA has articulated its authority to obligate producer-handlers

to further regulation, including marketwide pooling and minimum pricing provisions, if they singularly or collectively have a negative impact on the market. USDA found the activity of large scale producer-handlers to be a source of significant and measurable disorder in the Arizona and Pacific Northwest marketing areas.[5] Accordingly, those orders' were amended to establish a 3-million pound limit on monthly Class I disposition in the marketing area in the producer-handler definitions beyond which pooling and pricing regulation applies to the handler.

Prior rulemakings consistently articulated USDA's authority to subject producer-handlers to full regulation. For example, in a Final Decision for the Puget Sound order, a predecessor to the Pacific Northwest order, USDA found that producer-handlers should continue to be exempt from pooling and pricing provisions of the order with the caveat that producer-handlers could be subject to further regulation if justified by prevailing market conditions.[6] This position was amplified in a subsequent Puget Sound Final Decision wherein USDA found that a hearing should be held to consider the regulation of producer-handlers if the marketing area was susceptible to being affected by producer-handlers or if producer-handler sales could disrupt or operate to the detriment of other producers in the market.[7] Such policy was also articulated in another decision concerning producer-handlers in Texas and the Southwest Plains.[8] That decision concluded that it would be appropriate to obligate producer-handlers to the pooling and pricing provisions of the order if it could be shown that producer-handlers cause market disruption.

The proposals for elimination of the producer-handler definition are primarily based upon issues regarding producer-handler size, specifically the volume of Class I marketings. The elimination of the producer-handler definition across the system of orders is proposed to be offset by an increase in the exempt plant monthly limit on Class I route disposition and sales of packaged fluid milk products to other plants. This would, as the proponents intend, mitigate the impact of the proposed regulatory change on current producer-handlers characterized as not having a significant impact on orderly marketing conditions.

Producer-handlers are persons who operate dairy farms and generally process and sell only their own milk production. A pre-condition to operating a processing plant as a producer-handler is the operation of a dairy farm. Consequently, the size of the dairy farm determines the production level of a producer-handler's farm operation and is also the controlling factor of the volume that is processed by the plant and that is available for distribution. Accordingly, the major consideration in determining whether a producer-handler is a large or small business is its capacity as a dairy farm. Under SBA criteria, a dairy farm is considered large if its gross revenue exceeds $750,000 per year which equates to a production guideline of 500,000 pounds of milk per month. Accordingly, a producer-handler with Class I disposition and sales of packaged fluid milk products to other plants in excess of three million pounds per month is considered by this decision to be a large business.

At what size a producer-handler begins to have a significant impact on a market's pooled participants should be determined by whether minimum prices are uniform to producers and among handlers. Testimony in this proceeding presented the argument that the presence of effective prices—or actual prices paid and received—that differ from minimum prices set under the orders is indicative of disorder. This decision disagrees. The regulatory plan of the milk order program is not tasked with setting the effective prices. Rather, the regulatory plan of the milk order program provides for setting and enforcing *minimum* prices paid by handlers and received by producers. The effective prices producers receive can and do vary, but prices paid to producers and their cooperatives cannot be lower than the minimum price established under the orders. The fact that cooperatives can re-blend the price they pay for the marketing of their producer member milk is neither an example of disorderly marketing conditions nor germane to evaluation of the conditions appropriate for excluding handlers from the pooling and pricing provisions of the orders.

Because producer-handlers do not share the additional value of their Class I sales with a market's producers, their exemption from the pooling and pricing provisions is conditioned on the premise that the burden of surplus disposal (milk not used for fluid uses) is borne by them alone. The surplus milk of a producer-handler may be sold for any price, but germane to this condition, such surplus milk does not receive the minimum price protection offered by marketwide pooling. When a producer-handler is able to avoid the burden of surplus disposal while also retaining the entire additional value of milk accruing from Class I sales, equity among producers and handlers is jeopardized and disorderly marketing conditions can ensue. When uniform minimum price conditions exist, the basis for orderly marketing is present. In the absence of uniformity of minimum prices among producers and handlers, the basis for orderly marketing is undermined.

The record supports the finding that adoption of a limit on producer-handlers' monthly Class I disposition and sales of packaged fluid milk products to other plants can mitigate the disorderly marketing which arises when producer-handlers are able to avoid bearing the burden of surplus disposal. Bearing the burden of surplus disposal is a fundamental demonstration of a producer-handler balancing their milk production with market demand for their Class I products. Disorderly marketing conditions are present when a producer-handler becomes able to directly or indirectly balance their Class I marketings with the surplus milk of pooled producers. The record indicates examples of indirect balancing of producer-handlers on the regulated market. The record also indicates that as a producer-handler's Class I sales volume increases, conditions arise that offer an even greater ability to effectively transfer the balancing burden to the regulated market.

While opponents to the elimination of the producer-handler definitions argue otherwise, this decision agrees with proponent arguments, presented by witnesses testifying in support of NMPF and IDFA positions, that the difference between the Class I price and the blend price is a reasonable estimate of the price advantage enjoyed by producer-handlers even if it is not possible to determine the precise level of the advantage for any individual producer-handler. This price advantage is compounded as a producer-handler's Class I utilization increases. In addition, allowing producer-handlers to have unlimited Class I sales will result in a measureable impact on the blend price received by pooled producers.

This decision finds no reason to consider the higher costs purportedly associated with the operation of producer-handlers a relevant factor for determining conditions in which handlers should or should not be

[5] Official notice is taken of Final Decision, Published December 14, 2005 (70 FR 74166).

[6] Official notice is taken of Final Decision, published May 13, 1966 (31 FR 7062–7064).

[7] Official notice is taken of Final Decision, published July 21, 1967 (32 FR 1073–1074).

[8] Official notice is taken of Recommended Decision, published June 28, 1989, (54 FR 27179).

subject to full regulation. All handlers face different processing costs. These differences may be the result of divergent plant operating efficiencies related to size or to that portion, if any, of milk supplied, which may be produced and supplied from own-farm sources. Whatever the cost differences may be and the reasons for them, all fully regulated handlers must pay the same minimum Class I price, and equalize their use-value of milk (generally, the difference between the Class I price and the blend price) through payment into the order's producer-settlement fund. Similarly, all producers face different milk production costs. Producer cost differences, for example, may be the result of farm size or variation in milk production levels attributable to management ability. Producers, regardless of their individual costs, receive the same blend price.

Comments and exceptions to the recommended decision detailed support and opposition to the recommendation that the exempt plant limit on Class I sales remain unchanged. IDFA and PAMD, proponents of increasing the exempt plant limit of Class I sales from 150,000 pounds per month to 450,000 pounds per month, made clear their opposition to consideration of the proposed amendment in isolation. The comments and exceptions offered by IDFA and PAMD reiterated their record argument that the proposed increase of the exempt plant threshold was advanced only if the producer-handler definition was eliminated from all Federal milk marketing orders.

The record lacks evidence to warrant increasing the current exempt plant limit on Class I sales given the decision to retain the producer-handler definition, albeit with limits. While the comments and exceptions of a number of parties constructed support using the testimony of proponents, reliance on such testimony to warrant increasing the exempt plant Class I monthly sales limit is misplaced. The majority of testimony in support of a higher exempt plant limit, provided by IDFA, NMPF and PAMD witnesses, makes clear their conclusions were drawn based upon the condition that the Federal order system would no longer have producer-handlers. It is only in this context in which the NMPF, IDFA and PAMD witnesses drew the conclusion that exempt plants with Class I sales of up to 450,000 pounds a month would not be a disruptive factor to orderly marketing.

Because the record lacks evidence to support an increase in the exempt plant monthly Class I sales limit as a stand-alone proposal, concerns associated with its adoption are significant. Exempt plants are distinct from producer-handlers, as discussed above, in that the source of their milk supply may be from any source, including exclusive purchase from dairy farmers. The dairy farmers supplying exempt plants do not receive the minimum price protection of the orders or the other benefits of the marketing order system including verification of tests and weights and audits of the handlers to whom they deliver their milk. Dairy farmers delivering to exempt plants can be characterized as the "smallest" of the small dairy farm operations. Tripling the exempt plant limit may increase the number of producers who may be harmed by not being associated with the regulatory benefits of the orders. In other words, the smallest dairy farmers who are the most vulnerable would be the ones most likely to have their marketings fall outside the scope of the intended regulatory plan if the exempt plant threshold on monthly Class I sales volume were increased.

Establishment of Individual Handler Pools

The marketwide sharing of the classified use-values of milk among all producers supplying a marketing area is an essential feature of the Federal milk marketing order system. It ensures that producers supplying a given marketing area receive the same uniform price for their milk, regardless of its end use. In combination with classified pricing, marketwide pooling has, among other things, successfully mitigated price competition between producers seeking the higher-valued fluid outlets for their milk. Abandonment of the marketwide pooling system in favor of an individual handler pool system would reverse the stability achieved by its adoption in all Federal milk marketing orders.

The record reveals that justification for the adoption of individual handler pooling is rooted in a collection of extremely selective excerpts of a study authored by dairy industry participants and published in 1962. The study, commonly referred to as the Nourse Report, examined in great detail the Federal milk marketing order system. The few excerpts used to advance the features of individual handler pools pale in comparison to the Nourse Report's cautions as to its use as well as descriptions of the superior qualities associated with marketwide pooling. Over the years, USDA has repeatedly concluded that marketwide pooling promotes orderly marketing conditions more completely and is one of the most important marketing order tools used to ensure uniformity in prices to producers.[9] In markets where much of the milk is handled by operating cooperatives and large surpluses of milk are unevenly distributed among handlers, conditions observable today, marketwide pooling best ensures orderly marketing. This is the same opinion of the Nourse Report.

Individual handler pooling did have a role to play in the orderly marketing of milk, but only under very specific conditions. On the eve of milk marketing order reform implementation which instituted, among other things, the current large regional milk marketing orders, individual handler pooling existed for only one very small marketing area that had a single fully regulated handler distributing Class I products. When a marketing area has a single fully regulated handler, the classified prices established under the order and the blend price returned to dairy farmers supplying that handler are uniform. However, when a market contains more than a single regulated handler, the individual handler pooling system cannot provide uniform prices to producers.

As marketing areas grew in geographic size and in the number of handlers competing for Class I sales and manufacturing of other dairy products increased, marketwide pooling became the method ensuring uniform prices to producers. The pooled milk of producers shared in the additional revenue accruing from the higher classified use-value of Class I sales and the burdens of lower classified use-values. Under an individual handler pooling plan, producers supplying handlers with differing utilizations would receive different prices. These differences would be particularly notable between producers delivering to handlers with high manufactured class utilization and those with a majority of Class I uses. Producers supplying a handler with high Class I utilization would receive higher prices than producers whose milk was delivered to manufacturing handlers. Returns distributed to producers in this manner are not uniform nor can they be when a market consists of multiple handlers.

To the extent that individual handler pooling is an alternative to the elimination of the producer-handler definitions, USDA long ago determined it to be inferior to marketwide pooling. While it may be a novel way to address the issues under consideration in this

[9] Official notice is taken of: Final Decision, published April 2, 1999 (64 FR 16026); Final Decision, published October 13, 1955 (20 FR 7689); Final Decision, published June 15, 1990 (55 FR 25618).

proceeding, it does so by a claim that a producer-handler is paying itself the use-value of its own milk. Its adoption could not be immediately implemented as it would, for example, require an overhaul of an order's pooling standards plus the addition of other criteria to ensure that distributing plants had an adequate supply of milk for fluid uses.

The central issue of this proceeding is the consideration of the conditions that warrant exemption of handlers from full regulation not whether the method of pooling should be changed. Individual handler pooling does not directly address when and under what circumstances handlers can be exempted from pooling and pricing without undermining orderly marketing. Accordingly, the proposal for adopting individual handler pooling (Proposal 25) is denied.

Grandfathering, Soft-Caps, and Own-Farm Milk Exemptions

Three proposals, Proposals 17, 23, and 26, submitted in response to Proposals 1 and 2 received testimony in support of "grandfather clauses" and exemptions for "own-farm" milk supplies. In the context of this proceeding, "grandfather clause" refers to an exception that would allow current producer-handlers to continue their operations with added restrictions. "Own-farm" milk here refers to the amount of milk processed for use by a handler who is also the producer of that milk. These alternative proposals to the elimination or amendment of the producer-handler definition calling for these features are not recommended for adoption.

While requesting the elimination of the producer-handler definition in all orders, NMPF asserts that their Proposal 26 is consistent with this request because it effectively halts the proliferation of new producer-handlers. This decision disagrees and does not adopt NMPF's Proposal 26. If the position is taken that the exemption of producer-handlers from pooling and pricing causes disorderly marketing conditions, then it would be reasonable to conclude that the current producer-handler exemption, regardless of any limitations placed on Class I route dispositions, should come to an end. A willingness to accept a 3-million pound per month limit on Class I route dispositions for current producer-handlers begs the conclusion that producer-handlers with Class I dispositions at or below this level are not disorderly or, at the least, represent a tolerable deviation from strict application of pooling and pricing provisions.

Grandfathering clauses, as proposed, would create inequity between persons who are currently producer-handlers and other entities who may in the future seek to supply milk as producer-handlers. Adoption of these types of provisions would essentially create a new category of handler based solely on their regulatory status during a specified time period. Dairy farmers that aspire to produce, process and market milk at their own enterprise and risk would be denied the opportunity to join the new "grandfathered" category.

As previously discussed, the broad purpose of the AMAA is to establish and maintain orderly marketing conditions. Its purpose is not to create barriers to entry into a viable business or marketing alternative. New-to-market operations should not be denied the ability to form under the same provisions as current entities that have already met the producer-handler definition. Concern for the proliferation of producer-handlers is overly proscriptive.

In their post-hearing brief, Mallorie's Dairy, proponent of Proposal 17, articulated a willingness to accept the current size limitation of 3 million pounds of Class I route disposition of the PNW and Arizona orders as a reasonable alternative to elimination of the producer-handler provisions. This willingness was conditioned upon a USDA recommendation against the elimination of the producer-handler provisions and for the application of the Class I route disposition limit common to the PNW and Arizona orders across all other orders. As this decision recommends adoption of amendments similar to those acceptable to Mallorie's Dairy, no further consideration is given to Proposal 17, as proposed by Mallorie's Dairy.

Modifications to Proposal 17 as offered by NAJ request consideration for provisions which would create a new category of handler. In their post-hearing brief, NAJ advocated the creation of an exemption for handlers with own-farm milk supplies. With NAJ's modification to Proposal 17, handlers with own-farm milk would be exempting the first three million pounds of own-farm milk disposed of as Class I during the month. NAJ asserts that this would be equitable for handlers with less or more than the three million pounds of own-farm Class I dispositions or a combination of own-farm and purchased milk. This decision does not find NAJ's proposed changes to be equitable as represented by NAJ.

NAJ suggests that handlers with own-farm milk should be partially regulated distributing plants with an exemption from pooling and pricing equal to their own-farm milk volume. While this modification uses terminology common to current regulation it in fact represents a recast meaning of the term "partially regulated." Unlike pool distributing plants, partially regulated handlers are handlers that distribute fluid milk products into a marketing area but do not meet the standards for full regulation under that order. NAJ uses the term "partially regulated" to refer instead to handlers who would only be subject to full regulation for own-farm fluid milk product volume in excess of three million pounds and all purchased milk volume. This would essentially create a unique exemption based upon the origin of the milk supplies received by a given handler.

As proposed, NAJ's modification is grounded in a justification based upon the source of a milk supply. It would not be appropriate to have differentiated regulatory treatment of milk supplies on the basis of origin. The current producer-handler provisions require that operations be performed at their exclusive control and through a dependence on their own milk production without reliance on purchased milk.

AIDA, proponents of Proposal 23, offered two versions of Proposal 23 to be considered as distinct from one another. Both versions would require the creation of handler categories specific to handlers with own-farm milk supplies reflecting certain provisions that currently govern the regulatory treatment of pool distributing plants and partially regulated plants, save one major exception. Under the first variation of Proposal 23, handlers with own-farm milk would be treated as fully regulated plants with the ability to down-allocate all own-farm milk supplies. The second variation would allow handlers processing own-farm milk for Class I use to elect partially regulated status.

The first version of Proposal 23 would cause handlers with own-farm milk to have a price advantage due to their exemption from pooling and pricing while handlers without own-farm milk would be subject to pooling and pricing provisions of the orders. The second version of Proposal 23 seeking treatment of handlers with own-farm milk as partially regulated plants would treat differently those handlers without own-farm milk supplies. Adoption of this proposal would cause differentiated treatment of similar plant operations solely on the basis of supply sourcing. Furthermore, the provisions offered in Proposal 23 are far less restrictive than the current producer-handler

provisions, which proponents of Proposal 23 contend should not be changed. Either form of Proposal 23 would cause inequitable treatment of similarly situated handlers due to an exemption favoring handlers having own-farm milk supplies.

While AIDA describes their proposed changes using terminology common to current regulation, the proposals are different than current regulations. The proposals do not consider conditions under which full exemption from pooling and pricing regulation is warranted. Proposal 23 uses needlessly complex methods to address an issue that may be more easily fixed by simply modifying the current producer-handler definition to include a limit on monthly Class I route disposition. Accordingly, this decision does not adopt either version of Proposal 23.

The portion of Proposal 23 and the NAJ modification that propose total or partial exemption from pooling and pricing based on own-farm production disposed of as Class I while allowing for purchase of milk from other producers, deviates from the long-held own risk and enterprise conditions associated with the producer-handler definition. If adopted, each of these two proposed changes would create a soft-cap exemption. Soft-caps exempt some Class I disposition while subjecting any additional disposition to pooling and pricing. This would cause inequitable treatment across similarly situated handlers where handlers with own-farm milk could "smooth" the price advantage gained on the volumes of exempt fluid milk products across any additional Class I sales. In turn, this would also allow handlers with own-farm milk to undercut prices offered by those handlers without own-farm milk strictly as a consequence of regulation.

This decision has considered the testimony regarding the use of similar soft-cap limits for producer-handlers under California's milk marketing regulatory plan. California's milk marketing regulatory system is similar to that of the Federal order system. The soft-cap limits there led to inequity among similarly situated handlers. According to the record, other fully regulated handlers with similar Class I disposition, but without own-farm milk production, were placed at a competitive disadvantage relative to those handlers with own-farm production.

Retention of the Producer-Handler Definition With Limits on Class I Disposition and Sales of Packaged Fluid Milk Products to Other Plants

As discussed above, the exemption of handlers of any size (and exempt plants) from the regulatory plan of milk orders immediately leads to minimum prices under the orders that are not uniform to producers and handlers. However, USDA has a long history in which certain categories of handlers have not been subject to the full regulatory scheme in order to achieve the AMAA's objective of orderly marketing.

While having an absolute impact on milk orders' ability to set uniform prices to similarly situated handlers and return uniform prices to producers, the volume of milk represented by exempt plant sales has had and continues to have a de minimis impact on orderly marketing. As such, USDA has concluded that the full regulatory plan need not be applicable to such small handlers. The exempt plant limit on Class I route disposition and sales of packaged fluid milk products represents a measure of participation in the market that while exempt, is tolerable and does not undermine the purpose of the order system and its treatment of larger handlers.

The same de minimus impact on orderly marketing owed to producer-handler Class I sales volume has been, in part, the rationale for their exemption from full regulation. Simply stated, producer-handlers have historically conducted small scale operations and have been subject to certain requirements to remain exempt from full regulation. Those requirements have been that the operation: Be under the sole enterprise and risk of the producer-handler; bear the full responsibility and risks associated with the care and management of the dairy animals and other resources necessary for milk production; and engage in and exclusively control the processing and distribution of their Class I products. Under these and other requirements unique to each order, producer-handlers have been determined to have neither an advantage in their capacity as producers or as handlers.

With these conditional requirements for producer-handlers, there was no need to consider further regulatory requirements for this category of handler. Additional amendments to the producer-handler definitions became necessary when producer-handler size was shown to be a cause of disorderly marketing conditions in the Arizona and Pacific Northwest marketing areas, and a cap of three million pounds per month on Class I dispositions in the marketing area was adopted.

The record reveals that the number of producer-handlers and all other categories of handlers is declining. Opponents of change from the status quo conclude that this is justification to leave the producer-handler provisions unchanged. This decision disagrees. In evaluating the impact producer-handlers may have on orderly marketing, the volume of milk marketed by any individual producer-handler is more important than the overall trend in the number of producer-handlers.

The size of individual producer-handlers will impact orderly marketing conditions in any of the Federal order marketing areas if left without limit. Size of operation will have a direct bearing on competitive equity between producer-handlers and fully regulated handlers. Producer-handler size, as discussed above, will increasingly affect an order's ability to set uniform prices to similarly situated handlers and to producers. Producer-handler size will increasingly magnify disorderly marketing conditions and practices where the burden of balancing and surplus disposal is effectively transferred to the regulated market. These examples of the presence and anticipation of disorderly marketing conditions can be largely mitigated by establishing a reasonable limit on a producer-handlers' Class I route disposition and sales of packaged fluid milk products to other plants.

Establishing a reasonable limit on total Class I route disposition and sales of packaged fluid milk products in all producer-handler definitions for all Federal milk marketing orders unifies the policy objectives of the AMAA to establish and maintain orderly marketing conditions. Establishment of a reasonable limit on Class I disposition and sales of packaged fluid milk products does not require changing other order-specific features contained in the producer-handler definitions that have been provided to address local marketing conditions. The addition of a uniform limit on producer-handler total monthly Class I route disposition and sales of packaged fluid milk products in all orders is consistent with the past establishment of the uniform limits, characteristics and features of various milk marketing order provisions applicable to other categories of regulated handlers.

The limit acceptable to or broadly supported by both handler and producer interests is three million pounds of monthly sales. This decision finds that a 3-million pound per month limit on total Class I route disposition and sales

of packaged fluid milk products is reasonable. The evidence supports a conclusion that most producer-handlers continue to be small enterprises that have minimal impact in the marketing areas in which they operate. Their participation in the market is not giving rise to disorderly marketing conditions that warrant establishing a more restrictive limit on Class I disposition and sales of packaged fluid milk products. Implicit in this finding is that producer-handlers with no more than 3 million pounds of monthly Class I disposition and sales of packaged fluid milk products represent a level of market participation such that the AMAA goal of establishing and maintaining orderly marketing is achieved.

The record supports concluding that a direct relationship exists between producer-handler size and the potential for disorder. More specifically, the record supports the conclusion that adoption of a limit on producer-handlers' total monthly Class I route disposition and sales of packaged fluid milk products to other plants across all orders is necessary to maintain orderly marketing conditions. This represents a needed change to the producer-handler provisions of Orders 124 and 131, which only consider producer-handlers' monthly Class I dispositions within the respective marketing area. Adoption of a limit on the total Class I route disposition and sales of packaged fluid milk products of producer-handlers is reasonable and should mitigate the inequitable conditions associated with distribution in other marketing areas or where the handling of milk is not regulated. The producer-handlers with more than three million pounds of total Class I disposition and sales of packaged fluid milk products per month and which meet the pooling standards of an order will have all of their distribution of Class I products pooled and priced no matter where that milk is sold. The producer-handlers with more than three million pounds of total Class I disposition and sales of packaged fluid milk products per month and which do not meet the pooling standards of an order will be treated as partially regulated distributing plants for route sales in the marketing areas.

Several comments and exceptions to the recommended decision noted that a producer-handler's transfers or sales of packaged fluid milk products to other plants are distinguished separately from the definition of route disposition. While transfers of packaged fluid milk products to other plants are certainly sales, such a measure of sales is technically not a component of the route disposition definition common to all milk marketing orders. To make more precise the findings of the recommended decision, this final decision specifically limits a producer-handler's exclusion from full regulation upon both sales of packaged fluid milk products to other plants during the month and sales that meet the route disposition definition. This decision agrees that it is appropriate to include and specify that a producer-handler's sales of packaged fluid milk products to other plants, together with route disposition during the month, for determining if the 3-million pound per month threshold has been met. Doing so provides for a complete measure of the Class I marketings of a producer-handler. Accordingly, the inclusion of a producer-handler's sales of packaged fluid milk products to other plants during the month is reflected in the amended producer-handler definitions of all milk marketing orders.

An additional proposal, Proposal 24, seeking an unlimited exemption for producer-handlers marketing own-farm milk disposed of as fluid milk products through retail channels under the same handler's exclusive control is not adopted. This decision gave consideration to the testimony and evidence, which revealed that producer-handlers distributing fluid milk products exclusively through their own retail channels are self-contained and do not balance against pooled supplies. While this seems to adhere to a long-held producer-handler characteristic, the responsibility and risk for balancing is still relative to producer-handler size, as defined by total monthly Class I disposition, which represents a significant contributing factor to disorderly marketing. At issue is the ultimate displacement of Class I sales that would otherwise be supplied through regulated sources.

This decision does not amend the producer-handler definitions to include unique labeling restrictions. The rationale offered in support of establishing labeling restrictions offers interesting scenarios of the consequences that may arise without its inclusion. The scenarios speak to how the restrictions will provide better assurances that producer-handlers cannot balance their Class I dispositions on the fully regulated market and cannot act together to effectively circumvent otherwise intended regulation. This decision finds such an addition to either the producer-handler or exempt plant definition to be overly proscriptive. The record lacks evidence, apart from theoretical constructions, demonstrating a reasonable need for its adoption. This recommended decision finds that producer-handlers with total Class I route disposition and sales of packaged fluid milk products in excess of three million pounds per month enjoy significant competitive sales advantages because they do not pay the Class I price for raw milk.

Several comments and exceptions were filed that opposed the recommendation denying unique labeling provisions that were proposed. The rationale offered in support of establishing labeling restrictions presents a scenario in which exempt handlers would be organized in such a way that they could collectively supply fluid products under an identical label. This practice could allow securing of accounts that any single exempt handler in the arrangement would otherwise be unable to service based upon its own marketings (described as "daisy-chaining"). The record lacks evidence, apart from theoretical construction, demonstrating a reasonable need for its adoption.

However, this decision does find that producer-handlers with total Class I route disposition and sales of packaged fluid milk products to other plants of more than three million pounds per month may shift the burden of surplus disposal to the regulated market through labeling. A central condition underlying the exemption of producer-handlers is that they bear the full burden of surplus disposal which prevents balancing at the expense of regulated handlers and the milk of producers pooled on an order. The record contains examples of producer-handlers supplying accounts with fluid products packaged under an identical label as supplied by a regulated handler. The Shamrock witness testified to a past occurrence in the Arizona marketing area which was addressed in a separate rulemaking. The Country Dairy witness testified that as a producer-handler, it supplies a retailer's locations within Michigan with the same label supplied by other processors. The Country Dairy witness also testified to packaging under the same label as Country Fresh, a fully regulated handler. While this decision does not find the need for adoption of unique labeling provisions, it is possible that a producer-handler may fail to meet requirements for producer-handler status because such behavior is reasonable evidence that bearing the full burden of surplus disposal has been avoided.

While the adoption of a 3-million pound per month limit on total Class I disposition and sales of packaged fluid milk products to other plants will not completely eliminate the impact of

producer-handlers across the order system, it should result in a reduction in any current and future market disruption. It is also consistent with many of the positions detailed during this proceeding, and will likely prevent a significant increase in the magnitude of disruption observed in the marketing areas.

Ruling on Motions

A motion submitted on behalf of Nature's Dairy moved for review and reversal of the Administrative Law Judge's decision to exclude the testimony of a witness on behalf of a producer-handler, namely Nature's Dairy. The motion requested that the hearing be reopened for the purpose of cross-examination of the Nature's Dairy witness. New England Producer-Handlers Association *et al.* and AIDA joined Nature's Dairy and submitted motions to that effect. The Administrative Law Judge denied the Nature's Dairy, New England Producer-Handler Association *et al.* and AIDA motions prior to certification of the record. The recommended decision concurred with the ruling of the Presiding Administrative Law Judge; accordingly, the motions submitted on behalf of Nature's Dairy, New England Producer-Handler Association *et al.* and AIDA were denied.

Comments and exceptions to the recommended decision filed by AIDA motioned anew for the hearing to be reopened for the same reasons. Their comment expressed the opinion that not reopening the hearing results in an incomplete hearing record. Conversely, comments and exceptions to the recommended decision filed on behalf of the Handler Coalition supports USDA's denial of AIDA's motion based predominately on largely legal arguments. After careful consideration of the comments and exceptions, this final decision concurs with the ruling of the Administrative Law Judge. Accordingly, the motions for reopening the hearing of this proceeding are denied.

Rulings on Proposed Findings and Conclusions

Briefs and proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such findings are denied for the reasons previously stated in this decision.

General Findings

The findings and determinations hereinafter set forth supplement those that were made when the orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) The tentative marketing agreements and the orders, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in all marketing areas, and the minimum prices specified in the tentative marketing agreements and the orders, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest;

(c) The tentative marketing agreements and the orders, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, the marketing agreements upon which a hearing has been held; and

(d) All milk and milk products handled by handlers, as defined in the tentative marketing agreements and the orders as hereby proposed to be amended, are in the current of interstate commerce or directly burden, obstruct, or affect interstate commerce in milk or its products.

Rulings on Exceptions

In arriving at the findings and conclusions, and the regulatory provisions of this decision, each of the exceptions received was carefully and fully considered in conjunction with the record evidence. To the extent that the findings and conclusions and the regulatory provisions of this decision are at variance with any of the exceptions, such exceptions are hereby overruled for the reasons previously stated in this decision.

Marketing Agreement and Order

Annexed hereto and made a part hereof are two documents: A Marketing Agreement regulating the handling of milk, and an Order amending the orders regulating the handling of milk in the Northeast and other marketing areas, which has been decided upon as the detailed and appropriate means of effectuating the foregoing conclusions.

It is hereby ordered that this entire decision and the two documents annexed hereto be published in the **Federal Register.**

Referendum Order To Determine Producer Approval; Determination of Representative Period; and Designation of Referendum Agent

It is hereby directed that a referenda be conducted and completed on or before the 30th day from the date this decision in published in the **Federal Register,** in accordance with the procedures for the conduct of referenda [7 CFR 900.300–311], to determine whether the issuance of the orders as amended and hereby proposed to be amended, regulating the handling of milk in the Northeast, Appalachian, Florida, Southeast, Upper Midwest, Central, Mideast, Pacific Northwest, Southwest and Arizona marketing areas is approved or favored by producers, as defined under the terms of the order, as amended and as hereby proposed to be amended, who during such representative period were engaged in the production of milk for sale within the aforesaid marketing areas.

The representative period for the conduct of such referenda is hereby determined to be May 2009.

The agents of the Secretary of Agriculture to conduct such referenda are hereby designated to be the respective Market Administrators of the aforesaid orders.

List of Subjects in 7 CFR Parts 1001, 1005, 1006, 1007, 1030, 1032, 1033, 1124, 1126, and 1131

Milk marketing orders.

Order Amending the Orders Regulating the Handling of Milk in the Northeast and Other Marketing Areas

This order shall not become effective until the requirements of section 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

Findings and Determinations

The findings and determinations hereinafter set forth supplement those that were made when the orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) *Findings.* A public hearing was held upon certain proposed amendments to the tentative marketing agreements and to the orders regulating the handling of milk in the Northeast and other marketing areas. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure (7 CFR part 900).

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The said orders as hereby amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk, as determined pursuant to section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the aforesaid marketing areas. The minimum prices specified in the orders as hereby amended are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest;

(3) The said orders as hereby amended regulate the handling of milk in the same manner as and are applicable only to persons in the respective classes of industrial or commercial activity specified in a marketing agreement upon which a hearing has been held; and

(4) All milk and milk products handled by handlers, as defined in the marketing agreements and the orders as hereby amended, are in the current of interstate commerce in milk or its products.

Order Relative to Handling

It is therefore ordered, that on and after the effective date hereof, the handling of milk in the Northeast and other marketing areas shall be in conformity to and in compliance with the terms and conditions of the order, as amended and, as hereby amended, as follows:

For reasons set forth in the preamble, 7 CFR parts 1001, 1005, 1006, 1007, 1030, 1032, 1033, 1124, 1126, and 1131 are proposed to be amended as follows:

1. The authority citation for 7 CFR parts 1001, 1005, 1006, 1007,1030, 1032, 1033, 1124, 1126, and 1131 continues to read as follows:

Authority: 7 U.S.C. 601–674 and 7253.

PART 1001—MILK IN THE NORTHEAST MARKETING AREA

2. Amend § 1001.10 by revising paragraph (a) to read as follows:

§ 1001.10 Producer-handler.

* * * * *

(a) Operates a dairy farm and a distributing plant from which there is route disposition in the marketing area, and from which total route disposition *and packaged sales of fluid milk products to other plants* during the month does not exceed 3 million pounds;

* * * * *

PART 1005—MILK IN THE APPALACHIAN MARKETING AREA

3. Amend § 1005.10 by revising paragraph (a) to read as follows:

§ 1005.10 Producer-handler.

* * * * *

(a) Operates a dairy farm and a distributing plant from which there is route disposition in the marketing area, and from which total route disposition and *packaged sales of fluid milk products to other plants* during the month does not exceed 3 million pounds;

* * * * *

PART 1006—MILK IN THE FLORIDA MARKETING AREA

4. Amend § 1006.10 by revising paragraph (a) to read as follows:

§ 1006.10 Producer-handler.

* * * * *

(a) Operates a dairy farm and a distributing plant from which there is route disposition in the marketing area, and from which total route disposition *and packaged sales of fluid milk products to other plants* during the month does not exceed 3 million pounds;

* * * * *

PART 1007—MILK IN THE SOUTHEAST MARKETING AREA

5. Amend § 1007.10 by revising paragraph (a) to read as follows:

§ 1007.10 Producer-handler.

* * * * *

(a) Operates a dairy farm and a distributing plant from which there is route disposition in the marketing area, and from which total route disposition *and packaged sales of fluid milk products to other plants* during the month does not exceed 3 million pounds;

* * * * *

PART 1030—MILK IN THE UPPER MIDWEST MARKETING AREA

6. Amend § 1030.10 by revising paragraph (a) to read as follows:

§ 1030.10 Producer-handler.

* * * * *

(a) Operates a dairy farm and a distributing plant from which there is route disposition in the marketing area, and from which total route disposition *and packaged sales of fluid milk products to other plants* during the month does not exceed 3 million pounds;

* * * * *

PART 1032—MILK IN THE CENTRAL MARKETING AREA

7. Amend § 1032.10 by revising paragraph (a) to read as follows:

§ 1032.10 Producer-handler.

* * * * *

(a) Operates a dairy farm and a distributing plant from which there is route disposition in the marketing area, and from which total route disposition *and packaged sales of fluid milk products to other plants* during the month does not exceed 3 million pounds;

* * * * *

PART 1033—MILK IN THE MIDEAST MARKETING AREA

8. Amend § 1033.10 by revising paragraph (a) to read as follows:

§ 1033.10 Producer-handler.

* * * * *

(a) Operates a dairy farm and a distributing plant from which there is route disposition in the marketing area, and from which total route disposition *and packaged sales of fluid milk products to other plants* during the month does not exceed 3 million pounds;

* * * * *

PART 1124—MILK IN THE PACIFIC NORTHWEST MARKETING AREA

9. Revise § 1124.10 introductory text to read as follows:

§ 1124.10 Producer-handler.

Producer-handler means a person who operates a dairy farm and a distributing plant from which there is route disposition in the marketing area, from which total route disposition *and packaged sales of fluid milk products to other plants during the month* does not exceed 3 million pounds, and who the market administrator has designated a producer-handler after determining that

all of the requirements of this section have been met.

* * * * *

PART 1126—MILK IN THE SOUTHWEST MARKETING AREA

10. Amend § 1126.10 by revising paragraph (a) to read as follows:

§ 1126.10 Producer-handler.

* * * * *

Producer-handler means a person who: (a) Operates a dairy farm and a distributing plant from which there is route disposition in the marketing area, and from which total route disposition *and packaged sales of fluid milk products to other plants* during the month does not exceed 3 million pounds;

* * * * *

PART 1131—MILK IN THE ARIZONA MARKETING AREA

11. Revise § 1131.10 introductory text to read as follows:

§ 1131.10 Producer-handler.

Producer-handler means a person who operates a dairy farm and a distributing plant from which there is route disposition in the marketing area, from which total route disposition *and packaged sales of fluid milk products to other plants* during the month does not exceed 3 million pounds, and who the market administrator has designated a producer-handler after determining that all of the requirements of this section have been met.

* * * * *

Note: The following will not appear in the Code of Federal Regulations.

Marketing Agreement Regulating the Handling of Milk in Certain Marketing Areas

The parties hereto, in order to effectuate the declared policy of the Act, and in accordance with the rules of practice and procedure effective thereunder (7 CFR part 900), desire to enter into this marketing agreement and do hereby agree that the provisions referred to in paragraph I hereof, as augmented by the provisions specified in paragraph II hereof, shall be and are the provisions of this marketing agreement as if set out in full herein.

I. The findings and determinations, order relative to handling, and the provisions of § _____ to _____[10] all inclusive, of the order regulating the handling of milk in the _____[11] marketing area (7 CFR part _____[12]); and

II. The following provisions:

§ _____[13] Record of milk handled and authorization to correct typographical errors.

(a) Record of milk handled. The undersigned certifies that he/she handled during the month of _____[14], _____ hundredweight of milk covered by this marketing agreement.

(b) Authorization to correct typographical errors. The undersigned hereby authorizes the Deputy Administrator, or Acting Deputy Administrator, Dairy Programs, Agricultural Marketing Service, to correct any typographical errors which may have been made in this marketing agreement.

Effective date. This marketing agreement shall become effective upon the execution of a counterpart hereof by the Department in accordance with section 900.14(a) of the aforesaid rules of practice and procedure.

In Witness Whereof, The contracting handlers, acting under the provisions of the Act, for the purposes and subject to the limitations herein contained and not otherwise, have hereunto set their respective hands and seals.

Signature

By (Name) _____

(Title) _____

(Address) _____

(Seal)

Attest _____

Dated: February 18, 2010.

Edward Avalos,

Under Secretary, Marketing and Regulatory Programs.

[FR Doc. 2010–4046 Filed 2–26–10; 4:15 pm]

BILLING CODE P

[10] First and last section of order.

[11] Name of order.

[12] Appropriate part number.

[13] Next consecutive section number.

[14] Appropriate representative period for the order.

Federal Register

Thursday,
March 4, 2010

Part V

The President

Notice of February 26, 2010—Continuation of the National Emergency With Respect to Zimbabwe

Federal Register
Vol. 75, No. 42
Thursday, March 4, 2010

Presidential Documents

Title 3—

The President

Notice of February 26, 2010

Continuation of the National Emergency With Respect to Zimbabwe

On March 6, 2003, by Executive Order 13288, the President declared a national emergency and blocked the property of persons undermining democratic processes or institutions in Zimbabwe, pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1706). He took this action to deal with the unusual and extraordinary threat to the foreign policy of the United States constituted by the actions and policies of certain members of the Government of Zimbabwe and other persons to undermine Zimbabwe's democratic processes or institutions. These actions and policies have contributed to the deliberate breakdown in the rule of law in Zimbabwe, to politically motivated violence and intimidation in that country, and to political and economic instability in the southern African region.

On November 22, 2005, the President issued Executive Order 13391 to take additional steps with respect to the national emergency declared in Executive Order 13288 by ordering the blocking of the property of additional persons undermining democratic processes or institutions in Zimbabwe.

On July 25, 2008, the President issued Executive Order 13469, which expanded the scope of the national emergency declared in Executive Order 13288 and ordered the blocking of the property of additional persons undermining democratic processes or institutions in Zimbabwe.

Because the actions and policies of these persons continue to pose an unusual and extraordinary threat to the foreign policy of the United States, the national emergency declared on March 6, 2003, and the measures adopted on that date, on November 22, 2005, and on July 25, 2008, to deal with that emergency, must continue in effect beyond March 6, 2010. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency with respect to the actions and policies of certain members of the Government of Zimbabwe and other persons to undermine Zimbabwe's democratic processes or institutions.

This notice shall be published in the *Federal Register* and transmitted to the Congress.

THE WHITE HOUSE,
February 26, 2010.

[FR Doc. 2010–4805
Filed 3–3–10; 11:15 am]
Billing code 3195–W0–P

Rules and Regulations

Federal Register
Vol. 75, No. 42
Thursday, March 4, 2010

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–1180; Directorate Identifier 2009–CE–060–AD; Amendment 39–16220; AD 2010–05–10]

RIN 2120–AA64

Airworthiness Directives; Hawker Beechcraft Corporation (Type Certificate Previously Held by Raytheon Aircraft Company) Models B300 and B300C Airplanes

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

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Hawker Beechcraft Corporation (type certificate previously held by Raytheon Aircraft Company) Models B300 and B300C airplanes. This AD requires you to inspect the terminal board on the circuit card rack assembly to determine if the correct bus bar is installed and replace if necessary. This AD also requires you to do an operational check of the left and right pitot heat annunciators for proper operation and take corrective action as necessary. This AD results from reports of the left and right pitot heat annunciators not illuminating for an inoperative pitot heat condition. We are issuing this AD to detect and correct installation of an incorrect bus bar, which could result in failure of the pitot heat annunciators to illuminate. This failure could lead to the pilot being unaware that moisture has frozen on the pitot tube(s) and cause erroneous flight instrument indication.

DATES: This AD becomes effective on April 8, 2010.

On April 8, 2010, the Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD.

ADDRESSES: For service information identified in this AD, contact Hawker Beechcraft Corporation, Attn: Airline Technical Support, P.O. Box 85, Wichita, Kansas 67201; telephone: (800) 429–5372; fax: (316) 676–8745; Internet: *http://www.hawkerbeechcraft.com.*

To view the AD docket, go to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, or on the Internet at *http://www.regulations.gov.* The docket number is FAA–2009–1180; Directorate Identifier 2009–CE–060–AD.

FOR FURTHER INFORMATION CONTACT: Kevin Schwemmer, Aerospace Engineer, FAA, Wichita Aircraft Certification Office (ACO), 1801 Airport Road, Room 100, Wichita, Kansas 67209, telephone: (316) 946–4174, fax: (316) 946–4107.

SUPPLEMENTARY INFORMATION:

Discussion

On December 8, 2009, we issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to certain Hawker Beechcraft Corporation Models B300 and B300C airplanes. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on December 17, 2009 (74 FR 66924). The NPRM proposed to require inspecting the terminal board on the circuit card rack assembly to determine if the correct bus bar is installed and replacing if necessary. The NPRM also proposed to require doing an operational check of the left and right pitot heat annunciators for proper operation and taking corrective action as necessary.

Comments

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

Conclusion

We have carefully reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed except for minor editorial corrections. We have determined that these minor corrections:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Costs of Compliance

We estimate that this AD will affect 131 airplanes in the U.S. registry.

We estimate the following costs to do the operational check:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
1 work-hour × $85 per hour = $85	Not applicable	$85	$11,135

We estimate the following costs to do any necessary placard fabrication and installation that will be required based on the results of the operational check. We have no way of determining the number of airplanes that may need the placard:

Labor cost	Parts cost	Total cost per airplane
.5 work-hour × $85 per hour = $42.50	Not applicable	$42.50

We estimate the following costs to do the inspection of the terminal board:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
1 work-hour × $85 per hour = $85	Not applicable	$85	$11,135

We estimate the following costs to do any necessary replacements that will be required based on the results of the inspection of the terminal board. We have no way of determining the number of airplanes that may need to replace the bus bar:

Labor cost	Parts cost	Total cost per airplane
3 work-hours × $85 per hour = $255	$50	$305

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

We prepared a summary of the costs to comply with this AD (and other information as included in the Regulatory Evaluation) and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES**. Include "Docket No. FAA–2009–1180; Directorate Identifier 2009–CE–060–AD" in your request.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2010–05–10 Hawker Beechcraft Corporation (Type Certificate Previously Held by Raytheon Aircraft Company): Amendment 39–16220; Docket No. FAA–2009–1180; Directorate Identifier 2009–CE–060–AD.

Effective Date

(a) This AD becomes effective on April 8, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to the following airplane models and serial numbers that are certificated in any category:

Models	Serial Nos.
B300	FL–381, FL–383 through FL–530, FL–532, FL–534 through FL–596, FL–598, and FL–600.
B300C	FM–12 through FM–25.

Subject

(d) Air Transport Association of America (ATA) Code 31: Instruments.

Unsafe Condition

(e) This AD results from reports of the left and right pitot heat annunciators not illuminating for an inoperative pitot heat condition. We are issuing this AD to detect and correct the installation of an incorrect bus bar, which could result in failure of the pitot heat annunciators to illuminate. This failure could lead to moisture freezing on the pitot tube(s) and cause erroneous flight instrument indication.

Compliance

(f) To address this problem, you must do the following, unless already done:

Actions	Compliance	Procedures
(1) Do an operational check of the left and right pitot heat annunciators for illumination.	Within the next 15 hours time-in-service (TIS) after April 8, 2010 (the effective date of this AD) or within the next 30 days after April 8, 2010 (the effective date of this AD), whichever occurs first.	Follow Hawker Beechcraft Mandatory Service Bulletin SB 31–3948, Issued: April 2009.
(2) If the left and/or right pitot heat annunciators do not illuminate, install a placard on the instrument panel within the pilot's clear view specifying the pitot heat annunciator(s) as inoperative.	Before further flight after the operational check required in paragraph (f)(1) of this AD.	Follow Hawker Beechcraft Mandatory Service Bulletin SB 31–3948, Issued: April 2009.
(3) Inspect the terminal board on the circuit card rack assembly to determine if a five-hole bus bar is installed.	Within the next 50 hours TIS after April 8, 2010 (the effective date of this AD) or within the next 3 months after April 8, 2010 (the effective date of this AD), whichever occurs first.	Follow Hawker Beechcraft Mandatory Service Bulletin SB 31–3948, Issued: April 2009.
(4) If a five-hole bus bar is found installed during the inspection required in paragraph (f)(3) of this AD, perform an operational check. If the operational check detects anomalies, contact the manufacturer specified in paragraph (i)(2) of this AD to obtain an FAA-approved repair scheme and incorporate the repair scheme.	Before further flight after the inspection required in paragraph (f)(3) of this AD.	Follow Hawker Beechcraft Mandatory Service Bulletin SB 31–3948, Issued: April 2009.
(5) If a four-hole bus bar is found installed during the inspection required in paragraph (f)(3) of this AD, replace it with a five-hole bus bar and perform an operational check. If the operational check detects anomalies, contact the manufacturer specified in paragraph (i)(2) of this AD to obtain an FAA-approved repair scheme and incorporate the repair scheme.	Before further flight after the inspection required in paragraph (f)(3) of this AD.	Follow Hawker Beechcraft Mandatory Service Bulletin SB 31–3948, Issued: April 2009.
(6) If proper operation of the left and right pitot heat annunciators is verified in paragraphs (f)(4) and (f)(5) of this AD, remove the placard that was installed in paragraph (f)(2) of this AD.	Before further flight after doing the operational check required in paragraphs (f)(4) and (f)(5) of this AD.	Follow Hawker Beechcraft Mandatory Service Bulletin SB 31–3948, Issued: April 2009.

Note: The operational check required in this AD is different from the pilot's pre-flight check. An FAA-approved licensed mechanic authorized to do maintenance is required to do the operational check.

(g) The inspection action of paragraph (f)(3) of this AD and the follow-on actions of paragraphs (f)(4) and (f)(5) of this AD may be done instead of the operational check and the placard requirements of paragraphs (f)(1) and (f)(2) of this AD provided the inspection is done within the next 15 hours TIS after April 8, 2010 (the effective date of this AD).

Alternative Methods of Compliance (AMOCs)

(h) The Manager, Wichita Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Kevin Schwemmer, Aerospace Engineer, ACE–118W, Wichita ACO, 1801 Airport Road, Room 100, Wichita, Kansas 67209, telephone: (316) 946–4174, fax: (316) 946–4107. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

Material Incorporated by Reference

(i) You must use Hawker Beechcraft Mandatory Service Bulletin SB 31–3948, Issued: April 2009, to do the actions required by this AD, unless the AD specifies otherwise.

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

(2) For service information identified in this AD, contact Hawker Beechcraft, Attn: Airline Technical Support, P.O. Box 85, Wichita, Kansas 67201; telephone: (800) 429–5372; fax: (316) 676–8745; Internet: *http://www.hawkerbeechcraft.com.*

(3) You may review copies of the service information incorporated by reference for this AD at the FAA, Central Region, Office of the Regional Counsel, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the Central Region, call (816) 329–3768.

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

Issued in Kansas City, Missouri, on February 24, 2010.

James E. Jackson,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–4436 Filed 3–3–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–0712; Directorate Identifier 2007–NM–152–AD; Amendment 39–16205; AD 2010–04–12]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Model DHC–8–100 and DHC–8–200 Series Airplanes, and Model DHC–8–301, –311, and –315 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Model DHC–8–100 and DHC–8–200 series airplanes, and DHC–8–301, –311, and –315 airplanes. This AD requires implementing a corrosion prevention and control program (CPCP) either by accomplishing specific tasks or by revising the maintenance inspection program to include a CPCP. This AD results from the determination that, as airplanes age, they are more likely to exhibit indications of corrosion. We are issuing this AD to prevent structural failure of the airplane due to corrosion.

DATES: This AD is effective April 8, 2010.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of April 8, 2010.

ADDRESSES: For service information identified in this AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; e-mail *thd.qseries@aero.bombardier.com*; Internet *http://www.bombardier.com.*

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Craig Yates, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7355; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an airworthiness directive (AD) that would apply to certain Bombardier Model DHC–8–100 and DHC–8–200 series airplanes, and DHC–8–301, –311, and –315 airplanes. That NPRM was published in the **Federal Register** on August 13, 2009 (74 FR 40778). That NPRM proposed to require implementing a corrosion prevention and control program (CPCP) either by accomplishing specific tasks or by revising the maintenance inspection program to include a CPCP.

Comments

We gave the public the opportunity to participate in developing this AD. We considered the comment received from the single commenter.

Request for Clarification of Inspections

Mesa Airlines requests that we restate that the inspections required by paragraph (h) of this AD to specify to inspect for Environmental Damage and/or Corrosion Protection and Control Program (ED/CPCP). The commenter asserts that the NPRM would require only tasks identified as both ED and CPCP. Mesa Airlines notes that accomplishing the ED/CPCP inspections only does not encompass the Air Transport Association (ATA) of America Codes listed in the NPRM.

We agree. Canadian AD CF–2007–06, dated April 10, 2007, describes doing "ED/CPCP" inspections. The required actions include "ED" inspections and inspections identified as both "ED" and "CPCP." We have clarified this in paragraph (h) of this AD. This has been coordinated with TCCA. We have also revised paragraphs (i) and (i)(2) of this AD to clarify the inspections.

Explanation of Change Made to This AD

We have revised this AD to identify the legal name of the manufacturer as published in the most recent type certificate data sheet for the affected airplane models.

Conclusion

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

Explanation of Change to Costs of Compliance

Since issuance of the NPRM, we have increased the labor rate used in the Costs of Compliance from $80 per work-hour to $85 per work-hour. The Costs of Compliance information, below, reflects this increase in the specified hourly labor rate.

Costs of Compliance

This AD affects about 154 airplanes of U.S. registry. There are between 16 and 17 specific inspections, depending on the applicable manual identified in Table 1 of this AD. The inspections take about 53 work hours per airplane, per inspection cycle, at an average labor rate of $85 per work hour. Based on these figures, the estimated cost of this AD for U.S. operators is $693,770, or $4,505 per airplane, per inspection cycle.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

You can find our regulatory evaluation and the estimated costs of compliance in the AD Docket.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2010–04–12 Bombardier, Inc.: Amendment 39–16205. Docket No. FAA–2009–0712; Directorate Identifier 2007–NM–152–AD.

Effective Date

(a) This airworthiness directive (AD) is effective April 8, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Bombardier, Inc. Model DHC–8–101, DHC–8–102, DHC–8–103, DHC–8–106, DHC–8–201, DHC–8–202, DHC–8–301, DHC–8–311, and DHC–8–315 airplanes, certificated in any category; serial numbers 003 and subsequent.

Subject

(d) Air Transport Association (ATA) of America Codes 32: Landing Gear, 51: Standard Practices/Structures; 52: Doors; 53: Fuselage; 54: Nacelles/Pylons; 55: Stabilizers; and 57: Wings.

Unsafe Condition

(e) This AD results from the determination that, as airplanes age, they are more likely to exhibit indications of corrosion. We are issuing this AD to prevent structural failure of the airplane due to corrosion.

Compliance

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

Manual References

(g) This AD refers to the manuals listed in Table 1 of this AD.

TABLE 1—APPLICABLE MANUALS

Bombardier model	Manual
(1) DHC–8–101, –102, –103, and –106 airplanes.	Part 1, Section 3, Structural Inspection Program, of the Bombardier de Havilland Dash 8 Maintenance Program Maintenance Review Board Report Dash 8 Series 100 Program Support Manual (PSM) 1–8–7, Revision 22, dated November 1, 2008.
(2) DHC–8–201 and DHC–8–202 airplanes	Part 1, Section 3, Structural Inspection Program, of the Bombardier de Havilland Dash 8 Maintenance Program Maintenance Review Board Report Dash 8 Series 200 PSM 1–82–7, Revision 13, dated November 1, 2008.
(3) Model DHC–8–301, DHC–8–311, and DHC–8–315 airplanes.	Part 1, Section 3, Structural Inspection Program, of the Bombardier de Havilland Dash 8 Maintenance Program Maintenance Review Board Report Dash 8 Series 300, PSM 1–83–7, Revision 22, dated November 1, 2008.

Inspections

(h) At the later of the times specified in paragraphs (h)(1) and (h)(2) of this AD, do each of the Environmental Damage/Corrosion Protection and Control Program (ED/CPCP) inspections identified with both "ED" and "CPCP," or with only "ED," including re-protection tasks, as applicable, which are found in the "Type of Damage" column of the applicable manual found in Table 1 of this AD, in accordance with the applicable manual identified in Table 1 of this AD. Except as provided by paragraph (i) of this AD, repeat each task thereafter at intervals not to exceed the compliance time specified in the "Repeat" column of the applicable manual identified in Table 1 of this AD.

(1) Within 24 months after the effective date of this AD.

(2) At the compliance time specified in the "Threshold" column of the applicable manual identified in Table 1 of this AD since the date of issuance of the original Canadian airworthiness certificate or the date of issuance of the original Canadian export certificate of airworthiness. If there is no value in the "Threshold" column, use the time specified in the "Repeat" column.

(i) After accomplishment of each initial ED/CPCP and ED task required by paragraph (h) of this AD, the FAA may approve the incorporation into the operator's approved maintenance/inspection program of the CPCP specified in the applicable manual identified in Table 1 of this AD; or the equivalent program that is approved in accordance with this AD. In all cases, the initial corrosion task for each airplane area must be completed by the initial compliance time specified in paragraph (h) of this AD.

(1) Any operator complying with paragraph (i) of this AD may use an alternative recordkeeping method to that otherwise required by section 91.417 ("Maintenance records") or section 121.380 ("Maintenance recording requirements") of the Federal Aviation Regulations (14 CFR 91.417 or 14 CFR 121.380, respectively) for the actions required by this AD, provided that the recordkeeping method is approved by the FAA and is included in a revision to the maintenance/inspection program. For the purposes of this paragraph, "the FAA" is defined as the cognizant Principal Maintenance Inspector (PMI) for operators that are assigned a PMI (i.e., part 121, 125, and 135 operators), and the cognizant Flight Standards District Office for other operators (i.e., part 91 operators).

(2) After the initial accomplishment of the ED/CPCP and ED tasks required by paragraph (h) of this AD, any extension of the repetitive intervals specified in the manual must be approved by the Manager, New York Aircraft Certification Office (ACO), FAA.

Corrective Actions

(j) If any corrosion is found during accomplishment of any action required by paragraph (h) of this AD: Before further flight, rework, repair, or replace, as applicable, in accordance with a method approved by either the Manager, New York ACO, FAA; or Transport Canada Civil Aviation (TCCA) (or its delegated agent).

Reporting Requirements for Level 3 Corrosion Findings

(k) If any Level 3 corrosion, as defined in Part 1 of the Bombardier (de Havilland) DHC–6 Twin Otter, Dash 7 & Dash 8 Corrosion Prevention and Control Manual, PSM 1–GEN–5, Revision 3, dated November 30, 1998, is found during the accomplishment of any action required by this AD, do paragraphs (k)(1), (k)(2), and (k)(3) of this AD. Under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

(1) Within 3 days after the finding of Level 3 corrosion, report findings to the Manager, New York ACO, FAA, in accordance with the Bombardier (de Havilland) DHC–6 Twin Otter, Dash 7 & Dash 8 Corrosion Prevention and Control Manual, PSM 1–GEN–5, Revision 3, dated November 30, 1998.

(2) Within 10 days after the finding of Level 3 corrosion, either submit a plan to the FAA to identify a schedule for accomplishing the applicable CPCP task on the remainder of the airplanes in the operator's fleet that are subject to this AD, or provide data substantiating that the Level 3 corrosion that was found is an isolated case. The FAA may impose a schedule other than that proposed in the plan upon finding that a change to the schedule is needed to ensure that any other Level 3 corrosion is detected in a timely manner. For the purposes of this paragraph, "the FAA" is defined as the cognizant Principal Maintenance Inspector (PMI) for operators that are assigned a PMI (i.e., part 121, 125, and 135 operators), and the cognizant Flight Standards District Office for other operators (i.e., part 91 operators).

(3) Within the time schedule approved in accordance with paragraph (k)(2) of this AD, accomplish the applicable task on the remainder of the airplanes in the operator's fleet that are subject to this AD.

Limiting Future Corrosion Findings

(l) If corrosion findings that exceed Level 1 are found in any area during any repeat of any CPCP task after the initial accomplishment required by paragraph (h) of this AD: Within 60 days after such finding, implement a means approved by the FAA to reduce future findings of corrosion in that area to Level 1 or better. For the purposes of this paragraph, "the FAA" is defined as the cognizant PMI for operators that are assigned a PMI (*i.e.,* part 121, 125, and 135 operators), and the cognizant Flight Standards District Office for other operators (*i.e.,* part 91 operators).

Scheduling Corrosion Tasks for Transferred Airplanes

(m) Before any airplane subject to this AD is transferred and placed into service by an operator: Establish a schedule for accomplishing the CPCP tasks required by this AD in accordance with paragraph (m)(1) or (m)(2) of this AD, as applicable.

(1) For airplanes on which the CPCP tasks required by this AD have been accomplished previously at the schedule established by this AD: Perform the first CPCP task in each area in accordance with the previous operator's schedule, or in accordance with the new operator's schedule, whichever results in an earlier accomplishment of that CPCP task. After the initial accomplishment of each CPCP task in each area as required by this paragraph, repeat each CPCP task in accordance with the new operator's schedule.

(2) For airplanes on which the CPCP tasks required by this AD have not been accomplished previously, or have not been accomplished at the schedule established by this AD: The new operator must perform each initial CPCP task in each area before further flight or in accordance with a schedule approved by the FAA. For the purposes of this paragraph, "the FAA" is defined as the cognizant Principal Maintenance Inspector (PMI) for operators that are assigned a PMI (*i.e.,* part 121, 125, and 135 operators), and the cognizant Flight Standards District Office for other operators (*i.e.,* part 91 operators).

Alternative Methods of Compliance (AMOCs)

(n)(1) The Manager, New York ACO, ANE–170, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone 516–228–7300; fax 516–794–5531.

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

Related Information

(o) Canadian airworthiness directive CF–2007–06, dated April 10, 2007, also addresses the subject of this AD.

Material Incorporated by Reference

(p) You must use the service information contained in Table 2 of this AD, as applicable, to do the actions required by this AD, unless the AD specifies otherwise.

TABLE 2—MATERIAL INCORPORATED BY REFERENCE

Document	Revision	Date
Part 1, Section 3, Structural Inspection Program, of the Bombardier de Havilland Dash 8 Maintenance Program Maintenance Review Board Report Dash 8 Series 100 Program Support Manual (PSM) 1–8–7.	22	November 1, 2008.
Part 1, Section 3, Structural Inspection Program, of the Bombardier de Havilland Dash 8 Maintenance Program Maintenance Review Board Report Series 200 PSM 1–82–7.	13	November 1, 2008.
Part 1, Section 3, Structural Inspection Program, of the Bombardier de Havilland Dash 8 Maintenance Program Maintenance Review Board Report Dash 8 Series 300, PSM 1–83–7.	22	November 1, 2008.
Bombardier (de Havilland) DHC–6 Twin Otter, Dash 7 & Dash 8 Corrosion Prevention and Control Manual, PSM 1-GEN–5, Part 1.	3	November 30, 1998.

Bombardier de Havilland Dash 8 Maintenance Program Maintenance Review Board Report Dash 8 Series 100 PSM 1–8–7, Revision 22, dated November 1, 2008, contains the following effective pages:

LIST OF EFFECTIVE PAGES

Page title/ description	Page number(s)	Revision number	Date shown on page(s)
Title Page	None shown	22	November 1, 2008.
List of Effective Pages	1–4	None shown*	November 1, 2008.
Log of Revisions	1–18	None shown*	November 1, 2008.
Record of Revisions	1–2	22	November 1, 2008.
Contents	1–4	None shown*	November 1, 2008.
Section 3:			
Subject 3–0	1–4	None shown*	November 1, 2008.
Subject 3–32	1–2	None shown*	November 1, 2008.
Subject 3–52	1–2	None shown*	November 1, 2008.
Subject 3–53	1–16	None shown*	November 1, 2008.
Subject 3–54	1–4	None shown*	November 1, 2008.
Subject 3–55	1–8	None shown*	November 1, 2008.
Subject 3–57	1–12	None shown*	November 1, 2008.

Bombardier de Havilland Dash 8 Maintenance Program Maintenance Review Board Report Dash 8 Series 200 PSM 1–82–7, Revision 13, dated November 1, 2008, contains the following effective pages:

LIST OF EFFECTIVE PAGES

Page title/ description	Page number(s)	Revision number	Date shown on page(s)
Title Page	None shown	13	November 1, 2008.
List of Effective Pages	1–4	None shown*	November 1, 2008.
Log of Revisions	1–8	None shown*	November 1, 2008.
Record of Revisions	1–2	13	November 1, 2008.
Contents	1–4	None shown*	November 1, 2008.
Section 3:			
Subject 3–0	1–4	None shown*	November 1, 2008.
Subject 3–32	1–2	None shown*	November 1, 2008.
Subject 3–52	1–2	None shown*	November 1, 2008.
Subject 3–53	1–16	None shown*	November 1, 2008.
Subject 3–54	1–4	None shown*	November 1, 2008.
Subject 3–55	1–6	None shown*	November 1, 2008.
Subject 3–57	1–12	None shown*	November 1, 2008.

Bombardier de Havilland Dash 8 Maintenance Program Maintenance Review Board Report Dash 8 Series 300 PSM 1–83–7, Revision 22, dated November 1, 2008, contains the following effective pages:

LIST OF EFFECTIVE PAGES

Page title/description	Page number(s)	Revision number	Date shown on page(s)
Title Page	None shown	22	November 1, 2008.
List of Effective Pages	1–4	None shown*	November 1, 2008.
Log of Revisions	1–18	None shown*	November 1, 2008.
Record of Revisions	1–2	22	November 1, 2008.
Contents	1–4	None shown*	November 1, 2008.
Section 3:			
Subject 3–0	1–4	None shown*	November 1, 2008.
Subject 3–32	1–2	None shown*	November 1, 2008.
Subject 3–52	1–2	None shown*	November 1, 2008.
Subject 3–53	1–18	None shown*	November 1, 2008.
Subject 3–54	1–4	None shown*	November 1, 2008.
Subject 3–55	1–8	None shown*	November 1, 2008.
Subject 3–57	1–12	None shown*	November 1, 2008.

(*Only the title page and Record of Revisions of these documents specify the revision level of these documents.)

Bombardier (de Havilland) DHC–6 Twin Otter, Dash 7 & Dash 8 Corrosion Prevention and Control Manual PSM 1–GEN–5, Part 1, Revision 3, dated November 30, 1998, contains the following effective pages:

LIST OF EFFECTIVE PAGES

Page title/ description	Page number(s)	Revision number	Date shown on page(s)
Title Page	None shown	None shown*	November 8, 1993.
Record of Revisions	1	3	August 27, 1991.
	2	None shown*	August 27, 1991.
Part 1 List of Effective Pages	1–2	None shown*	November 30, 1998.
Part 1 Table of Contents	1–4	None shown*	November 8, 1993.
Part 1 List of Illustrations	1–2	None shown*	November 8, 1993.
Part 1 List of Tables	1	None shown*	November 8, 1993.
	2	None shown*	August 27, 1991.
Introduction	1–2	None shown*	November 8, 1993.
	3–4	None shown*	November 5, 1992.
Chapter 1	1–1 through 1–10	None shown*	November 8, 1993.
Chapter 2	2–1 through 2–6	None shown*	November 8, 1993.
Chapter 3	3–1 through 3–4	None shown*	November 8, 1993.
Chapter 4	4–1 through 4–44	None shown*	November 8, 1993.
Chapter 5	5–1 through 5–48	None shown*	November 8, 1993.
Chapter 6	6–1 through 6–8, 6–11 through 6–16	None shown*	August 27, 1991.

LIST OF EFFECTIVE PAGES—Continued

Page title/ description	Page number(s)	Revision number	Date shown on page(s)
	6–9	None shown*	November 8, 1993.
	6–10	None shown*	November 5, 1992.
Chapter 7	7–1 through 7–2	None shown*	November 8, 1993.
Chapter 8	8–1 through 8–4	None shown*	November 8, 1993.
Chapter 9	9–1 through 9–4	None shown*	November 30, 1998.

(*Only page 1 of the Record of Revisions of Bombardier (de Havilland) DHC–6 Twin Otter, Dash 7 & Dash 8 Corrosion Prevention and Control Manual PSM 1–GEN– 5, Part 1, Revision 3, contains the revision level of this document.)

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

(2) For service information identified in this AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; e-mail *thd.qseries@aero.bombardier.com;* Internet *http://www.bombardier.com.*

(3) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

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

Issued in Renton, Washington, on February 11, 2010.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–3226 Filed 3–3–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–0718; Directorate Identifier 2009–NM–025–AD; Amendment 39–16212; AD 2010–05–03]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, 747–400F, 747SR, and 747SP Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for all Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, 747–400F, 747SR, and 747SP series airplanes. This AD requires one-time detailed and high frequency eddy current inspections for cracks in the wing and horizontal stabilizer side-of-body joints and the fuselage skin circumferential splices, and repair if necessary. This AD also requires, for certain airplanes, repetitive detailed inspections for cracks of the fuselage skin circumferential splices, and repair if necessary. This AD results from Boeing analysis indicating that the wing and horizontal stabilizer side-of-body joints, and the fuselage skin circumferential splices, are susceptible to fatigue cracking due to high cyclic loads on the airplane. We are issuing this AD to detect and correct fatigue cracking at multiple adjacent locations in the subject areas, which could connect to form large cracks and result in reduced structural integrity leading to rapid decompression and consequent loss of control of the airplane.

DATES: This AD is effective April 8, 2010.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of April 8, 2010.

ADDRESSES: For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; e-mail *me.boecom@boeing.com*; Internet *https://www.myboeingfleet.com.*

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Ivan Li, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6437; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an airworthiness directive (AD) that would apply to all Model 747 airplanes. That NPRM was published in the **Federal Register** on August 25, 2009 (74 FR 42807). That NPRM proposed to require one-time detailed and high frequency eddy current inspections for cracks in the wing and horizontal stabilizer side-of-body joints and the fuselage skin circumferential splices, and repair if necessary. That NPRM also proposed to require, for certain airplanes, repetitive detailed inspections for cracks of the fuselage skin circumferential splices, and repair if necessary.

Comments

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

Supportive Comment

Boeing concurs with the contents of the NPRM.

Requests To Change Compliance Times

UPS asks that we change the NPRM to extend the compliance time for the inspections specified in Table 3 of paragraph 1.E. of Boeing Alert Service Bulletin 747–51A2060, dated October 30, 2008, and required by paragraph (g) of the NPRM. UPS states that the inspections are not to be done until at least 28,500 total flight cycles or 130,000 total flight hours, whichever occurs later, have been accumulated on

the airplane. UPS notes that by restricting the compliance time to between 28,500 and 30,000 total flight cycles or between 130,000 and 135,000 total flight hours, whichever occurs later, operators are extremely limited in positioning aircraft for common access at maintenance checks. UPS adds that without being able to reposition aircraft to line up common access maintenance inspections, a heavy burden will be placed on the operator's maintenance plans, having an adverse economic impact on the airlines.

All Nippon Airways (ANA) asks that the lower flight cycle criteria of 28,500 flight cycles be reduced to 28,000 flight cycles to alleviate additional maintenance burdens. ANA understands the intent of the service bulletin but based on the average utilization of its airplanes (2,000 to 3,000 flight cycles accumulated between C checks), the proposed lower cycle criterion might be a burden to its future operation.

We disagree with the commenters' request to change the compliance time. While restricting the compliance time for the one-time inspection to between 28,500 and 30,000 total flight cycles, or between 130,000 and 135,000 total flight hours, whichever occurs later, would have additional impact on scheduled maintenance, the inspections are intended to detect widespread fatigue damage (WFD) of affected structure. We have determined that such damage is likely to occur in a specific timeframe (in terms of flight cycles and flight hours). Therefore, the potential WFD would be undetectable if the inspections are done at an earlier time.

In developing an appropriate compliance time for the inspections, we considered the safety implications and the practical aspect of accomplishing the inspections within a period of time that corresponds to the normal scheduled maintenance for most affected operators. In consideration of these items, and since the inspections are done one time only, we have determined that the specified compliance time will ensure an acceptable level of safety and allow the inspections to be done during scheduled maintenance intervals for most affected operators. However, under the provisions of paragraph (m) of the AD, we will consider requests to adjust the compliance time if sufficient data are submitted to substantiate that the new compliance time would provide an acceptable level of safety. We have made no change to the AD in this regard.

Request To Omit Reporting Negative Findings

Japan Airlines (JAL) asks that the requirement to report negative findings to Boeing be omitted from the NPRM. JAL states that the proposed reporting requirement specifies submitting a report of both positive and negative findings within 30 days. JAL notes that Boeing requests a report of crack findings only. JAL also asks that we remove the reporting requirement for positive findings. JAL adds that, in most cases, operators will contact Boeing to ask for a review when cracks are found.

We partially agree with the commenter. We do not agree to remove the reporting requirement for positive findings. However, we find that it is not necessary for operators to report negative findings for Boeing and the FAA to further evaluate the WFD inspection program. Therefore, we have changed paragraph (l) of this AD to require only positive findings be reported.

Request To Delay Issuing AD

JAL also asks that the final rule be issued after release of a revised service bulletin to correct an error. Figure 31, Sheet 7, of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–51A2060, dated October 30, 2008, specifies inspecting the fuselage stringer; however, Circle Note 1 of Sheet 6 specifies inspecting the fuselage skin. Boeing has confirmed that an inspection of the "fuselage skin" is correct, and stated that a revised service bulletin will be issued.

We partially agree with the commenter. We agree that there is an error in Circle Note 1 of Sheet 6 of Figure 31; however, we do not agree that issuing the final rule should be delayed to wait for the service bulletin to be revised. We have added Note 1 to this AD to clarify that the inspection specified in Sheet 6 of Figure 31 is of the fuselage skin.

Request To Include Credit for Previously Approved Repairs

ANA asks that credit for previously approved repairs per AMOCs for AD 2004–07–22, Amendment 39–13566 (69 FR 18250, April 7, 2004), AD 2004–07–22 R1, Amendment 39–13566 (69 FR 24063, May 3, 2004), or AD 2006–10–16 Amendment 39–14600 (71 FR 28570, May 17, 2006) be included in the NPRM.

We acknowledge the commenter's request. However, the purpose of this AD is to detect WFD of affected structure, and the effect of local repairs on that affected structure must be thoroughly evaluated on a case-by-case basis. We suggest that the commenter contact Boeing for evaluation guidelines. After the commenter has the evaluation guidelines, under the provisions of paragraph (m) of the AD, we will consider requests to give credit for previously approved repairs if sufficient data are submitted. We have made no change to the AD in this regard.

Clarifications to Final Rule

The affected airplane models identified in the Summary section of this final rule have been changed, for clarification, to more accurately reflect the airplane models as they are identified on the type certificate data sheet. We have also revised this final rule to identify the legal name of the manufacturer as published in the most recent type certificate data sheet for the affected airplane models.

Explanation of Change Made to This AD

Boeing Commercial Airplanes has received an Organization Designation Authorization (ODA), which replaces their previous designation as a Delegation Option Authorization (DOA) holder. We have revised paragraph (m)(3) of this AD to delegate the authority to approve an alternative method of compliance for any repair required by this AD to the Boeing Commercial Airplanes ODA.

Explanation of Change to Costs of Compliance

After the NPRM was issued, we reviewed the figures we have used over the past several years to calculate AD costs to operators. To account for various inflationary costs in the airline industry, we find it necessary to increase the labor rate used in these calculations from $80 per work-hour to $85 per work-hour. The cost impact information, below, reflects this increase in the specified hourly labor rate.

Interim Action

We consider this AD interim action. If final action is later identified, we might consider further rulemaking then.

Conclusion

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

Costs of Compliance

We estimate that this AD affects 165 airplanes of U.S. registry. We also estimate that it takes 2,604 work-hours per product to comply with this AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $36,521,100, or $221,340 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

You can find our regulatory evaluation and the estimated costs of compliance in the AD Docket.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2010–05–03 The Boeing Company: Amendment 39–16212. Docket No. FAA–2009–0718; Directorate Identifier 2009–NM–025–AD.

Effective Date

(a) This airworthiness directive (AD) is effective April 8, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all The Boeing Company Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, 747–400F, 747SR, and 747SP series airplanes, certificated in any category.

Subject

(d) Air Transport Association (ATA) of America Code 51: Standard practices/structures.

Unsafe Condition

(e) This AD results from a Boeing analysis indicating that the wing and horizontal stabilizer side-of-body joints, and the fuselage skin circumferential splices, are susceptible to fatigue cracking due to high cyclic loads on the airplane. The Federal Aviation Administration is issuing this AD to detect and correct fatigue cracking at multiple adjacent locations in the subject areas, which could connect to form large cracks and result in reduced structural integrity leading to rapid decompression and consequent loss of control of the airplane.

Compliance

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

Inspections and Repair if Necessary

(g) Except as provided by paragraphs (h) and (i) of this AD: At the applicable times specified in paragraph 1.E. of Boeing Alert Service Bulletin 747–51A2060, dated October 30, 2008, do one-time inspections for cracks in the wing and horizontal stabilizer side-of-body joints, and the fuselage skin circumferential splices; do detailed inspections, as applicable, for cracks of the fuselage skin circumferential splices; and do all applicable repairs before further flight, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–51A2060, dated October 30, 2008, except as provided by paragraphs (j) and (k) of this AD. As applicable, repeat the detailed inspection for cracks of the fuselage skin circumferential splices, at the applicable times specified in paragraph 1.E. of Boeing Alert Service Bulletin 747–51A2060, dated October 30, 2008.

Note 1: The inspection specified in Sheet 6 of Figure 31 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–51A2060, dated October 30, 2008, is an external detailed inspection of the fuselage skin as specified in Step 3 of Figure 31, not an inspection of the fuselage stringer.

Exceptions to Compliance Times

(h) Where Boeing Alert Service Bulletin 747–51A2060, dated October 30, 2008, specifies a compliance time after "* * * the date on this service bulletin," this AD requires compliance within the specified compliance time after the effective date of this AD.

(i) Where Note (a) of Table 2 of paragraph 1.E. of Boeing Alert Service Bulletin 747–51A2060, dated October 30, 2008, specifies that if a certain modification was done then certain inspections may be deferred "until the post modification inspection period as given in Service Bulletin 747–57A2314," this AD allows, for airplanes on which the modification specified in Boeing Service Bulletin 747–57A2314 has been done, deferring the inspections specified in Part 2 of paragraph 3.B., Work Instructions, of Boeing Alert Service Bulletin 747–51A2060, dated October 30, 2008, until the applicable post-modification inspection compliance times required by paragraph (e) of AD 2004–03–09, amendment 39–13453.

Exception to Part 4 Actions

(j) For Group 6 airplanes identified in Boeing Alert Service Bulletin 747–51A2060, dated October 30, 2008: Do the inspections specified in Part 4 of paragraph 3.B., Work Instructions, of Boeing Alert Service Bulletin 747–51A2060, dated October 30, 2008, in accordance with the procedures specified in paragraph (m) of this AD.

Exception to Corrective Actions

(k) If any crack is found during any inspection required by this AD, and Boeing Alert Service Bulletin 747–51A2060, dated October 30, 2008, specifies to contact Boeing for appropriate action: Before further flight, repair using a method approved in accordance with the procedures specified in paragraph (m) of this AD.

Reporting Requirement

(l) At the applicable time specified in paragraph (l)(1) or (l)(2) of this AD, submit a report of positive findings of cracks found during the inspection required by paragraph (g) of this AD to Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. Alternatively, operators may submit reports to their Boeing field service representatives. The report must contain, as a minimum, the following information: airplane serial number, flight cycles at time

of discovery, location(s) and extent of positive crack findings. Under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements contained in this AD and has assigned OMB Control Number 2120–0056.

(1) If the inspection was done on or before the effective date of this AD: Send the report within 30 days after the effective date of this AD.

(2) If the inspection was done after the effective date of this AD: Send the report within 30 days after the inspection is done.

Alternative Methods of Compliance (AMOCs)

(m)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Ivan Li, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle ACO, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6437; fax (425) 917–6590; Or, e-mail information to *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov*.

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

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

Material Incorporated by Reference

(n) You must use Boeing Alert Service Bulletin 747–51A2060, dated October 30, 2008, to do the actions required by this AD, unless the AD specifies otherwise.

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

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; e-mail *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.com*.

(3) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

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

Issued in Renton, Washington, on February 11, 2010.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–3714 Filed 3–3–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 61, 63, and 65

[Docket No.: FAA–2009–0923; Special Federal Aviation Regulation No. 100–2]

RIN 2120–AJ54

Relief for U.S. Military and Civilian Personnel Who Are Assigned Outside the United States in Support of U.S. Armed Forces Operations

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; request for comments.

SUMMARY: The FAA is replacing Special Federal Aviation Regulation 100–1 (SFAR 100–1), with SFAR 100–2 that continues to allow Flight Standards District Offices (FSDOs) to accept expired flight instructor certificates and inspection authorizations for renewals from U.S. military and civilian personnel (U.S. personnel) who are assigned outside the United States in support of U.S. Armed Forces operations. SFAR 100–2 also continues to allow FSDOs to accept expired airman written test reports for certain practical tests from U.S. personnel who are assigned outside the United States in support of U.S. Armed Forces operations. This action is necessary to avoid penalizing U.S. personnel who are unable to meet the regulatory time limits of their flight instructor certificate, inspection authorization, or airman written test report because they are serving outside the United States in support of U.S. Armed Forces operations. The effect of this action is to give U.S. personnel who are assigned outside the United States in support of U.S. Armed Forces operations extra time to meet certain eligibility requirements in the current rules.

DATES: This final rule is effective June 20, 2010.

Submit comments on or before April 5, 2010.

ADDRESSES: You may send comments identified by Docket Number FAA–2009–0923 using any of the following methods:

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

For more information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://DocketsInfo.dot.gov.*

Docket: To read background documents or comments received, go to *http://www.regulations.gov* at any time or to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: R. Lance Nuckolls, AFS–810, General Aviation and Commercial Division, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–8212.

For legal questions about this SFAR, contact: Michael Chase, AGC–240, Office of Chief Counsel, Regulations Division, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–3110; e-mail to *michael.chase@faa.gov.*

SUPPLEMENTARY INFORMATION:

The Direct Final Rule Procedure

Under 14 CFR 11.13 the FAA may issue a direct final rule with request for comments which is a rule issued in final (with an effective date) that invites public comment on the rule. The FAA is using the direct final rule procedure because this rule is not controversial, not expected to result in the receipt of an adverse comment, and a notice of proposed rulemaking (NPRM) is not necessary. SFAR 100–2 will continue to provide a limited amount of regulatory relief to certain U.S. personnel who are assigned outside the United States in support of U.S. Armed Forces operations. The FAA finds good cause for issuing this direct final rule as an exception to notice and comment rulemaking procedures. Unless a written adverse comment, or a written notice of intent to submit an adverse comment, is received within the comment period the regulation will become effective on June 20, 2010. In previous issuances of this SFAR, we have received no comments.

After the comment period closes, the FAA will publish a document in the **Federal Register** indicating that no adverse comments were received and confirming the date on which the SFAR will become effective. In the event that the FAA receives a timely adverse comment, or a written notice of intent to submit such a comment, the FAA will withdraw the direct final rule. An NPRM may be published with a new comment period.

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, please send only one copy of written comments, or if you are filing comments electronically, please submit your comments only one time.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, we will consider all comments we receive on or before the closing date for comments. We will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. We may change this proposal in light of the comments we receive.

Background

Currently, the U.S. Armed Forces are engaged in activities that have resulted in overseas assignments for both military and civilian personnel. Because of the unexpected duration of these assignments, the FAA has determined that the flight instructor certificates, inspection authorizations, and airman written test reports held by some U.S. military and civilian personnel may expire before they return to the United States. If so, these individuals would have to reestablish their qualifications. We believe it is unfair to penalize these military and civilian personnel in this manner. Therefore, the FAA has determined that we should provide relief to these U.S. personnel who are unable to comply with some of the regulatory time constraints as a result of their assignment outside the United States in support of U.S. Armed Forces operations.

Previous Regulatory Action

After the terrorist attacks of September 11, 2001, many U.S. military and civilian personnel were assigned outside the United States in support of Operation Enduring Freedom. For this reason, we adopted SFAR 96 to provide relief to a narrow range of individuals in a narrow set of circumstances. (67 FR 30524, May 6, 2002). As a result of the continuing conflicts, the FAA superseded SFAR 96 with SFAR 100 (68 FR 36902, June 20, 2003) that applied to all military and civilian personnel assigned overseas in support of any and all U.S. Armed Forces operations. Additionally, the FAA further extended SFAR 100 with the issuance of SFAR 100–1 (70 FR 37946–37949, June 30, 2005) with an expiration date of June 20, 2010. Most of these U.S. military and civilian personnel are or will be located at military bases that are away from their normal training or work environment. There are no FAA aviation safety inspectors, designated examiners, or FAA facilities readily available in the areas where these U.S. military and civilian personnel are assigned.

SFAR 100–2 replaces SFAR 100–1. SFAR 100–2 is being issued without an expiration date and will remain in effect until further notice. This ensures these U.S. personnel assigned outside of the United States, who continue to preserve, protect and defend the American public, can obtain additional time for renewal of their flight instructor certificates, inspection authorizations, and airman written test reports.

Who is affected by this SFAR?

To be eligible for the relief provided by this SFAR, a person must meet two criteria—one related to the person's assignment and the second related to the expiration of the person's certificate, authorization, or test report.

Assignment. The person must have served in a civilian or military capacity outside the United States in support of U.S. Armed Forces operations some time on or after September 11, 2001. The term "United States" is defined under 14 CFR 1.1 and means "the States, the District of Columbia, Puerto Rico, and the possessions, including the territorial waters and the airspace of those areas." "In support of U.S. Armed Forces operations" means an assignment that supports operations being conducted by our U.S. Army, Navy, Air Force, Marine Corps, and Coast Guard, including their regular and reserve components. Members serving without component status are also covered. A person seeking relief under this SFAR must be able to show that he or she had an assignment as described above by providing appropriate documentation that is described below.

Expiration. The person's flight instructor certificate, inspection authorization, or airman written test report must have expired some time on or after September 11, 2001.

Renewing a Flight Instructor Certificate

The FAA regulations governing flight instructor certificates provide that they expire 24 calendar months after the month of issuance. The regulations also provide that a flight instructor may renew his or her certificate before it expires, but if it expires, the flight instructor must get a new certificate. If you are interested in the details of how to get or renew a flight instructor certificate, please see 14 CFR 61.197 and 61.199.

This SFAR changes the existing regulations for a certain class of individuals by allowing FAA Flight Standards District Offices to accept for a limited amount of time an expired flight instructor certificate for the purpose of renewing the certificate. Therefore, a person who can show the kind of evidence required by this SFAR (described below) can apply for renewal of a flight instructor certificate under 14 CFR 61.197. A person cannot exercise the privileges of a flight instructor certificate if it has expired, but the person can renew the flight instructor certificate under the limited circumstances described in this SFAR.

Airman Written Test Reports of Parts 61, 63, and 65

Generally, FAA regulations give airmen a limited amount of time to take a practical test after passing a knowledge test. For example, 14 CFR 61.39(a)(1) gives a person 24 calendar months. This SFAR permits an extension of the expiration date of the airman written test reports of parts 61, 63, and 65. The extension can be for up to six calendar months after returning to the United States or termination of SFAR 100–2, whichever date is earlier.

Renewing an Inspection Authorization

Under 14 CFR 65.92, an inspection authorization expires on March 31 of each year. Under 14 CFR 65.93, a person can renew an inspection authorization for an additional 12 calendar months by presenting certain evidence to the FAA during the month of March. This SFAR changes the existing regulations for individuals eligible under this SFAR by allowing FAA Flight Standards District Offices to accept for a limited amount of time an expired inspection authorization for the purpose of renewing the authorization. Therefore, a person who can show the kind of evidence required by this SFAR (described below) can apply for renewal of an inspection authorization under 14 CFR 65.93. If an inspection authorization expires, the person may not exercise the privileges of the authorization until that person renews the authorization. In this case, to meet the renewal requirements the person must attend a refresher course (*see* § 65.93(a)(4)) or submit to an oral test (*See* § 65.93(a)(5)) within 6 calendar months after returning to the United States from an assignment outside the United States in support of U.S. Armed Forces operations.

Evidence of an Assignment Outside the United States in Support of U.S. Armed Forces Operations

A person must show one of the following kinds of evidence to establish that the person is eligible for the relief provided by this SFAR:

1. An official U.S. Government notification of personnel action, or equivalent document, showing the person was a U.S. civilian on official duty for the U.S. Government and was assigned outside the United States in support of U.S. Armed Forces operations at some time between September 11, 2001 to termination of SFAR 100–2;

2. An official military order that shows the person was assigned to military duty outside the United States in support of U.S. Armed Forces operations at some time after September 11, 2001 to termination of SFAR 100–2; or

3. A letter from the person's military commander or civilian supervisor providing the dates during which the person served outside the United States in support of U.S. Armed Forces operations at some time between September 11, 2001 to termination of SFAR 100–2.

International Compatibility

In keeping with U.S obligations under the Convention on International Civil Aviation, it is FAA policy to comply with International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has determined that there are no ICAO Standards and Recommended Practices that correspond to these regulations.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. We have determined that there is no new information collection requirement associated with this final rule.

Regulatory Evaluation, Regulatory Flexibility Determination, International Trade Impact Assessment, and Unfunded Mandates Assessment

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs each Federal agency to propose or adopt a regulation only after a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (19 U.S.C. 2531–2533) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act also requires agencies to consider international standards and, where appropriate, use them as the basis of U.S. standards. And fourth, the Unfunded Mandates Reform Act of 1995 requires agencies to prepare a written assessment of the costs, benefits and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation.)

The Department of Transportation Order DOT 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If the expected cost impact is so minimal that a proposal does not warrant a full evaluation, this order permits a statement to that effect and the basis for it to be included in the preamble and a full regulatory evaluation need not be prepared. Such a determination has been made for this rule. The reasoning for that determination follows.

The FAA has determined that the expected economic impact of this final rule is so minimal that it does not need a full regulatory evaluation. This action imposes no costs on operators subject to this rule; however, it does provide some unquantifiable benefits to some who would avoid the costs of having to reestablish expired credentials. The expected outcome will have a minimal impact with positive net benefits, and a regulatory evaluation was not prepared.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) of 1980, 5 U.S.C. 601–612, directs the FAA to fit regulatory requirements to the scale of the business, organizations, and governmental jurisdictions subject to the regulation. We are required to determine whether a proposed or final action will have a "significant economic impact on a substantial number of small entities" as defined in the Act. If we find that the action will have such impacts, we must do a "regulatory flexibility analysis."

This SFAR replaces Special Federal Aviation Regulation 100–1 (SFAR 100–1), with SFAR 100–2 that continues to allow Flight Standards District Offices (FSDOs) to accept expired flight instructor certificates and inspection authorizations for renewals from U.S. military and civilian personnel (U.S. personnel) who are assigned outside the United States in support of U.S. Armed Forces operations. SFAR 100–2 also continues to allow FSDOs to accept expired airman written test reports for certain practical tests from U.S. personnel who are assigned outside the United States in support of U.S. Armed Forces operations. Its economic impact is minimal. Therefore, we certify that this action will not have a significant economic impact on a substantial number of small entities.

International Trade Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create

unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such as protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA notes that this rule uses international standards as its basis and does not create unnecessary obstacles to the foreign commerce of the United States.

Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a "significant regulatory action". The FAA currently uses an inflation-adjusted value of $136.1 million in lieu of $100 million.

This final rule does not contain such a mandate. Therefore, the requirements of Title II of the Act do not apply.

Executive Order 13132, Federalism

The FAA has analyzed this SFAR under the principles and criteria of Executive Order 13132, Federalism. We determined that this action will not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it does not have federalism implications.

Environmental Analysis

FAA Order 1050.1E identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in paragraph 312f and involves no extraordinary circumstances.

Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA has analyzed this SFAR under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). We have determined that it is not a "significant energy action" under the executive order because it is not a "significant regulatory action" under Executive Order 12866, and it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

Availability of Rulemaking Documents

You can get an electronic copy of rulemaking documents using the Internet by—

1. Searching the Federal eRulemaking portal (*http://www.regulations.gov*);

2. Visiting the FAA's Regulations and Policies Web page at—*http://www.faa.gov/regulations_policies.*

3. Accessing the Government Printing Office's Web page at—*http://www.gpoaccess.gov/fr/index.html.*

You can also get a copy by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–9680. Make sure to identify the amendment or docket number of this rulemaking.

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://DocketsInfo.dot.gov.*

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. Therefore, any small entity that has a question regarding this document may contact their local FAA official, or the person listed under **FOR FURTHER INFORMATION CONTACT**. You can find out more about SBREFA on the Internet at our site—

http://www.faa.gov/regulations_policies/rulemaking/sbre_act.

List of Subjects

14 CFR Part 61

Aircraft, Aircraft pilots, Airmen, Airplanes, Air safety, Air transportation, Aviation safety, Balloons, Helicopters, Rotorcraft, Students.

14 CFR Part 63

Air safety, Air transportation, Airman, Aviation safety, Safety, Transportation.

14 CFR Part 65

Airman, Aviation safety, Air transportation, Aircraft.

The Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends parts 61, 63, and 65 of Title 14 Code of Federal Regulations as follows:

PART 61—CERTIFICATION: PILOTS, FLIGHT INSTRUCTORS, AND GROUND INSTRUCTORS

■ 1. The authority citation for part 61 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44703, 44707, 44709–44711, 45102–45103, 45301–45302.

SFAR 100–1 [Removed]

■ 2. Remove SFAR 100–1 from parts 61, 63 and 65.

■ 3. Add Special Federal Aviation Regulation (SFAR) No. 100–2 to parts 61, 63 and 65 to read as follows: [The full text of the SFAR will appear in part 61]

SFAR No. 100–2—Relief for U.S. Military and Civilian Personnel Who are Assigned Outside the United States in Support of U.S. Armed Forces Operations

1. *Applicability.* Flight Standards District Offices are authorized to accept from an eligible person, as described in paragraph 2 of this SFAR, the following:

(a) An expired flight instructor certificate to show eligibility for renewal of a flight instructor certificate under § 61.197, or an expired written test report to show eligibility under part 61 to take a practical test;

(b) An expired written test report to show eligibility under §§ 63.33 and 63.57 to take a practical test; and

(c) An expired written test report to show eligibility to take a practical test required under part 65 or an expired inspection authorization to show eligibility for renewal under § 65.93.

2. *Eligibility.* A person is eligible for the relief described in paragraph 1 of this SFAR if:

(a) The person served in a U.S. military or civilian capacity outside the

United States in support of the U.S. Armed Forces' operation during some period of time from September 11, 2001, to termination of SFAR 100–2;

(b) The person's flight instructor certificate, airman written test report, or inspection authorization expired some time between September 11, 2001, and 6 calendar months after returning to the United States or termination of SFAR 100–2, whichever is earlier; and

(c) The person complies with § 61.197 or § 65.93 of this chapter, as appropriate, or completes the appropriate practical test within 6 calendar months after returning to the United States, or upon termination of SFAR 100–2, whichever is earlier.

3. *Required documents.* The person must send the Airman Certificate and/or Rating Application (FAA Form 8710–1) to the appropriate Flight Standards District Office. The person must include with the application one of the following documents, which must show the date of assignment outside the United States and the date of return to the United States:

(a) An official U.S. Government notification of personnel action, or equivalent document, showing the person was a civilian on official duty for the U.S. Government outside the United States and was assigned to a U.S. Armed Forces' operation some time between September 11, 2001, to termination of SFAR 100–2;

(b) Military orders showing the person was assigned to duty outside the United States and was assigned to a U.S. Armed Forces' operation some time between September 11, 2001, to termination of SFAR 100–2 ; or

(c) A letter from the person's military commander or civilian supervisor providing the dates during which the person served outside the United States and was assigned to a U.S. Armed Forces' operation some time between September 11, 2001, to termination of SFAR 100–2.

4. *Expiration date.* This Special Federal Aviation Regulation No. 100–2 is effective until further notice.

PART 63—CERTIFICATION: FLIGHT CREWMEMBERS OTHER THAN PILOTS

■ 4. The authority citation for part 63 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44703, 44707, 44709–44711, 45102–45103, 45301–45302.

PART 65—CERTIFICATION: AIRMEN OTHER THAN FLIGHT CREWMEMBERS

■ 5. The authority citation for part 65 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44703, 44707, 44709–44711, 45102–45103, 45301–45302.

Issued in Washington, DC, on February 22, 2010.

J. Randolph Babbitt,

Administrator.

[FR Doc. 2010–4580 Filed 3–3–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 333

RIN 0910—AG00

[Docket Nos. FDA–1981–N–0114 and FDA–1992–N–0049] (formerly Docket Nos. 1981N–0114A and 1992N–0311)

Classification of Benzoyl Peroxide as Safe and Effective and Revision of Labeling to Drug Facts Format; Topical Acne Drug Products for Over-The-Counter Human Use; Final Rule

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: We, the Food and Drug Administration (FDA), are issuing this final rule to include benzoyl peroxide as a generally recognized as safe and effective (GRASE) active ingredient in over-the-counter (OTC) topical acne drug products. In addition, this final rule includes new warnings and directions required for OTC acne drug products containing benzoyl peroxide. We are also revising labeling for OTC topical acne drug products containing resorcinol, resorcinol monoacetate, salicylic acid and/or sulfur to meet OTC drug labeling content and format requirements in a certain FDA regulation. This final rule is part of our ongoing review of OTC drug products and represents our conclusions on benzoyl peroxide in OTC acne drug products.

DATES: *Effective Date*: This rule is effective on March 4, 2011.

Compliance Date: The compliance date for products containing resorcinol, resorcinol monoacetate, salicylic acid, and/or sulfur subject to 21 CFR part 333 is March 4, 2015. The compliance date for products containing benzoyl peroxide subject to 21 CFR part 333 with annual sales less than $25,000 is March 2, 2012. The compliance date for products containing benzoyl peroxide subject to part 21 CFR part 333 with annual sales of $25,000 or more is March 4, 2011.

FOR FURTHER INFORMATION CONTACT: Matthew R. Holman, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, MS 5411, Silver Spring, MD 20993, 301–796–2090.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Glossary

- ANPR: Advance Notice of Proposed Rulemaking
- CFR: Code of Federal Regulations
- CHPA: Consumer Healthcare Products Association (formerly Nonprescription Drug Manufacturers Association)
- Committee: Dermatologic Drugs Advisory Committee
- FDA: Food and Drug Administration
- FR: **Federal Register**
- GRASE: Generally Recognized as Safe and Effective
- NDA: New Drug Application—an application submitted to FDA to market a new drug under section

505 of the Federal Food, Drug, and Cosmetic Act (21 CFR part 314)
- OTC: Over-the-Counter—medicines sold without a prescription
- Panel: Advisory Review Panel on OTC Antimicrobial (II) Drug Products
- SKU: Stock Keeping Unit—an identifier that is used by merchants to permit the systematic tracking of products and services offered to customers
- TPA: 12-O-tetradecanoylphorbol 13-acetate—a powerful tumor promoter
- U.S.C.: United States Code—compilation of Federal laws
- UVA: Ultraviolet A radiation—ultraviolet radiation with a wavelength between 400 and 320 nanometers
- UVB: Ultraviolet B radiation—ultraviolet radiation with a wavelength between 320 and 280 nanometers
- UVR: Ultraviolet radiation—UVC, UVB, and UVA radiation (1–400 nanometers)
- We: Food and Drug Administration

II. Purpose of this Final Rule

This final rule establishes conditions under which OTC drug products containing benzoyl peroxide for the topical treatment of acne are GRASE and not misbranded. In the **Federal Register** of January 15, 1985 (50 FR 2173), we published a proposed rule in which 2.5 to 10 percent benzoyl peroxide is proposed GRASE for the topical treatment of acne (the 1985 proposed rule). In the **Federal Register** of August 7, 1991 (56 FR 37622), we issued a proposed rule which proposed to classify benzoyl peroxide as category III (i.e., "more-data-needed") instead of category I (GRASE) based on safety concerns that arose at that time (the 1991 proposed rule). Following the 1991 proposed rule, new data were submitted to address our safety concerns. After reviewing the data, we now conclude that benzoyl peroxide can be adequately labeled to minimize the risks associated with benzoyl peroxide while delivering effective acne treatment. Therefore, we are classifying benzoyl peroxide as category I in this final rule.

In addition, this final rule requires that OTC acne drug products containing benzoyl peroxide, resorcinol, resorcinol monoacetate, salicylic acid, and/or sulfur be relabeled. We revised the warnings and directions for these products such that they meet the content and format requirements in § 201.66 (21 CFR 201.66). When the final rule for these products was established in 1991, we had not yet established § 201.66. The revisions necessary to comply with the requirements of § 201.66 were minimal.

III. Past FDA Actions or Activities Related to this Final Rule

In the **Federal Register** of March 23, 1982 (47 FR 12430), we published an ANPR to establish a monograph for OTC topical acne drug products (the 1982 ANPR). The 1982 ANPR included the recommendations of the Advisory Review Panel on OTC Antimicrobial (II) Drug Products (the Panel). The Panel concluded that benzoyl peroxide, in concentrations of 2.5 to 10 percent, is safe and effective for OTC topical use to treat acne. The Panel recognized that benzoyl peroxide is a dose-dependent skin irritant that can also lead to sensitization. Therefore, the Panel recommended the following warnings be included in labeling:
- Do not use benzoyl peroxide on very sensitive skin.
- Keep benzoyl peroxide products away from the eyes, lips, and mouth.
- Benzoyl peroxide may bleach hair or dye fabric.

The 1985 proposed rule proposed conditions under which OTC topical acne drug products are GRASE and not misbranded. We agreed with the Panel's recommendations, and the 1985 proposed rule proposed that 2.5 to 10 percent benzoyl peroxide is GRASE for the treatment of acne. The 1985 proposed rule also proposed requiring the benzoyl peroxide warnings recommended by the Panel.

In the **Federal Register** of August 16, 1991 (56 FR 41008), we issued a final rule for OTC topical acne drug products (the 1991 final rule). In the 1991 final rule, we established conditions under which OTC topical acne drug products, except those containing benzoyl peroxide, are GRASE and not misbranded. We also issued the 1991 proposed rule which proposed to classify benzoyl peroxide as category III instead of category I (GRASE) based on safety concerns. Category III means that we need more data before we can properly classify benzoyl peroxide as GRASE. This proposed classification of benzoyl peroxide as Category III came after considering new safety data and information suggesting that benzoyl peroxide may initiate tumor formation and promote tumor development in animals. We stated in the 1991 proposed rule that it is unclear whether these findings in animals can be extrapolated to humans. We also stated that further studies were necessary to adequately assess the tumor promotion and carcinogenic potential of benzoyl peroxide. In the meantime, we noted that manufacturers could continue to market acne drug products containing benzoyl peroxide until the safety issues were resolved.

To help us resolve the safety issues, we requested comments on the safety of these products, stating that we would discuss these issues with an Advisory Committee (Committee) shortly after the 1991 proposed rule published. In 1992, a few months after the 1991 proposed rule published, we discussed the available benzoyl peroxide safety and efficacy data at an Advisory Committee meeting. The Committee made the following recommendations:
- New photocarcinogenicity studies on benzoyl peroxide should be conducted.
- Current animal safety data regarding benzoyl peroxide should be conveyed in labeling.
- Acne drug products containing benzoyl peroxide should stay on the market while new studies are being performed.

The Committee's recommendations applied to both prescription and OTC acne drug products.

During the Advisory Committee meeting, industry representatives stated that published studies in mice showed no evidence of benzoyl peroxide being photocarcinogenic (Refs. 1 and 2). However, the Committee concluded that the studies were insufficient to determine whether benzoyl peroxide is carcinogenic. The Committee indicated that the studies were inconclusive because none of the studies used sufficient numbers of mice and the mice should have been observed over their entire lifespan. Therefore, the Committee unanimously agreed that a new photocarcinogenicity study should be conducted.

The Committee recommended, by a four-to-three vote (with one abstention), that the known safety data regarding the tumor promoting potential of benzoyl peroxide should be communicated to consumers. Because this data was inconclusive, the Committee unanimously agreed that the word "cancer" should not be included in the labeling of acne drug products containing benzoyl peroxide. The Committee was concerned that the word "cancer" would cause consumers to avoid using these products (even though the data were inconclusive). The Committee did not believe the data adequately demonstrated that benzoyl peroxide was unsafe, and they recognized that benzoyl peroxide is effective in treating acne. Therefore, the Committee unanimously recommended that acne drug products containing benzoyl peroxide should remain on the

market while the additional safety studies were being conducted.

In the **Federal Register** of February 17, 1995 (60 FR 9554), we issued a proposed rule for all OTC and prescription acne drug products containing benzoyl peroxide in which we agreed with all of the Committee's recommendations (the 1995 proposed rule). When stating the need for additional safety studies, we noted that the Nonprescription Drug Manufacturers Association (since renamed Consumer Healthcare Products Association (CHPA)) was conducting photocarcinogenicity studies at that time. We also proposed labeling to communicate the results of the animal studies. The labeling included warnings and directions that would appear in the Drug Facts box of OTC acne drug products containing benzoyl peroxide. In addition, we proposed requiring package inserts for OTC and prescription acne drug products containing benzoyl peroxide. We requested that manufacturers voluntarily implement the proposed labeling as soon as possible. As recommended by the Committee, the proposed package inserts included the word "tumor" but not "cancer." We also agreed with the Committee that these drug products should stay on the market. To support this position, we discussed human epidemiological studies conducted at that time suggesting that the use of benzoyl peroxide does not increase the risk of facial skin cancer in humans (Refs. 3 and 4).

IV. FDA's Conclusions on Safety

We now conclude that benzoyl peroxide, in concentrations of 2.5 to 10 percent, is GRASE for the OTC topical treatment of acne. This conclusion is based on safety data that we received and evaluated since publication of the 1995 proposed rule that proposed classifying benzoyl peroxide as Category III. As recommended by the Committee, these new data include studies examining the carcinogenic and photocarcinogenic potential of benzoyl peroxide. In addition to discussing these new studies in this section of the document, we provide a summary of earlier studies discussed in previous OTC acne drug product rulemakings. We believe the combined results of the earlier and new studies support the GRASE finding for benzoyl peroxide (see section IV.G of this document).

A. Genotoxicity

In the 1991 proposed rule, we discussed studies suggesting that benzoyl peroxide may be genotoxic (56 FR 37622 at 37627 and 37628). Genotoxic substances are capable of causing genetic mutations and chromosomal changes that can contribute to the development of tumors and possibly cancer. Six in vitro studies examining deoxyribonucleic acid (DNA) breaks in various mammalian cells were reviewed in the 1991 proposed rule. Benzoyl peroxide was shown to produce DNA breaks in five of the six studies. In addition, the 1991 proposed rule reviewed six Ames tests. The Ames test is a standard biological assay to assess the mutagenic potential of chemical compounds using the bacteria *Salmonella typhimurium* or *Escherichia coli*. Five of the tests demonstrate that benzoyl peroxide is not mutagenic, while one demonstrates it is a weak mutagen. Finally, we discussed three other in vitro genotoxicity studies in the 1991 proposed rule. One study suggests that benzoyl peroxide is not mutagenic, while two studies suggest that it is a weak mutagen.

Even though some of the in vitro studies suggest that benzoyl peroxide may be a weak mutagen, the negative studies along with the overall genotoxicity profile do not warrant concluding that benzoyl peroxide is a genotoxic agent. In accordance with ICH S2A Guidelines (the guidelines), a single positive result in any genotoxicity assay does not necessarily mean that the test compound poses a genotoxic hazard to humans (Ref. 5). The guidelines state that "any in vitro positive test result should be evaluated for its biological relevance." We believe that the positive genotoxicity results are likely due to the oxidative DNA damage caused by benzoyl peroxide, which has been shown in numerous studies (Refs. 6, 7, and 8). In humans, there are oxidative repair mechanisms that would likely prevent benzoyl peroxide from causing DNA damage (Ref. 9). Therefore, we believe there is no significant biological relevance of the mixed results from the in vitro genotoxicity studies.

B. Tumor Promotion Wth Chemical Initiation

In the 1991 proposed rule, we discussed concerns that benzoyl peroxide may be a tumor promoter in the presence of a chemical tumor initiator (56 FR 37622 at 37631). A tumor promoter increases tumor formation and growth as well as conversion of benign tumors to malignant tumors after exposure to a tumor initiator (e.g., a chemical or UV radiation). However, a tumor promoter is not a carcinogen and exposure to a tumor promoter alone will not cause cancer. In the 1991 proposed rule, we reviewed animal studies examining the ability of benzoyl peroxide to act as a tumor promoter in the presence of a chemical tumor initiator. The tumor promoter studies were conducted by applying a known tumor initiator at the beginning of a study and then later applying the suspected tumor promoter, benzoyl peroxide, at multiple times throughout the remainder of the study. Because tumor promotion was observed in almost all the studies, we concluded that benzoyl peroxide is a skin tumor promoter, in the presence of a chemical tumor initiator, in more than one strain of mice and other laboratory animals (56 FR 37622 at 37631). We continue to believe that benzoyl peroxide is a tumor promoter in animals when combined with a chemical tumor initiator.

C. Tumor Promotion with Ultraviolet Initiation

In the 1991 proposed rule, we discussed a tumor promotion study in which ultraviolet (UV) radiation was the initiator (56 FR 37622 at 37629). The backs of albino hairless mice were irradiated three times per week for 8 weeks. After completion of the UV irradiation cycles, benzoyl peroxide was applied to the backs 5 times per week for 50 weeks. In this study, benzoyl peroxide was not a tumor promoter with UV initiation.

There were no other UV initiation tumor promoter studies until after publication of the 1995 proposed rule, when CHPA submitted a new study entitled "The Skin Tumor Promoting Potential of Benzoyl Peroxide Carbopol Gel Following UVR Initiation in SKH-1 Albino Mice" (Ref. 10). The study compares benzoyl peroxide's tumor promoting capability on mice exposed to UV radiation to that of a known chemical tumor promoter, 12-O-tetradecanoylphorbol 13-acetate (TPA). Six groups of mice were irradiated for 6 weeks (5 days per week) with a daily dose of 0.2 joules per square centimeter ultraviolet B (UVB, 290–320 nanometers) radiation. Another six groups of mice were not exposed to UVB radiation. After a 1-week rest period, benzoyl peroxide or TPA were applied on the mice as outlined in table 1 of this document. Acetone was also applied because TPA was dissolved in acetone, so acetone was a control. The test materials were applied to the backs and sides of the mice. The mice were treated for 40 weeks and then observed for a 12-week treatment-free period.

TABLE 1.—TREATMENT GROUPS IN UV INITIATION TUMOR PROMOTER STUDY OF ALBINO MICE

	Treatment Groups[1,2]											
	1	2	3	4	5	6	7	8	9	10	11	12
UVB irradiation	-	-	-	-	-	-	+	+	+	+	+	+
Benzoyl peroxide	-	0.1%	1.5%	5%	-	-	-	0.1%	1.5%	5%	-	-
TPA in acetone	-	-	-	-	+	-	-	-	-	-	+	-
Acetone	-	-	-	-	-	+	-	-	-	-	-	+

[1] + Denotes the presence of UVB radiation, TPA, or acetone.
[2] - Denotes the absence of UVB radiation, TPA, or acetone.

The study authors assessed tumor promotion ability by comparing two endpoints in mice treated with vehicle and those treated with benzoyl peroxide as follows: (1) The percent of mice with tumors and (2) the number of tumors per mouse. At the end of the study, the percent of mice with tumors was the same in the vehicle-treated group (Group 7) and the group treated with 0.1 percent benzoyl peroxide (Group 8). The percent of mice with tumors in the groups treated with 1.5 or 5 percent benzoyl peroxide (Groups 8 and 9) was much higher than the vehicle or 0.1 percent groups. The number of tumors per mouse in the groups treated with 1.5 or 5 percent benzoyl peroxide (Groups 8 and 9) was much higher than the vehicle or 0.1 percent groups. The results from this study suggest that benzoyl peroxide causes tumor promotion in a dose-dependent manner.

The results from the study submitted in 1995 by CHPA and the study discussed in the 1991 proposed rule produced contradictory results. Therefore, it is difficult to draw any final conclusions regarding tumor promotion with benzoyl peroxide in the presence of UV radiation from these two studies. As with the genotoxicity studies, the biological relevance of the tumor promotion studies results needs to be determined. Drug dosing in tumor promoter studies does not reflect actual human use conditions, making it difficult to interpret the results and extrapolate to human use. The relevance of the animal tumor promoter study results to human safety can only be determined by carcinogenicity and photocarcinogenicity studies for benzoyl peroxide (see sections IV.D and E of this document).

D. Carcinogenicity

We have reviewed a number of animal studies examining the carcinogenic potential of benzoyl peroxide and conclude that benzoyl peroxide is not a carcinogen. In the ANPR, the Panel cites data from two dermal animal carcinogenicity studies and a report to support their conclusion that benzoyl peroxide is not a carcinogen (47 FR 12430 at 12443 to 12444). In the 1991 proposed rule, we stated that "* * *[a] definitive study to assess the complete carcinogenicity of benzoyl peroxide has not, as yet, been conducted" (56 FR 37622 at 37630). In that document, we state that benzoyl peroxide did not produce cancer in the following studies conducted on mice and rats that were not reviewed by the Panel (56 FR 37622 at 37623 to 37626):

- Four studies using oral administration
- Three studies using subcutaneous administration
- Five studies using topical administration

We explain that, because these studies were not of a sufficient duration, they were not sufficient to assess the carcinogenicity of benzoyl peroxide. We state that long-term (i.e., over the entire animal lifespan) carcinogenicity studies need to be conducted in two rodent species to understand whether benzoyl peroxide is a carcinogen with a long latency period (56 FR 37622 at 37631).

After publication of the 1995 proposed rule, we collaborated with CHPA to develop carcinogenicity study protocols (Refs. 11 through 14). In 2001, CHPA submitted a mouse and a rat carcinogenicity study (Ref. 15). Both studies were conducted using a carbopol benzoyl peroxide gel administered topically for 2 years. Neither study demonstrated that benzoyl peroxide is carcinogenic. In the mouse study, benzoyl peroxide was applied at doses of 1, 5, and 15 milligrams (mg) per mouse once daily to 6 square centimeters (cm^2) on the dorsal skin. In the rat study, benzoyl peroxide was applied at doses of 5, 15, and 45 mg per rat once daily to 12 cm^2 on the dorsal skin. The mice and rats were sacrificed at 52 weeks (interim sacrifice) or 104 weeks, and complete necropsies were performed. Both studies show that benzoyl peroxide had no effect on survival, body weight, food consumption, or gross pathology, and neither produced any evidence of systemic toxicity. The dosing used in the study (0.17, 0.83, and 2.5 mg per cm^2) probably represents the dosing used by humans under actual use conditions. Because these studies were well-designed and conducted for the animals' lifespan, we believe they adequately exclude the possibility that benzoyl peroxide is a carcinogen with a short or long latency period.

E. Photocarcinogenicity

Our review of a photocarcinogenicity study submitted after the 1995 proposed rule suggest that benzoyl peroxide is not a photocarcinogen. The design of photocarcinogenicity studies is similar to that of the tumor promoter studies discussed in the previous section of this document but differ in the exposure to UV radiation. The tumor promoter studies are designed so that animals are exposed to UV radiation for a short time and then exposed to benzoyl peroxide (in the absence of UV radiation) for nearly the animals' entire lifespan. Photocarcinogenicity studies involve exposure to UV radiation and benzoyl peroxide simultaneously for the animals' lifespan.

The 1991 proposed rule did not include a discussion of any photocarcinogenicity studies because none were available at the time. Two published photocarcinogenicity studies in mice, whose results had been reviewed at the 1992 Advisory Committee meeting, were discussed in the 1995 proposed rule. The studies showed no evidence that benzoyl peroxide is a photocarcinogen. The Advisory Committee, however, concluded that the studies were not adequate to fully resolve this issue because they did not include sufficient numbers of mice and they did not collect data throughout the animals' lifespan. We agreed with the Advisory Committee and requested new

photocarcinogenic studies in the 1995 proposed rule.

In 1999, CHPA submitted a study examining the photocarcinogenic potential of benzoyl peroxide in mice (Ref. 10). The study is entitled "12-Month Topical Study to Determine the Influence of Benzoyl Peroxide on Photocarcinogenesis in Albino Hairless Mice Crl: SKH1(hr/hr)BR." The mice received single daily doses of UV radiation along with 0, 5, 15, and 50 mg per milliliter benzoyl peroxide carbopol gel. The mice were dosed daily, Monday through Friday. On Monday, Wednesday, and Friday, the benzoyl peroxide was applied before irradiation. On Tuesday and Thursday, the benzoyl peroxide was applied after irradiation. Treatment was continued for 40 weeks, and then the mice were observed for an additional 12 weeks (52 weeks total). The number of tumors was recorded each week. This study shows a slight enhancement of UV-mediated skin tumorigenesis by benzoyl peroxide at the low and mid doses. However, no enhancement was apparent at the high dose, as the number of tumors was similar to that in the control group. Because increased doses of benzoyl peroxide did not produce greater numbers of tumors, the study suggests that benzoyl peroxide is not photocarcinogenic in mice.

F. Epidemiological Data

There have been several epidemiological studies conducted that provide information about whether there is a link between the use of benzoyl peroxide to tumor development, as discussed in the 1991 proposed rule (56 FR 37622 at 37629 and 37630). None of the studies clearly associate the use of benzoyl peroxide with the development of skin cancer in humans. The largest of these studies evaluated 870 subjects who developed skin cancer and 1,250 control subjects who did not develop skin cancer (matched for age, sex, and geographic location) (Ref. 4). The study authors concluded that the past history of acne was the second strongest correlation to the development of basal cell carcinoma, with a family history of cancer being the strongest correlation. Although the authors suggested that there may be a relationship between benzoyl peroxide use and skin cancer, data about subject use of acne treatments was not collected (e.g., whether subjects had used benzoyl peroxide). We are not aware of any relevant epidemiological studies published since 1991. Therefore, we do not have any epidemiological evidence demonstrating that benzoyl peroxide is a carcinogen in humans.

G. Overall Conclusion

We are classifying benzoyl peroxide as GRASE. This conclusion is supported by the animal studies that suggest benzoyl peroxide is not carcinogenic or photocarcinogenic. Although some of the studies suggest that benzoyl peroxide is a tumor promoter with chemical initiators in animals, three studies demonstrate that benzoyl peroxide is not carcinogenic or photocarcinogenic in animals. We believe these three studies are more meaningful than the conflicting tumor promoter studies.

As explained in this section of the document, we believe that consideration of all the findings supports the GRASE status of benzoyl peroxide. Even though benzoyl peroxide is known to be a skin irritant and sensitizer in humans (47 FR 12430 at 12444), we believe, with adequate labeling, these risks can be minimized in such a way that benzoyl peroxide is safe to use for acne.

There were two safety signals that concerned us when we proposed to classify benzoyl peroxide as category III (i.e., more data needed to determine safety) instead of GRASE:

- The ability of benzoyl peroxide to be a weak mutagen in vitro, and
- The tumor promotion potential of benzoyl peroxide in the presence of a chemical initiator in animals

No new safety signals have been identified since the 1991 proposed rule, despite the conduct of additional studies. We conclude that the additional rodent carcinogenicity and photocarcinogenicity studies conducted since the proposed rule justify a GRASE determination in spite of the mutagenic and tumor promoter potential of benzoyl peroxide.

Although genotoxicity studies are useful, findings that a drug is mutagenic in these studies does not necessarily lead to a determination that the drug is unsafe. Genotoxicity studies are often preliminary studies in drug development that help provide a framework for how to proceed with future studies. Positive results with genotoxicity studies show that a drug has the potential to be a mutagen, thereby contributing to the development of tumors and possibly cancer. Consistent with the guidelines (Ref. 5), the genotoxicity study findings led to animal studies to determine the biological relevance of the evidence that benzoyl peroxide may be a weak mutagen in vitro. The animal studies subsequently conducted consist of animal tumor promotion, carcinogenicity, and photocarcinogenicity studies.

The tumor promotion studies demonstrate that benzoyl peroxide is a tumor promoter in the presence of a chemical initiator. It is unclear from the studies whether benzoyl peroxide is a tumor promoter in the presence of UV radiation (as an initiator) because two studies are contradictory. As with the genotoxicity studies, the biological relevance of the tumor promotion studies results needs to be determined. Tumor promoter studies are not generally relied on solely in place of carcinogenicity studies. Drug dosing in tumor promoter studies does not reflect actual human use conditions, making it difficult to interpret the results and extrapolate to human use. The relevance of the animal tumor promoter study results to human safety can only be determined by carcinogenicity and photocarcinogenicity studies for benzoyl peroxide.

Carcinogenicity studies are the most reliable non-clinical studies that can be extrapolated to humans for determining the long-term or chronic safety. These studies are conducted with topical application of benzoyl peroxide with and without UV irradiation (i.e., both carcinogenicity and photocarcinogenicity studies). Dermal carcinogenicity and photocarcinogenicity studies best represent actual use conditions for benzoyl peroxide. They are the benchmark for determining the carcinogenic potential of a drug. We believe that the negative findings in the carcinogenic and photocarcinogenic studies support a GRASE conclusion for benzoyl peroxide because they are more relevant to humans under conditions of actual use than genotoxicity or tumor promotion studies.

V. FDA's Conclusions on Labeling

In addition to the labeling required for all OTC topical acne drug products, we are now requiring labeling that provides information related specifically to benzoyl peroxide. We are only requiring carton labeling and not consumer package insert labeling for benzoyl peroxide. This required benzoyl peroxide labeling is based on labeling that we previously proposed for the ingredient (discussed in section IV.A of this document). In addition, the required labeling reflects our safety assessment of benzoyl peroxide discussed in the previous sections of this document. We believe that the labeling required in this document is necessary for the safe and effective use of OTC topical acne drug products containing benzoyl peroxide.

In addition to the labeling specific to benzoyl peroxide, we are revising labeling for all OTC acne drug products. We revised the warnings and directions for these products such that they meet the content and format requirements in § 201.66. When the final rule for these products was established in 1991, we had not yet established § 201.66.

A. Past FDA Requirements for Labeling

In the 1985 proposed rule, we proposed warnings required for OTC acne drug products containing benzoyl peroxide:

- Do not use benzoyl peroxide on very sensitive skin.
- Keep benzoyl peroxide products away from the eyes, lips, and mouth.
- Benzoyl peroxide may bleach hair or dye fabric.

These warnings were specific to benzoyl peroxide and were not proposed for OTC acne drug products containing other active ingredients. These warnings come from recommendations made by the Panel in the 1982 ANPR.

In the 1995 proposed rule, we proposed the following warning and direction appear on prescription and OTC drug products containing benzoyl peroxide:

- Warning: "When using this product, avoid unnecessary sun exposure and use a sunscreen."
- Direction: "If going outside, use a sunscreen. (sentence in boldface type) Allow [insert name of benzoyl peroxide product] to dry, then follow directions in the sunscreen labeling. If irritation or sensitivity develops, discontinue use of both products and consult a doctor."

For OTC products, the 1995 proposed rule proposed that this labeling be required on the outer carton. For prescription products, the 1995 proposed rule proposed that this labeling appear in the patient package insert.

In the 1995 proposed rule, we also proposed a series of questions and answers that would appear in a package insert and would explain the tumor promotion potential and sensitizing nature of benzoyl peroxide (60 FR 6554 at 6555 to 6556). The questions answered in the 1995 proposed rule included the following:

- What is in (insert brand name of benzoyl peroxide product)?
- Does benzoyl peroxide cause tumors to grow in humans?
- What should I do?

This information essentially summarized the data from animal studies that led to the earlier proposed classification of benzoyl peroxide as category III. We suggested that it appear as a package insert for prescription and OTC products. This labeling in the 1995 proposed rule stems from and agrees with the recommendations of the Committee, which met in 1992 to discuss benzoyl peroxide in acne drug products.

B. Carton Labeling

We are requiring the warnings proposed in the 1985 proposed rule as well as the warning and direction proposed in the 1995 proposed rule (see section V.A of this document). Although we are revising the warnings and direction slightly, the overall meaning remains the same.

This action relates to three submissions that we received in response to the 1995 proposed rule. These submissions argue that we should not require the proposed warning concerning sun exposure. Two of the submissions argue that there is no scientific evidence demonstrating a risk of photosensitivity in humans when using benzoyl peroxide (Refs. 16 and 17). They acknowledge the studies showing that benzoyl peroxide is a skin tumor promoter in rodents. However, they do not believe the results from rodent studies support a finding of significant human health risk. The third submission suggests that cleansers and soaps containing benzoyl peroxide be excluded from the required label warning "use a sunscreen" (Ref. 18). The submission concurs with the recommended label warning to "use a sunscreen" for benzoyl peroxide products. We proposed this warning be included on all OTC benzoyl peroxide products. However, the submission argues that the warning should only be required on products that are left on the skin because it would confuse consumers using products that are washed off after use.

Since receiving these submissions, we have reviewed new data regarding the potential phototoxicity of benzoyl peroxide. The data shows that benzoyl peroxide is not a photocarcinogen in animals. Studies have also shown that 5 and 10 percent benzoyl peroxide preparations can decrease the skin's tolerance to UV radiation (i.e., increase sunburn) after repeated applications (Refs. 19 and 20). In addition, benzoyl peroxide can cause skin irritation, which may worsen with sun exposure. These adverse effects of benzoyl peroxide are important because drug products containing benzoyl peroxide are often used daily on sun-exposed areas of the body (e.g., face). The best ways to protect sun-exposed areas of the body are to cover them up, stay out of the sun, and to use a sunscreen. Therefore, we believe it is important to include information warning consumers to avoid unnecessary sun exposure and to use a sunscreen when using any drug products containing benzoyl peroxide.

For the same reason, we are not exempting cleansers and soaps containing benzoyl peroxide from the "use a sunscreen" warning, as argued by the third comment. This warning is required for all OTC topical acne drug products containing benzoyl peroxide. We do not believe this warning (and the accompanying directions about sunscreen use) will confuse consumers. The warning is clear, simple, and applies to all OTC topical acne drug products containing benzoyl peroxide whether they are washed off or left on. We are moving this direction from the beginning of the directions section to the end. Whether a product is washed off or left on, the directions should instruct consumers to use the product and then apply a sunscreen. We believe this revision will prevent confusion about sunscreen use and adequately address the concern raised by the third submission.

Accordingly, we are adding the following benzoyl peroxide warnings in this document (§ 333.350(c)(4)):

- Do not use if you [bullet] have very sensitive skin [bullet] are sensitive to benzoyl peroxide.
- When using this product [bullet] avoid unnecessary sun exposure and use a sunscreen [bullet] avoid contact with the eyes, lips, and mouth [bullet] avoid contact with hair and dyed fabrics, which may be bleached by this product [bullet] skin irritation may occur, characterized by redness, burning, itching, peeling, or possibly swelling. Irritation may be reduced by using the product less frequently or in a lower concentration.
- Stop use and ask a doctor if [bullet] irritation becomes severe.

In addition, we are adding a new direction for products containing benzoyl peroxide (§ 333.350(d)(2)) (21 CFR 333.350(d)(2))):

- [bullet] if going outside, apply sunscreen after using this product. If irritation or sensitivity develops, stop use of both products and ask a doctor.

We are also revising carton labeling to reflect OTC drug labeling format and content requirements (i.e., "Drug Facts") implemented after the 1995 proposed rule (§ 201.66).

C. Consumer Package Insert

We received three submissions from healthcare organizations arguing that we should not require the patient and consumer package insert labeling proposed for OTC and prescription

benzoyl peroxide drug products in the 1995 proposed rule. One submission argues that the purpose of OTC labeling has never been to tell consumers everything that scientists have discovered, or might still be investigating, about a drug product and its ingredients (Ref. 17). The second submission argues that information related to possible carcinogenicity should not be disseminated until the completion of valid epidemiologic studies (Ref. 16). The submission believes it is not helpful to imply a connection between benzoyl peroxide and sunlight in the absence of supporting epidemiological data. The third submission is concerned that the proposal to include patient package inserts with all topical acne drug products containing benzoyl peroxide will increase costs to the healthcare distribution system (Ref. 21). The submission argues that in order for written materials to accompany each package of a prescription drug product, manufacturers must switch from automated to manual packaging, which would be costly. In addition, the submission argues that the costs of applying the same requirement to OTC products would be even higher because OTC products are more numerous and are distributed in much greater volume.

We agree with the submissions' request to not require a consumer package insert accompanying OTC topical acne drug products containing benzoyl peroxide. The purpose of including a consumer package insert is to disseminate as much information pertaining to the potential risks of using benzoyl peroxide containing drug products. We believe that the proposed carton labeling sufficiently informs the consumer of the potential risks of using these products. After reviewing the newly submitted data, we no longer see the need for a consumer package insert.

We are not creating regulations requiring a patient package insert to accompany prescription topical acne drug products containing benzoyl peroxide because all prescription topical acne drug products are marketed under new drug applications (NDAs). The decision to include patient package inserts for prescription products should be done on a case-by-case basis. Prescription products containing benzoyl peroxide cannot be marketed until we review information submitted for a specific product and determine that the product is safe and effective. As part of this review, we determine labeling that is specific to the product. We have and will continue to require appropriate safety information about benzoyl peroxide in each prescription product as part of the NDA review and approval. Therefore, we do not believe that the proposed labeling needs to be included in monograph regulations.

D. Overall Conclusion

In this document, we are requiring labeling specific to benzoyl peroxide containing drug products. Warnings for drug products containing benzoyl peroxide include the following: (§ 333.350(c)(4)):

- Avoiding unnecessary sun exposure
- Not using on very sensitive skin
- Keeping away from the eyes, lips, and mouth
- Cautioning that benzoyl peroxide may bleach hair or dye fabric

These warnings are not required for other acne active ingredients. However, warnings required for other acne active ingredients, such as "for external use only," are required for benzoyl peroxide. We are also requiring a direction for drug products containing benzoyl peroxide to use a sunscreen when going outside.

We are not requiring a consumer package insert for drug products containing benzoyl peroxide. After reviewing the newly submitted data, we no longer see the need for a consumer package insert. We believe that the proposed carton labeling sufficiently informs the consumer of the potential risks of using these products. We are also not requiring a patient package insert to accompany prescription topical acne drug products containing benzoyl peroxide with this final rule. All prescription topical acne drug products are marketed under NDAs, which already require appropriate safety information about benzoyl peroxide in the labeling of each prescription product as part of the NDA review and approval. We do not believe that the proposed labeling needs to be included in monograph regulations.

VI. Analysis of Impacts

We have examined the impacts of this final rule under Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). We believe that this final rule is not a significant regulatory action under the Executive order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. We lack the data to certify that this final rule will not have a significant economic impact on a substantial number of small entities. Therefore, we have prepared a final regulatory impact analysis.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing "any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year." The current threshold after adjustment for inflation is $133 million, using the most current (2008) Implicit Price Deflator for the Gross Domestic Product. We do not expect this final rule to result in any 1-year expenditure that would meet or exceed this amount.

A. Need for and Objectives of the Rule

The purpose of this document is to revise the conditions for marketing OTC acne drug products. This final rule establishes that OTC acne drug products containing benzoyl peroxide are GRASE and establishes required labeling for these products. This final rule requires manufacturers of OTC acne products containing benzoyl peroxide to relabel their products and add new warnings and directions within 12 months from the date of publication.

This final rule also requires that the warnings and directions for OTC acne drug products containing resorcinol, resorcinol monoacetate, salicylic acid, and/or sulfur be revised to meet the content and format requirements in § 201.66. We are allowing manufacturers up to 5 years to comply with this provision. Frequent label redesigns are typical for OTC topical acne drug products, with redesigns generally implemented at least every 5 years for a product. Therefore, the regulatory-mandated relabeling will fall within this time period, minimizing the impact on the manufacturer of these products. There are no reformulation costs required by this rule.

B. Number of Products Affected

Estimating the number of manufacturers and affected products is difficult because we lack data on products currently marketed. Our Drug Listing System currently does not have accurate information on the number of

marketed OTC acne drug manufacturers and products containing benzoyl peroxide. We used data from A. C. Nielsen to estimate the dollar sales and the number of stock keeping units (SKUs) that would be affected by this rule. Based on 2006 retail sales data, the total sales for approximately 330 affected SKUs were $263.0 million, or converting to 2009 dollars, $278 million. However, there are likely some affected OTC acne products that we were unable to identify.

Of the 330 affected SKUs, about 25 percent contain benzoyl peroxide and 75 percent contain other ingredients cited in this final rule (i.e., resorcinol, resorcinol monoacetate, salicylic acid, or sulfur). Most manufacturers of products containing benzoyl peroxide will need to relabel and add new warnings and directions within 1 year from the date of publication. Small entities with annual product sales of less than $25,000 will have up to 2 years to comply. Manufacturers of all other OTC acne drug products (containing resorcinol, resorcinol monoacetate, salicylic acid and sulfur) will have up to 5 years to relabel and conform to the OTC format and contents requirements in § 201.66.

C. Cost to Relabel

Estimates of relabeling costs for the types of changes required by this document vary depending on the following: (1) Whether the products are nationally branded or private label, (2) the printing method, and (3) the number of colors used. The costs of product relabeling are also dependent on the timing of the required labeling change. Most OTC manufacturers routinely schedule revisions of product labels every few years. To the extent that the timing of regulatory changes corresponds with routine labeling revisions by the company, the regulatory cost of relabeling is significantly reduced.

We used a labeling cost model developed for FDA by the consulting firm RTI International (RTI) to derive an estimate of the cost to relabel OTC acne drug products (Ref. 22). The model was developed to estimate the cost of revising food and dietary supplement labels. The RTI model assumes that all manufacturers voluntarily revise their labeling every 3 years. We believe that the graphic and design estimates from the RTI model are an appropriate proxy for the costs that would be incurred by OTC acne drug product manufacturers. However, we are unable to use this model to forecast reductions in relabeling costs for year four and five of the implementation period.

The RTI model estimates that the costs to revise labeling ranges from $2,700 to $6,600 for a 1-year implementation period. Assuming an average relabeling cost of $4,650 per SKU, the total one-time cost for 80 SKUs containing benzoyl peroxide would be about $372,000 (80 SKUs x $4,650). To minimize the impact on small entities with annual sales less than $25,000, we are allowing up to 24 months for products containing benzoyl peroxide to be relabeled.

All other manufacturers of acne treatment products containing resorcinol, resorcinol monoacetate, salicylic acid, and sulfur would need to revise their product labels to conform to the OTC format and contents requirements in § 201.66. Based on the labeling cost model, the average incremental costs of conforming to the OTC format and content requirements are estimated to be $3,750 per SKU, assuming a maximum period of 3 years to comply. The total one-time costs to manufacturers to relabel the estimated 250 affected OTC SKUs is about $937,500 (250 SKUs x $3,750). Because the labeling cost model stops at a 3-year implementation period and these manufacturers would have up to 5 years to incorporate these changes with routinely scheduled labeling changes, these relabeling costs would be reduced. However, we lack sufficient information to estimate the reduction.

The present value of total one-time costs for relabeling all of the 330 affected OTC acne treatment products is $1.1 million using a 7 percent discount rate and $1.2 million using a 3 percent discount rate. The annualized total costs of compliance of this rule are $0.4 million using 7 percent and 3 percent discount rates over 3 years.

Using the 2009 dollar value of annual retail sales for OTC acne products of $278 million, the annualized costs of compliance account for less than 0.2 percent of total annual OTC acne retail sales for all entities, for both a 7 percent and 3 percent discount rate over 3 years. Because the period selected for annualization is typically much longer than 3 years, using a 3-year period maximizes annualized compliance costs for this analysis.

D. Benefits of this Rule

The primary benefit of this final rule is that consumers will have standardized and consistent labeling information that is necessary for the safe use of OTC acne products affected by this rule. This final rule finds that OTC acne drug products containing benzoyl peroxide are GRASE and allows these products to remain on the market. This final rule will provide consumers with warnings and directions information that is needed for the safe use of OTC acne products containing benzoyl peroxide. This final rule also will require that the current monograph labeling information for OTC topical acne drug products containing resorcinol, resorcinol monoacetate, salicylic acid, and sulfur be consistently presented according to the OTC Drug Facts labeling requirements in 21 CFR part 201.

With this final rule, there are now five GRASE active ingredients for OTC acne drug products. Consumers will continue to have a range of choices for OTC acne products with safety and use information uniformly presented. A uniform presentation of labeling information should help consumers compare similar products to make informed choices.

E. Alternatives and Steps Taken to Minimize Impacts on Small Entities

For products containing benzoyl peroxide, we considered a longer implementation period, such as 2 years for all of the 80 SKUs, rather than only for those entities with annual sales less than $25,000. However, we believe it is important to provide the new warning statements and directions to consumers as soon as possible. We considered and rejected a shorter implementation period for all other OTC acne products to conform to the OTC format and content requirements. To provide maximum flexibility and to minimize burdens, we are allowing up to 5 years for firms to coordinate required labeling changes with planned revisions. We believe any longer implementation period is impractical and would unnecessarily delay the benefit of providing uniform format and content labeling to consumers who use OTC drug products for the treatment of acne.

F. Impact on Small Businesses

The Small Business Administration defines an entity as small in the pharmaceutical manufacturing industry if the business has fewer than 750 employees. Over 90 percent of manufacturers in the OTC pharmaceutical industry are classified as small. The average annual value of shipments for small entities in Pharmaceutical Manufacturing Preparation NAICS 325412 was $34.9 million in 2002[1]. Converting to 2009 dollars, the average value of shipments

[1] U.S. Department of Commerce, 2002 Economic Census of Manufacturers, "Pharmaceutical Preparation Manufacturing: 2002," Industry Series, NAICS 325412, Table 4. Industry Statistics by Employment Size, December 2004.

per small entity is $39.0 million. However, the Census data do not allow us to estimate the average value of shipments for OTC manufacturers.

To estimate possible impacts on small entities, we used A. C. Nielsen total retail sales for all OTC acne products affected by this rule to calculate the annualized total cost of compliance as a percentage of annual sales. The annualized total costs of compliance of this rule are $0.4 million using 7 percent and 3 percent discount rates over 3 years.

Table 2 of this document presents the annualized costs of compliance as a percent of total annual retail sales for OTC acne products by size of the affected entities. Although we have sales data for each SKU, we were unable to determine the firm size for certain private label SKUs because A. C. Nielsen does not reveal ownership information for certain store brands. These store brands are typically large chain stores. In addition, we combined the category for small entities with 11 other entities whose size information could not be found in financial listings.

TABLE 2.—ANNUALIZED COMPLIANCE COST AS A PERCENT OF OTC ACNE SALES BY SIZE OF ENTITY[1]

Size	2009 Sales (dollars in millions)	Number of SKUs	Annualized Compliance Cost (dollars in millions)		Compliance Cost (Percent of Sales)	
			7% discount rate	3% discount rate	7 % discount rate	3% discount rate
Large	$254.0	233	$0.3	$0.3	0.1%	0.1%
Small	$18.1	49	$0.1	$0.1	0.3%	0.3%
Private Label[2]	$6.1	48	$0.1	$0.1	1.0%	1.0%
Total[3]	$278.1	330	$0.4	$0.4	0.2%	0.2%

[1] The use of a 3-year period for annualizing maximizes the value of compliance costs for this analysis.
[2] Private label represents store brand and unknown brand names.
[3] Total sales and annualized compliance cost may not sum due to rounding.

The annualized costs of compliance are less than 0.2 percent of total annual OTC acne retail sales for all entities. Private label entities compliance costs as a percent of OTC acne sales are about 1 percent over 3 years. For small entities, the annualized costs over 3 years are 0.3 percent annual sales for OTC acne products. These estimates represent maximum values because of the relatively short period used to annualize costs.

These estimates do not account for the additional time granted to small entities to minimize the cost impacts. Industry routinely changes their OTC product labeling, and we have allowed for extended implementation periods to comply with this final rule. Therefore, we believe that it is unlikely that this final rule will have a significant economic impact on a substantial number of small entities. This final rule does not require any new reporting or recordkeeping activities.

G. Summary of Analysis

This analysis shows that this final rule is not economically significant under Executive Order 12866. We have allowed flexible implementation periods to minimize the regulatory costs of revising labeling. We lack the data to certify that this final rule will not have a significant economic impact on a substantial number of small entities. Therefore, this analysis, together with other relevant sections of this document, serves as our Regulatory Flexibility Analysis, as required under the Regulatory Flexibility Act.

VII. Paperwork Reduction Act of 1995

We conclude that the labeling requirements required in this rule are not subject to review by the Office of Management and Budget because they do not constitute a "collection of information" under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Rather, the labeling statements are a "public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public" (5 CFR 1320.3(c)(2)).

VIII. Environmental Impact

We have determined under 21 CFR 25.31(a) 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.

IX. Federalism

We have analyzed this final rule in accordance with the principles set forth in Executive Order 13132. Section 4(a) of the Executive order requires agencies to "construe * * * a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute." The sole statutory provision giving preemptive effect to the final rule is section 751 of the act (21 U.S.C. 379r). We believe that we have complied with all of the applicable requirements under the Executive order and have determined that the preemptive effects of this rule are consistent with Executive Order 13132.

X. References

The following references are on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20857, and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday. FDA has verified the Web site addresses, but FDA is not responsible for any subsequent changes to the Web sites after this document publishes in the **Federal Register**.

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13. Comment No. LET21, 1981N–0114.

14. Comment No. LET22, 1981N–0114.

15. Comment No. RPT4, 1981N–0114.

16. Comment No. C3, 1992N–0311.

17. Comment No. C4, 1992N–0311.

18. Comment No. C1, 1992N–0311.

19. Jeanmougin, M. and J. Civatte, "Prediction of Benzoyl Peroxide Phototoxicity by Photoepidermotests After Repeated Applications. Preventative Value of a UVB Filter," *Archives of Dermatological Research*, 280 (Suppl): S90–S93, 1988.

20. Jeanmougin, M. et al., "Phototoxic Activity of 5% Benzoyl Peroxide in Man. Use of a New Methodology," *Dermatologica*, 167:19–23, 1983.

21. Comment No. C2, 1992N–0311.

22. "FDA Labeling Cost Model, Final Report" prepared by Mary Muth, Erica Glendhill, and Shawn Karns, RTI International, Prepared for Amber Jessup, FDA Center for Food Safety and Applied Nutrition, RTI International, January 2003.

List of Subjects in 21 CFR Part 333

Labeling, Over-the-counter drugs.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 333 is amended as follows:

PART 333—TOPICAL ANTIMICROBIAL DRUG PRODUCTS FOR OVER-THE-COUNTER HUMAN USE

■ 1. The authority citation for 21 CFR part 333 continues to read as follows:

Authority: 21 U.S.C. 321, 351, 352, 353, 355, 360, 371.

■ 2. Section 333.310 is revised to read as follows:

§ 333.310 Acne active ingredients.

The active ingredient of the product consists of any of the following:

(a) Benzoyl peroxide, 2.5 to 10 percent.

(b) Resorcinol, 2 percent, when combined with sulfur in accordance with § 333.320(a).

(c) Resorcinol monoacetate, 3 percent, when combined with sulfur in accordance with § 333.320(b).

(d) Salicylic acid, 0.5 to 2 percent.

(e) Sulfur, 3 to 10 percent.

(f) Sulfur, 3 to 8 percent, when combined with resorcinol or resorcinol monoacetate in accordance with § 333.320.

■ 3. Section 333.320 is revised to read as follows:

§ 333.320 Permitted combinations of active ingredients.

(a) Resorcinol identified in § 333.310(b) may be combined with sulfur identified in § 333.310(f).

(b) Resorcinol monoacetate identified in § 333.310(c) may be combined with sulfur identified in § 333.310(f).

■ 4. Section 333.350 is amended by revising paragraphs (c) and (d) and removing paragraph (e) to read as follows:

§ 333.350 Labeling of acne drug products.

* * * * *

(c) *Warnings.* The labeling of the product contains the following warnings under the heading "Warnings":

(1) *For products containing any ingredients identified in § 330.310.*

(i) The labeling states "For external use only."

(ii) The labeling states "When using this product [bullet] skin irritation and dryness is more likely to occur if you use another topical acne medication at the same time. If irritation occurs, only use one topical acne medication at a time."

(2) *For products containing sulfur identified in § 333.310(e) and (f).*

(i) The labeling states "Do not use on [bullet] broken skin [bullet] large areas of the skin."

(ii) The labeling states "When using this product [bullet] apply only to areas with acne."

(3) *For products containing any combination identified in § 333.320.* (i) The labeling states "When using this product [bullet] rinse right away with water if it gets in eyes."

(ii) The labeling states "Stop use and ask a doctor [bullet] if skin irritation occurs or gets worse."

(4) *For products containing benzoyl peroxide identified in § 333.310(a).*

(i) The labeling states "Do not use if you [bullet] have very sensitive skin [bullet] are sensitive to benzoyl peroxide."

(ii) The labeling states "When using this product [bullet] avoid unnecessary sun exposure and use a sunscreen [bullet] avoid contact with the eyes, lips, and mouth [bullet] avoid contact with hair and dyed fabrics, which may be bleached by this product [bullet] skin irritation may occur, characterized by redness, burning, itching, peeling, or possibly swelling. Irritation may be reduced by using the product less frequently or in a lower concentration."

(iii) The labeling states "Stop use and ask a doctor if [bullet] irritation becomes severe."

(d) *Directions.* The labeling of the product contains the following information under the heading "Directions":

(1) *For products applied containing any ingredient identified in § 333.310.* The labeling states "[bullet] clean the skin thoroughly before applying this product [bullet] cover the entire affected area with a thin layer one to three times daily [bullet] because excessive drying of the skin may occur, start with one application daily, then gradually increase to two or three times daily if needed or as directed by a doctor [bullet] if bothersome dryness or peeling occurs, reduce application to once a day or every other day."

(2) *For products applied and left on the skin containing benzoyl peroxide identified in § 333.310(a).*

(i) The labeling states the directions in paragraph (d)(1) of this section.

(ii) The labeling states "[bullet] if going outside, apply sunscreen after using this product. If irritation or sensitivity develops, stop use of both products and ask a doctor."

(3) *For products applied and removed from the skin containing any ingredient identified in § 333.310.* Products, such as soaps and masks, may be applied and removed and should include appropriate directions. All products containing benzoyl peroxide should include the directions in paragraph (d)(2)(ii) of this section.

(4) *Optional directions.* In addition to the required directions in paragraphs (d)(1) and (d)(2) of this section, the product may contain the following optional labeling: "*Sensitivity Test for a New User.* Apply product sparingly to one or two small affected areas during the first 3 days. If no discomfort occurs, follow the directions stated (select one of the following: 'elsewhere on this label,' 'above,' or 'below')."

Dated: February 25, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–4424 Filed 3–3–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF EDUCATION

34 CFR Part 280

RIN 1855–AA07

[Docket ID ED–2010–OII–0003]

Magnet Schools Assistance Program

AGENCY: Office of Innovation and Improvement, Department of Education.

ACTION: Interim final rule; request for comments.

SUMMARY: The Secretary amends the regulations governing the Magnet Schools Assistance Program (MSAP) to provide greater flexibility to school districts designing MSAP programs for the Fiscal Year (FY) 2010 grant competition announced in a notice inviting applications for new awards published elsewhere in this issue of the **Federal Register**. These changes remove provisions in the regulations that require districts to use binary racial classifications and prohibit the creation of magnet schools that result in minority group enrollments in magnet and feeder schools exceeding the district-wide average of minority group students. This new flexibility is necessary to permit school districts interested in receiving funds under this program to determine how best to meet program requirements while also taking into account intervening Supreme Court case law, including the Court's decision in *Parents Involved in Community Schools* v. *Seattle School District No 1 et al.,* 551 U.S. 701 (2007) (*Parents Involved*).

DATES: These regulations are effective March 4, 2010. We must receive your comments by April 5, 2010.

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments by fax or by e-mail. Please submit your comments only one time, in order to ensure that we do not receive duplicate copies. In addition, please include the Docket ID at the top of your comments.

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* to submit your comments electronically. Information on using Regulations.gov, including instructions for accessing agency documents, submitting comments, and viewing the docket is available on the site under "How To Use This Site."
- *Postal Mail, Commercial Delivery, or Hand Delivery:* If you mail or deliver your comments about these interim final regulations, address them to Anna Hinton, U.S. Department of Education, 400 Maryland Avenue, SW., room 4W229, Washington, DC 20202.

Privacy Note: The Department's policy for comments received from members of the public (including those comments submitted by mail, commercial delivery, or hand delivery) is to make these submissions available for public viewing in their entirety on the Federal eRulemaking Portal at *http://www.regulations.gov.* Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available on the Internet.

FOR FURTHER INFORMATION CONTACT: Anna Hinton, U.S. Department of Education, 400 Maryland Avenue, SW., room 4W229, Washington, DC 20202. Telephone: (202) 260–1816 or by e-mail: *FY10MSAPCOMP@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 may obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION:

Invitation To Comment

We invite you to submit comments regarding the removal of the regulatory provisions in these interim final regulations. The MSAP regulations in 34 CFR part 280, as amended by these interim final regulations, will govern the FY 2010 MSAP competition. Any changes made to these interim final regulations in light of comments would govern the next MSAP competition in FY 2013. To ensure that your comments have maximum effect in developing the final regulations, we urge you to identify clearly the specific section or sections of the interim final regulations that each of your comments addresses and to arrange your comments in the same order as the interim final regulations. We also are considering issuing a notice of proposed rulemaking (NPRM) that would propose provisions to replace those that are removed by these interim final regulations, although we are not soliciting comments on an NPRM at this time. Again, any changes subsequent to these interim final regulations would apply to the next MSAP competition, which the Department anticipates conducting in FY 2013.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from these interim final regulations. Please let us know of any further opportunities we should take to reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

During and after the comment period you may inspect all public comments about these interim final regulations by accessing Regulations.gov. You may also inspect the comments, in person, in room 4W229, 400 Maryland Avenue, SW., Washington, DC 20202, between the hours of 8:30 a.m. and 4 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these interim final regulations. If you want to schedule an appointment for this type of aid, please contact Anna Hinton, U.S. Department of Education, 400 Maryland Avenue, SW., room 4W229, Washington, DC 20202. Telephone: (202) 260–1816 or by e-mail: *FY10MSAPCOMP@ed.gov.*

Background

The MSAP is a discretionary grant program that provides funds to local educational agencies (LEAs) for "the elimination, reduction, or prevention of minority group isolation in elementary and secondary schools" with substantial proportions of minority students, and "the development and design of innovative educational methods and practices that promote diversity." 20 U.S.C. 7231; 34 CFR 280.1. The Department awards grants to LEAs for magnet schools that are "part of an approved desegregation plan" and "designed to bring students from different social, economic, ethnic, and racial backgrounds together." 20 U.S.C. 7231b; 34 CFR 280. There are two types of MSAP desegregation plans: (1) Required desegregation plans ordered by a Federal or State court or agency of competent jurisdiction;[1] and (2)

[1] The revisions in these interim final regulations do not affect how the Department treats required desegregation plans under the MSAP.

voluntary desegregation plans that must be approved by the Secretary as adequate under Title VI of the Civil Rights Act of 1964 (Title VI). *See* 20 U.S.C. 7231c; 34 CFR part 280.

The Supreme Court's Decision in Parents Involved

On June 28, 2007, the Supreme Court in *Parents Involved* found the voluntary desegregation plans in the Seattle, Washington, and Louisville, Kentucky school districts unconstitutional in part because the districts failed to adequately show that they considered race-neutral alternatives prior to using individual racial classifications in assigning students to schools.[2] In *Parents Involved,* five justices affirmed that avoiding racial isolation—one of the purposes of the MSAP program—is a compelling governmental interest. However, the majority opinion found each plan's use of only two categories in defining race problematic. The Seattle school district used "white" and "nonwhite" and the Louisville school district used "black" and "other." The *Parents Involved* Court also rejected the achievement of racial balance, (*i.e.,* a student enrollment that mirrors the racial composition of a school district, as a basis for the use of race in a voluntary desegregation plan.) *Parents Involved* at 722.

The MSAP Regulations

The current regulations governing the MSAP are in 34 CFR part 280. In light of guidance provided by the Supreme Court in *Parents Involved,* we are changing three provisions of these regulations to provide districts greater flexibility in how they demonstrate that their magnet or feeder schools will eliminate, reduce, or prevent minority group isolation and that their voluntary desegregation plans are adequate under Title VI. Each of these provisions and the changes we are making are described in the following paragraphs.[3]

The current regulations in 34 CFR 280.4(b) define the term *minority group isolation,* in reference to a school, to mean "a condition in which minority group children constitute more than 50 percent of the enrollment of the school." 34 CFR 280.4(b). We are removing the definition of *minority group isolation* through these interim final regulations because the definition requires the use of only two racial classifications of students—"minority group" and "nonminority group" students. In the absence of a definition of *minority group isolation,* the Department will determine on a case-by-case basis whether a district's voluntary plan meets the statutory purpose of reducing, eliminating, or preventing minority group isolation in its magnet or feeder schools, considering the unique circumstances in each district and school. For example, the Department may consider whether there is a substantial proportion of students from any minority group enrolled in a school, looking at the student enrollment numbers of the district and the targeted schools disaggregated by race.

The current regulations in 34 CFR 280.2(b)(2) and 280.20(g) provide for the use of a district-wide percentage of minority students as an absolute limitation on student enrollment in magnet or feeder schools. Specifically, section 280.2(b)(2) provides for the Secretary to approve a voluntary plan as adequate under Title VI if the establishment of the magnet school will not result in an increase of minority enrollment, at the magnet school or at any feeder school, above the district-wide percentage of minority group students in the LEA's schools at the grade levels served by the magnet school. Similarly, section 280.20(g), related to the information that an applicant must include in its application, provides, in part, that an applicant seeking approval of a voluntary plan as adequate under Title VI that cannot provide the information required for review of its application may submit other information to demonstrate that—

> the creation or operation of its proposed magnet school * * * would not result in an increase of minority student isolation at one of the applicant's schools above the districtwide percentage for minority students at the same grade levels as those served in the magnet school.

The Department is removing the language requiring use of the district-wide percentage limitations in both of these sections. Section 280.2(b)(2) is removed in its entirety, and section 280.20(g) is revised to remove the language regarding district-wide percentage for minority students. This amended provision reads as follows:

> An applicant that does not have an approved desegregation plan, and demonstrates that it cannot provide some portion of the information requested under paragraphs (f)(4) and (5) of this section, may provide other information (in lieu of that portion of the information not provided in response to paragraphs (f)(4) and (5) of this section) to demonstrate that the creation or operation of its proposed magnet school would reduce, eliminate, or prevent minority group isolation in the applicant's schools.

The Department will determine on a case-by-case basis whether the voluntary plans are adequate under Title VI of the Civil Rights Act of 1964 and whether the proposed magnet schools will reduce, eliminate or prevent minority group isolation within the period of the grant award, for the purposes of sections 280.2(b) and 280.20(g). This will include an examination of the factual basis for any proposed increases in minority enrollment at district schools rather than the use of the absolute district-wide percentage limitation found in the current regulations. For example, the Department may consider whether a plan to reduce, eliminate or prevent minority group isolation at a magnet school or at a feeder school would significantly increase minority group isolation at any magnet or feeder school in the project at the grade levels served by the magnet school. In cases in which a school district is subject to a desegregation order that prohibits magnet or feeder schools from exceeding the district-wide average of minority group students, the district would, of course, continue to be bound by that order.

Waiver of Rulemaking and Delayed Effective Date

Under the Administrative Procedure Act (APA) (5 U.S.C. 553), the Department is generally required to publish a notice of proposed rulemaking and provide the public with an opportunity to comment on proposed regulations prior to establishing a final rule. However, we are waiving the notice-and-comment rulemaking requirements under the APA. Section 553(b) of the APA provides that an agency is not required to conduct notice-and-comment rulemaking when the agency for good cause finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest. Although these regulations are subject to the APA's notice-and-comment requirements, the Secretary has determined that it would be contrary to the public interest and impracticable to conduct notice-and-comment rulemaking.

This determination is based on the need to provide school districts

[2] In evaluating these challenges to the districts' use of individual racial classifications, the Court applied the two part strict scrutiny standard which requires a compelling governmental interest for the use of race and that any use of race be narrowly tailored to further the compelling interest.

[3] We are not removing a fourth regulatory provision in the selection criterion *Quality of project design* at 34 CFR 280.31(c)(2)(v) that provides for the Secretary to determine the extent to which each magnet school for which funding is sought will improve the racial balance of students in the applicant's schools, because we are not using this factor in the FY 2010 grant competition.

flexibility in determining how to meet the MSAP's statutory requirements (*i.e.,* that magnet schools eliminate, reduce, or prevent minority group isolation and that voluntary plans are adequate under Title VI) while taking into account the Supreme Court's decision in *Parents Involved.* It would be impracticable for the Department to conduct notice-and-comment rulemaking and then promulgate final regulations in time to make new awards for FY 2010 funding prior to September 30, 2010, the date by which FY 2010 funds must be obligated under the MSAP program. The application submission and review process for this program normally takes seven to eight months, without any rulemaking activity, and we anticipate that conducting notice-and-comment rulemaking would require at least an additional four months. More specifically, given the complexity of the application, LEAs need 60 days to submit their applications, which is the time that has been provided in the past, and which, in our experience, is the minimum amount of time LEAs need. The peer review of the applications will take at least two months, if done on an expedited basis. And, the Department will need significant additional time to review the most competitive applications to determine, as required by the MSAP statute, whether each applicant will meet its assurances of non-discrimination, and whether each voluntary plan is adequate under Title VI of the Civil Rights Act of 1964. Finally, we must allow time in September to negotiate and award the grants. Given these time frames, even expediting the application review process, we could not conduct both notice-and-comment rulemaking and make awards before the end of the fiscal year. Based upon these considerations, therefore, the Secretary is issuing these interim final regulations without first publishing proposed regulations for public comment.

Although the Department is adopting these regulations on an interim final basis, the Department requests public comment on these changes in the MSAP regulations for future grant competitions. After consideration of public comments, the Secretary will publish final regulations applicable to the next grant competition.

The APA also requires that a substantive rule be published at least 30 days before its effective date, except as otherwise provided for good cause (5 U.S.C. 553(d)(3)). For the reasons outlined in the preceding paragraphs, the Secretary has determined that a delayed effective date for these interim final regulations is unnecessary and contrary to the public interest, and that good cause exists to waive the requirement for a delayed effective date.

Executive Order 12866

Under Executive Order 12866, the Secretary must determine whether a regulatory action is "significant" and therefore subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may (1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or Tribal governments or communities in a material way (also referred to as an "economically significant" rule); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or local programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order. The Secretary has determined that this regulatory action is significant under section 3(f) of the Executive order.

Potential Costs and Benefits

Under Executive Order 12866, we have assessed the potential costs and benefits of this regulatory action. The potential costs associated with the regulations are those resulting from Supreme Court action and those we have determined to be necessary for administering this program effectively and efficiently. In assessing the potential costs and benefits—both quantitative and qualitative—of this regulatory action, we have determined that the benefits justify the costs.

We have also determined that this 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

Because the Secretary has chosen to regulate only to the extent necessary to reflect changes required by the Supreme Court's decision in *Parents Involved,* LEAs have considerable flexibility in implementing the provisions of the MSAP. Consequently, the potential costs associated with this regulatory action are minimal.

Benefits of the regulations include providing LEAs greater latitude in the design of projects, the removal of the restriction of using a binary classification in the definition of minority group isolation, and removing the district-wide average limitation in the MSAP regulation.

Regulatory Flexibility Act Certification

The Secretary certifies that these regulations will not have a significant economic impact on a substantial number of small entities. The small entities that are affected by these regulations are small local educational agencies (LEAs) receiving Federal funds under this program. However, the regulations will not have a significant economic impact on the small LEAs affected because the regulations do not impose excessive regulatory burdens or require unnecessary Federal supervision. The regulations impose minimal requirements to ensure the proper expenditure of program funds.

Paperwork Reduction Act of 1995

These regulations do not require the collection of new information subject to the Paperwork Reduction Act of 1995. The existing MSAP student enrollment data forms approved under control number OMB–1855–0011, require districts to report current and projected racial and ethnic student enrollment data using the binary classifications of minority and non-minority. In order to conform to the change in the regulations removing the definition of minority group isolation, the required data will now be reported in a different manner by applicants. The forms have been changed to remove the requirement that applicants report racial and ethnic data using the minority and non-minority racial and ethnic classifications. Applicants will now be required to report racial and ethnic data disaggregated by the racial and ethnic categories used by the district for reporting such racial and ethnic data to the Department for the 2009–2010 school year. Although the Department has made changes to these student enrollment data forms, we do not anticipate that these changes will alter the current burden because the same racial and ethnic data will be collected by districts, even though it will be reported in a different manner.

In the October 2007 Guidance on Collecting, Maintaining and Reporting Data by Race or Ethnicity (Guidance) (72 FR 59266 (Oct. 19, 2007), at *http://www.ed.gov/legislation/FedRegister/other/2007–4/101907c.html,* the Department established new requirements for the collection and

reporting of racial and ethnic data under the programs we administer. The Department also announced that districts must begin reporting data using the new collection procedures and aggregate reporting categories no later than for data about the 2010–2011 school year. Under the Guidance, for upcoming grant applications, which would include applications for new MSAP funds, districts are permitted to report data using the racial and ethnic categories used in their district for the 2009–2010 school year.

This means that districts have two options for reporting the required data in disaggregated categories in their MSAP applications.

For districts that have already converted to the revised categories, racial and ethnic student enrollment data should be reported and projected using the revised forms that disaggregate student enrollment data by race and ethnicity using the following categories: Hispanic/Latino, American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, White, and Two-or More Races.

For districts that have not already converted to the revised categories, racial and ethnic student enrollment data should be reported and projected using the revised forms that disaggregate student enrollment data by race and ethnicity using the following categories: American Indian or Alaskan Native, Asian or Pacific Islander, Black (Not of Hispanic Origin), Hispanic, and White.

Two versions of the forms will be included in the application package.

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.

Assessment of Educational Impact

In accordance with section 411 of the General Education Provisions Act, 20 U.S.C. 1221e-4, we have determined that these regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

Electronic Access to This Document

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To use PDF you must have Adobe Acrobat Reader, which is available free at this site.

You may also view this document in text or PDF at the following site: *http://www.ed.gov/programs/magnet/applicant.html.*

Note: 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 on GPO Access at: *http://www.access.gpo.gov/nara/index.html.*

(Catalog of Federal Domestic Assistance Number 84.165A Magnet Schools Assistance Program)

List of Subjects in 34 CFR Part 280

Elementary and secondary education, Equal educational opportunity, Grant programs—education, Reporting and recordkeeping requirements.

Dated: February 25, 2010.

James H. Shelton, III,

Assistant Deputy Secretary for Innovation and Improvement.

■ For the reasons discussed in the preamble, the Secretary amends part 280 of title 34 of the Code of Federal Regulations as follows:

PART 280—MAGNET SCHOOLS ASSISTANCE PROGRAM

■ 1. The authority citation for part 280 continues to read as follows:

Authority: 20 U.S.C. 7231–7231j, unless otherwise indicated.

§ 280.2 [Amended]

■ 2. Section 280.2 is amended by revising paragraph (b) to read as follows:

§ 280.2 Who is eligible to apply for a grant?

* * * * *

(b) The Secretary approves a voluntary plan under paragraph (a)(2) of this section only if he determines that for each magnet school for which funding is sought, the magnet school will reduce, eliminate, or prevent minority group isolation within the period of the grant award, either in the magnet school or in a feeder school, as appropriate.

* * * * *

§ 280.4 [Amended]

■ 3. Section 280.4 is amended by removing the definition of *minority group isolation* in paragraph (b).

■ 4. Section 280.20(g) is revised to read as follows:

§ 280.20 How does one apply for a grant?

* * * * *

(g) An applicant that does not have an approved desegregation plan, and demonstrates that it cannot provide some portion of the information requested under paragraphs (f)(4) and (5) of this section, may provide other information (in lieu of that portion of the information not provided in response to paragraphs (f)(4) and (5) of this section) to demonstrate that the creation or operation of its proposed magnet school would reduce, eliminate, or prevent minority group isolation in the applicant's schools.

* * * * *

[FR Doc. 2010–4415 Filed 3–3–10; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 55

[EPA–R10–OAR–2009–0799; FRL–9123–1]

Technical Amendment to the Outer Continental Shelf Air Regulations Consistency Update; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correction.

SUMMARY: This document contains technical corrections to the final regulations, which were published in the **Federal Register** of Thursday January 21, 2010. The regulations related to the Consistency Update of the Outer Continental Shelf Air Regulations for Alaska.

DATES: Effective on March 22, 2010.

FOR FURTHER INFORMATION CONTACT: Natasha Greaves, Federal and Delegated Air Programs Unit, Office of Air, Waste, and Toxics, U.S. Environmental Protection Agency, Region 10, 1200 Sixth Avenue, Suite 900, Mail Stop: AWT–107, Seattle, WA 98101; telephone number: (206) 553–7079; e-mail address: *greaves.natasha@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background Information

This Notice is to provide a technical correction to the final regulation published at 75 FR 3392, January 21, 2010. The final regulations that are the subject to these corrections are effective on March 22 and affect the State of Alaska Administrative Code ("ACC") Air Emission User Fee provision in 18 AAC 50.410 as incorporated into 40 CFR Part 55. Alaska revised the Air Emission User Fee provision in 18 AAC 50.410 to extend the date through which the current emission fee rates apply to stationary sources permitted under AS 46.14 from June 30, 2009 to June 30, 2010 and clarified that the fee applies annually. This correction relates only to the air emission user fee provision in 18 AAC 50.410.

II. Need for Correction

As published, the final regulations contained an error which may prove to be misleading and needs to be clarified. The direct final rule in 75 FR 3392 inadvertently stated that Appendix A to 40 CFR part 55 was amended by "revising" Article 4 of paragraph (a)(1) under the heading "Alaska". The direct final rule should have said that at Appendix A to 40 CFR part 55 was amended by "adding" a provision within Article 4 of paragraph (a)(1) under the heading "Alaska".

■ Accordingly, the following correction is made to the final rule published January 21, 2010 (75 FR 3392).

■ 1. On page 3394, in the third column, amendatory instruction 3 is corrected to read as follows:

"3. Appendix A to Part 55 is amended under "Alaska" by revising paragraph (a)(1) introductory text and by adding an entry for "18 AAC 50.410" under article 4 to read as follows:"

Dated: February 25, 2010.

Michelle L. Pirzadeh,

Acting Regional Administrator, Region 10.

[FR Doc. 2010–4558 Filed 3–3–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[EPA–R04–OAR–2007–0958–201005(c); FRL–9122–1]

Determination of Nonattainment and Reclassification of the Atlanta, Georgia, 8-Hour Ozone Nonattainment Area; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correcting amendment.

SUMMARY: On March 6, 2008, EPA published a document reclassifying the Atlanta, Georgia, area from marginal to moderate for the 1997 8-hour ozone nonattainment area by operation of law. This action clarifies a portion of the preamble language in the aforementioned **Federal Register** notice.

DATES: This action is effective March 4, 2010.

ADDRESSES: Copies of the documentation used in the action being corrected are available for inspection during normal business hours at the following location: U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Ms. Stacy Harder, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Ms. Harder can be reached at 404–562–9042, or via electronic mail at *harder.stacy@epa.gov.*

SUPPLEMENTARY INFORMATION: This action corrects preamble language for a designation that appears in Georgia's Attainment Designation Status section at 40 CFR part 81.311. The reclassification of the Atlanta Area from marginal to moderate for the 1997 8-hour ozone standard, was approved by EPA on March 6, 2008 (73 FR 12013). However, EPA inadvertently excluded Hall County from the list of counties included in the Atlanta, Georgia, 1997 8-hour ozone nonattainment area in the preamble portion of the rulemaking. Also, EPA inadvertently included Pickens County in the list of counties included in the Atlanta, Georgia, 1997 8-hour ozone nonattainment area, in the preamble portion of the rulemaking. Additionally, EPA is clarifying that "Bartow" and "Spalding" Counties were inadvertently misspelled as "Barton" and "Spaulding" Counties on page 12014. Therefore, EPA is correcting this inadvertent error by clarifying that the first sentence, in the second paragraph, in the first column, of page 12014 (**SUPPLEMENTARY INFORMATION**, Section I) should read: "The Atlanta Area is located in Northern Georgia and consists of Barrow, Bartow, Carroll, Cherokee, Clayton, Cobb, Coweta, DeKalb, Douglas, Fayette, Forsyth, Fulton, Gwinnett, Hall, Henry, Newton, Paulding, Rockdale, Spalding and Walton Counties." The regulatory portion of the notice, found at 40 CFR 81.311, is correct as written in the March 6, 2008, rulemaking.

EPA has determined that today's action falls under the "good cause" exemption in section 553(b)(3)(B) of the Administrative Procedure Act (APA) which, upon finding "good cause," authorizes agencies to dispense with public participation where public notice and comment procedures are impracticable, unnecessary, or contrary to the public interest. Public notice and comment for this action are unnecessary because today's action to clarify the list of counties included in the Atlanta 1997 8-hour ozone nonattainment area, in the narrative portion of the rulemaking, has no substantive impact on EPA's March 6, 2008, approval of this regulation. In addition, EPA can identify no particular reason why the public would be interested in being notified of the correction of this omission, or in having the opportunity to comment on the correction prior to this action being finalized, since this correction action does not change the meaning of EPA's analysis or action to reclassify the Atlanta 1997 8-hour ozone nonattainment area from marginal to moderate.

EPA also finds that there is good cause under APA section 553(d)(3) for this correction to become effective on the date of publication of this action. Section 553(d)(3) of the APA allows an effective date less than 30 days after publication "as otherwise provided by the agency for good cause found and published with the rule." 5 U.S.C. 553(d)(3). The purpose of the 30-day waiting period prescribed in APA section 553(d)(3) is to give affected parties a reasonable time to adjust their behavior and prepare before the final rule takes effect. Today's rule, however, does not create any new regulatory requirements such that affected parties would need time to prepare before the rule takes effect. Rather, today's rule merely corrects an inadvertent error in the preamble portion of a prior rule by clarifying the list of counties included in the 1997 8-hour ozone nonattainment area, which EPA approved on March 6, 2008. For these reasons, EPA finds good cause under APA section 553(d)(3) for this correction to become effective on the date of publication of this action.

Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For

this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This action merely corrects an inadvertent error of omission in the preamble of a prior rule by identifying the list of counties included in the Atlanta 1997 8-hour ozone nonattainment area in a regulation which EPA approved on March 6, 2008, and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule merely corrects an inadvertent error in the preamble of a prior rule, and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This rule also does not have tribal implications because it will 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, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This rule also does not have Federalism implications because it does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This rule merely corrects an inadvertent error of omission in the preamble of a prior rule by identifying the list of counties included in the Atlanta 1997 8-hour ozone nonattainment area in a regulation which EPA approved on March 6, 2008, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant. In addition, this rule does not involve technical standards, thus the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule also does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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

Under section 307(b)(1) of the Clean Air Act (CAA), petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by May 3, 2010. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* CAA section 307(b)(2).)

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

Dated: February 23, 2010.

Beverly H. Banister,

Acting Regional Administrator, Region 4.

[FR Doc. 2010–4533 Filed 3–3–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–2009–0579, EPA–HQ–SFUND–2009–0581, EPA–HQ–SFUND–2009–0582, EPA–HQ–SFUND–2009–0583, EPA–HQ–SFUND–2009–0586, EPA–HQ–SFUND–2009–0587, EPA–HQ–SFUND–2009–0590, EPA–HQ–SFUND–2009–0591, EPA–HQ–SFUND–2005–0005; FRL–9120–7]

RIN 2050–AD75

National Priorities List, Final Rule No. 49

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA" or "the Act"), as amended, requires that the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP") include a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States. The National Priorities List ("NPL") constitutes this list. The NPL is intended primarily to guide the Environmental Protection Agency ("EPA" or "the Agency") in determining which sites warrant further investigation. These further investigations will allow EPA to assess the nature and extent of public health and environmental risks associated with the site and to determine what CERCLA-financed remedial action(s), if any, may be appropriate. This rule adds nine sites to the NPL, all to the General Superfund Section.

DATES: *Effective Date:* The effective date for this amendment to the NCP is April 5, 2010.

ADDRESSES: For addresses for the Headquarters and Regional dockets, as well as further details on what these dockets contain, see section II, "Availability of Information to the Public" in the **SUPPLEMENTARY INFORMATION** portion of this preamble.

FOR FURTHER INFORMATION CONTACT: Terry Jeng, phone: (703) 603–8852, e-mail: *jeng.terry@epa.gov,* Site Assessment and Remedy Decisions Branch; Assessment and Remediation Division; Office of Superfund Remediation and Technology Innovation (mail code 5204P); U.S. Environmental Protection Agency; 1200 Pennsylvania Avenue, NW.; Washington, DC 20460; or the Superfund Hotline, phone (800) 424–9346 or (703) 412–9810 in the Washington, DC, metropolitan area.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

A. What Are CERCLA and SARA?

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601–9675 (“CERCLA” or “the Act”), in response to the dangers of uncontrolled releases or threatened releases of hazardous substances, and releases or substantial threats of releases into the environment of any pollutant or contaminant that may present an imminent or substantial danger to the public health or welfare. CERCLA was amended on October 17, 1986, by the Superfund Amendments and Reauthorization Act (“SARA”), Public Law 99–499, 100 Stat. 1613 *et seq.*

B. What Is the NCP?

To implement CERCLA, EPA promulgated the revised National Oil and Hazardous Substances Pollution Contingency Plan (“NCP”), 40 CFR part 300, on July 16, 1982 (47 FR 31180), pursuant to CERCLA section 105 and Executive Order 12316 (46 FR 42237, August 20, 1981). The NCP sets guidelines and procedures for responding to releases and threatened releases of hazardous substances, or releases or substantial threats of releases into the environment of any pollutant or contaminant that may present an imminent or substantial danger to the public health or welfare. EPA has revised the NCP on several occasions. The most recent comprehensive revision was on March 8, 1990 (55 FR 8666).

As required under section 105(a)(8)(A) of CERCLA, the NCP also includes “criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable taking into account the potential urgency of such action, for the purpose of taking removal action.” “Removal” actions are defined broadly and include a wide range of actions taken to study, clean up, prevent or otherwise address releases and threatened releases of hazardous substances, pollutants or contaminants (42 U.S.C. 9601(23)).

C. What Is the National Priorities List (NPL)?

The NPL is a list of national priorities among the known or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States. The list, which is appendix B of the NCP (40 CFR part 300), was required under section 105(a)(8)(B) of CERCLA, as amended. Section 105(a)(8)(B) defines the NPL as a list of “releases” and the highest priority “facilities” and requires that the NPL be revised at least annually. The NPL is intended primarily to guide EPA in determining which sites warrant further investigation to assess the nature and extent of public health and environmental risks associated with a release of hazardous substances, pollutants or contaminants. The NPL is only of limited significance, however, as it does not assign liability to any party or to the owner of any specific property. Also, placing a site on the NPL does not mean that any remedial or removal action necessarily need be taken.

For purposes of listing, the NPL includes two sections, one of sites that are generally evaluated and cleaned up by EPA (the “General Superfund Section”), and one of sites that are owned or operated by other Federal agencies (the “Federal Facilities Section”). With respect to sites in the Federal Facilities Section, these sites are generally being addressed by other Federal agencies. Under Executive Order 12580 (52 FR 2923, January 29, 1987) and CERCLA section 120, each Federal agency is responsible for carrying out most response actions at facilities under its own jurisdiction, custody, or control, although EPA is responsible for preparing a Hazard Ranking System (“HRS”) score and determining whether the facility is placed on the NPL.

D. How Are Sites Listed on the NPL?

There are three mechanisms for placing sites on the NPL for possible remedial action (*see* 40 CFR 300.425(c) of the NCP): (1) A site may be included on the NPL if it scores sufficiently high on the HRS, which EPA promulgated as appendix A of the NCP (40 CFR part 300). The HRS serves as a screening tool to evaluate the relative potential of uncontrolled hazardous substances, pollutants or contaminants to pose a threat to human health or the environment. On December 14, 1990 (55 FR 51532), EPA promulgated revisions to the HRS partly in response to CERCLA section 105(c), added by SARA. The revised HRS evaluates four pathways: ground water, surface water, soil exposure, and air. As a matter of Agency policy, those sites that score 28.50 or greater on the HRS are eligible for the NPL. (2) Pursuant to 42 U.S.C. 9605(a)(8)(B), each State may designate a single site as its top priority to be listed on the NPL, without any HRS score. This provision of CERCLA requires that, to the extent practicable, the NPL include one facility designated by each State as the greatest danger to

public health, welfare, or the environment among known facilities in the State. This mechanism for listing is set out in the NCP at 40 CFR 300.425(c)(2). (3) The third mechanism for listing, included in the NCP at 40 CFR 300.425(c)(3), allows certain sites to be listed without any HRS score, if all of the following conditions are met:

- The Agency for Toxic Substances and Disease Registry (ATSDR) of the U.S. Public Health Service has issued a health advisory that recommends dissociation of individuals from the release.
- EPA determines that the release poses a significant threat to public health.
- EPA anticipates that it will be more cost-effective to use its remedial authority than to use its removal authority to respond to the release.

EPA promulgated an original NPL of 406 sites on September 8, 1983 (48 FR 40658) and generally has updated it at least annually.

E. What Happens to Sites on the NPL?

A site may undergo remedial action financed by the Trust Fund established under CERCLA (commonly referred to as the "Superfund") only after it is placed on the NPL, as provided in the NCP at 40 CFR 300.425(b)(1). ("Remedial actions" are those "consistent with permanent remedy, taken instead of or in addition to removal actions * * *." 42 U.S.C. 9601(24).) However, under 40 CFR 300.425(b)(2) placing a site on the NPL "does not imply that monies will be expended." EPA may pursue other appropriate authorities to respond to the releases, including enforcement action under CERCLA and other laws.

F. Does the NPL Define the Boundaries of Sites?

The NPL does not describe releases in precise geographical terms; it would be neither feasible nor consistent with the limited purpose of the NPL (to identify releases that are priorities for further evaluation), for it to do so. Indeed, the precise nature and extent of the site are typically not known at the time of listing.

Although a CERCLA "facility" is broadly defined to include any area where a hazardous substance has "come to be located" (CERCLA section 101(9)), the listing process itself is not intended to define or reflect the boundaries of such facilities or releases. Of course, HRS data (if the HRS is used to list a site) upon which the NPL placement was based will, to some extent, describe the release(s) at issue. That is, the NPL site would include all releases evaluated as part of that HRS analysis.

When a site is listed, the approach generally used to describe the relevant release(s) is to delineate a geographical area (usually the area within an installation or plant boundaries) and identify the site by reference to that area. However, the NPL site is not necessarily coextensive with the boundaries of the installation or plant, and the boundaries of the installation or plant are not necessarily the "boundaries" of the site. Rather, the site consists of all contaminated areas within the area used to identify the site, as well as any other location where that contamination has come to be located, or from where that contamination came.

In other words, while geographic terms are often used to designate the site (*e.g.,* the "Jones Co. plant site") in terms of the property owned by a particular party, the site, properly understood, is not limited to that property (*e.g.,* it may extend beyond the property due to contaminant migration), and conversely may not occupy the full extent of the property (*e.g.,* where there are uncontaminated parts of the identified property, they may not be, strictly speaking, part of the "site"). The "site" is thus neither equal to, nor confined by, the boundaries of any specific property that may give the site its name, and the name itself should not be read to imply that this site is coextensive with the entire area within the property boundary of the installation or plant. In addition, the site name is merely used to help identify the geographic location of the contamination, and is not meant to constitute any determination of liability at a site. For example, the name "Jones Co. plant site," does not imply that the Jones company is responsible for the contamination located on the plant site.

EPA regulations provide that the Remedial Investigation ("RI") "is a process undertaken * * * to determine the nature and extent of the problem presented by the release" as more information is developed on site contamination, and which is generally performed in an interactive fashion with the Feasibility Study ("FS") (40 CFR 300.5). During the RI/FS process, the release may be found to be larger or smaller than was originally thought, as more is learned about the source(s) and the migration of the contamination. However, the HRS inquiry focuses on an evaluation of the threat posed and therefore the boundaries of the release need not be exactly defined. Moreover, it generally is impossible to discover the full extent of where the contamination "has come to be located" before all necessary studies and remedial work are completed at a site. Indeed, the known boundaries of the contamination can be expected to change over time. Thus, in most cases, it may be impossible to describe the boundaries of a release with absolute certainty.

Further, as noted above, NPL listing does not assign liability to any party or to the owner of any specific property. Thus, if a party does not believe it is liable for releases on discrete parcels of property, it can submit supporting information to the Agency at any time after it receives notice it is a potentially responsible party.

For these reasons, the NPL need not be amended as further research reveals more information about the location of the contamination or release.

G. How Are Sites Removed From the NPL?

EPA may delete sites from the NPL where no further response is appropriate under Superfund, as explained in the NCP at 40 CFR 300.425(e). This section also provides that EPA shall consult with States on proposed deletions and shall consider whether any of the following criteria have been met:

(i) Responsible parties or other persons have implemented all appropriate response actions required;

(ii) All appropriate Superfund-financed response has been implemented and no further response action is required; or

(iii) The remedial investigation has shown the release poses no significant threat to public health or the environment, and taking of remedial measures is not appropriate.

H. May EPA Delete Portions of Sites From the NPL as They Are Cleaned Up?

In November 1995, EPA initiated a new policy to delete portions of NPL sites where cleanup is complete (60 FR 55465, November 1, 1995). Total site cleanup may take many years, while portions of the site may have been cleaned up and made available for productive use.

I. What Is the Construction Completion List (CCL)?

EPA also has developed an NPL construction completion list ("CCL") to simplify its system of categorizing sites and to better communicate the successful completion of cleanup activities (58 FR 12142, March 2, 1993). Inclusion of a site on the CCL has no legal significance.

Sites qualify for the CCL when: (1) Any necessary physical construction is complete, whether or not final cleanup

levels or other requirements have been achieved; (2) EPA has determined that the response action should be limited to measures that do not involve construction (*e.g.,* institutional controls); or (3) the site qualifies for deletion from the NPL. For the most up-to-date information on the CCL, see EPA's Internet site at *http://www.epa.gov/superfund/cleanup/ccl.htm.*

J. What Is the Sitewide Ready for Anticipated Use Measure?

The Sitewide Ready for Anticipated Use Measure (formerly called Sitewide Ready-for-Reuse) represents important Superfund accomplishments and the measure reflects the high priority EPA places on considering anticipated future land use as part of our remedy selection process. See Guidance for Implementing the Sitewide Ready-for-Reuse Measure, May 24, 2006, OSWER 9365.0–36. This measure applies to final and deleted sites where construction is complete, all cleanup goals have been achieved, and all institutional or other controls are in place. EPA has been successful on many occasions in carrying out remedial actions that ensure protectiveness of human health and the environment, including current and future land users, in a manner that allows contaminated properties to be restored to environmental and economic vitality. For further information, please go to *http://www.epa.gov/superfund/programs/recycle/tools/index.html.*

II. Availability of Information to the Public

A. May I Review the Documents Relevant to This Final Rule?

Yes, documents relating to the evaluation and scoring of the sites in this final rule are contained in dockets located both at EPA Headquarters and in the Regional offices.

An electronic version of the public docket is available through *http://www.regulations.gov* (*see* table below for Docket Identification numbers). Although not all Docket materials may be available electronically, you may still access any of the publicly available Docket materials through the Docket facilities identified below in section II D.

Site name	City/County, State	Docket ID No.
Salt Chuck Mine	Outer Ketchikan County, AK	EPA–HQ–SFUND–2009–0579.
JJ Seifert Machine	Ruskin, FL	EPA–HQ–SFUND–2009–0581.
Kerr-McGee Chemical Corp—Jacksonville	Jacksonville, FL	EPA–HQ–SFUND–2009–0582.
Chemetco	Madison County, IL	EPA–HQ–SFUND–2009–0583.
Lake Calumet Cluster	Chicago, IL	EPA–HQ–SFUND–2005–0005.
Gratiot County Golf Course	St. Louis, MI	EPA–HQ–SFUND–2009–0586.
Kerr-McGee Chemical Corp—Navassa	Navassa, NC	EPA–HQ–SFUND–2009–0587.
Black Butte Mine	Cottage Grove, OR	EPA–HQ–SFUND–2009–0590.
Van der Horst USA Corporation	Terrell, TX	EPA–HQ–SFUND–2009–0591.

B. What Documents Are Available for Review at the Headquarters Docket?

The Headquarters Docket for this rule contains, for each site, the HRS score sheets, the Documentation Record describing the information used to compute the score, pertinent information regarding statutory requirements or EPA listing policies that affect the site, and a list of documents referenced in the Documentation Record. For sites that received comments during the comment period, the Headquarters Docket also contains a Support Document that includes EPA's responses to comments.

C. What Documents Are Available for Review at the Regional Dockets?

The Regional Dockets contain all the information in the Headquarters Docket, plus the actual reference documents containing the data principally relied upon by EPA in calculating or evaluating the HRS score for the sites located in their Region. These reference documents are available only in the Regional Dockets. For sites that received comments during the comment period, the Regional Docket also contains a Support Document that includes EPA's responses to comments.

D. How Do I Access the Documents?

You may view the documents, by appointment only, after the publication of this rule. The hours of operation for the Headquarters Docket are from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. Please contact the Regional Dockets for hours.

Following is the contact information for the EPA Headquarters: Docket Coordinator, Headquarters; U.S. Environmental Protection Agency; CERCLA Docket Office; 1301 Constitution Avenue, NW.; EPA West, Room 3334, Washington, DC 20004, 202/566–0276.

The contact information for the Regional Dockets is as follows:

Joan Berggren, Region 1 (CT, ME, MA, NH, RI, VT), U.S. EPA, Superfund Records and Information Center, Mailcode HSC, One Congress Street, Suite 1100, Boston, MA 02114–2023; 617/918–1417.

Ildefonso Acosta, Region 2 (NJ, NY, PR, VI), U.S. EPA, 290 Broadway, New York, NY 10007–1866; 212/637–4344.

Dawn Shellenberger (ASRC), Region 3 (DE, DC, MD, PA, VA, WV), U.S. EPA, Library, 1650 Arch Street, Mailcode 3PM52, Philadelphia, PA 19103; 215/814–5364.

Debbie Jourdan, Region 4 (AL, FL, GA, KY, MS, NC, SC, TN), U.S. EPA, 61 Forsyth Street, SW, Mailcode 9T25, Atlanta, GA 30303; 404/562–8862.

Janet Pfundheller, Region 5 (IL, IN, MI, MN, OH, WI), U.S. EPA, Records Center, Superfund Division SMR–7J, Metcalfe Federal Building, 77 West Jackson Boulevard, Chicago, IL 60604; 312/353–5821.

Brenda Cook, Region 6 (AR, LA, NM, OK, TX), U.S. EPA, 1445 Ross Avenue, Suite 1200, Mailcode 6SFTS, Dallas, TX 75202–2733; 214/665–7436.

Michelle Quick, Region 7 (IA, KS, MO, NE), U.S. EPA, 901 North 5th Street, Mailcode SUPRERNB, Kansas City, KS 66101; 913/551–7335.

Gwen Christiansen, Region 8 (CO, MT, ND, SD, UT, WY), U.S. EPA, 1595 Wynkoop Street, Mailcode 8EPR–B, Denver, CO 80202–1129; 303/312–6463.

Karen Jurist, Region 9 (AZ, CA, HI, NV, AS, GU, MP), U.S. EPA, 75 Hawthorne Street, Mailcode SFD–9–1, San Francisco, CA 94105; 415/972–3219.

Ken Marcy, Region 10 (AK, ID, OR, WA), U.S. EPA, 1200 6th Avenue, Mailcode ECL–112, Seattle, WA 98101; 206/463–1349.

E. How May I Obtain a Current List of NPL Sites?

You may obtain a current list of NPL sites via the Internet at *http://www.epa.gov/superfund/* (look under the Superfund sites category) or by

contacting the Superfund Docket (*see* contact information above).

III. Contents of This Final Rule

A. Additions to the NPL

This final rule adds the following nine sites to the NPL, all to the General Superfund Section. The sites are presented in the table below:

State	Site name	City/County
AK	Salt Chuck Mine	Outer Ketchikan County.
FL	JJ Seifert Machine	Ruskin.
FL	Kerr-McGee Chemical Corp—Jacksonville	Jacksonville.
IL	Chemetco	Madison County.
IL	Lake Calumet Cluster	Chicago.
MI	Gratiot County Golf Course	St. Louis.
NC	Kerr-McGee Chemical Corp—Navassa	Navassa.
OR	Black Butte Mine	Cottage Grove.
TX	Van der Horst USA Corporation	Terrell.

B. What Did EPA Do With the Public Comments It Received?

EPA reviewed all comments received on the sites in this rule and responded to all relevant comments. This rule adds nine sites to the NPL.

One site being added to the NPL in this rule, Lake Calumet Cluster (IL), received extensive comments related to the HRS scoring. The responses to those comments and the impact those comments have on the score, if any, are contained in a support document issued concurrently with the publication of this rule. The support document is available to the public at *http://www.regulations.gov.*

Four sites being added to the NPL in this rule received no comments: JJ Seifert Machine (FL), Kerr-McGee Chemical Corp—Jacksonville (FL), Gratiot County Golf Course (MI), and Van der Horst (TX).

Two sites received comments requesting the sites be listed on the NPL. Those sites are Salt Chuck Mine (AK) and Black Butte Mine (OR). The Salt Chuck Mine commenters urged EPA to list the site, ensure subsistence resources can be harvested, work in partnership with the Organized Village of Kasaan to ensure Tribal needs are considered, work with the State and Forest Service, and evaluate additional abandoned mines in the area. The Black Butte Mine commenter urged EPA to list the site and give it a high priority for remediation. In response, EPA is listing both sites. Listing makes a site eligible for remedial action funding under CERCLA, and EPA will examine the site to determine the appropriate response action(s). Actual funding may not necessarily be undertaken in the precise order of HRS scores, however, and upon more detailed investigation may not be necessary at all in some cases. EPA will determine the need for using Superfund monies for remedial activities on a site-by-site basis, taking into account State priorities, further site investigation, other response alternatives, and other factors as appropriate. In the case of Salt Chuck Mine, EPA will work in partnership with the State, Tribes, and Forest Service as EPA determines how to address subsistence resource concerns, and considers additional mines to be evaluated.

Three commenters submitted comments on the Kerr-McGee Chemical Corp—Jacksonville (FL) site. No comment specifically related to the site. One comment briefly described the NPL, suggested it be updated every six months, and said appropriate funding should be provided. A second comment urged that the NPL be used to address contamination from coal mining companies in Appalachia. The third comment also included general suggestions on how EPA can improve the Superfund program. In response, EPA is adding this site to the NPL. See responses to Salt Chuck Mine (AK) and Black Butte Mine (OR) comments above. EPA will continue to assess other sites in the future to determine if they meet the listing criteria and if NPL listing is appropriate. To date a number of mining sites, although no coal mine sites, have been listed, and a number of contaminated ground water sites have been listed as well. EPA notes that its practice has been to update the NPL every six months, and it will take the commenters' suggestions for improving the Superfund program under advisement as it continues its site clean-up work under CERCLA, consistent with the authority provided to it under the statute.

EPA is also adding the Chemetco (IL) site to the NPL. EPA received one comment on the site. This comment, on behalf of a company that stated it recently entered into a purchase agreement with the Chemetco trustee to demolish site structures and then process metal-bearing materials on the site, opposed listing of the site. The purchasing company's actions will, according to the commenter, increase jobs and lead to future development in the area. The commenter claimed it was premature and detrimental for the site to be listed on the NPL, because the stigma of listing could hamper redevelopment by making it difficult to attract financing. The commenter asked EPA to defer listing pending the outcome of the buyer's negotiations with EPA and the State, leaving open the possibility of later withdrawing the proposed listing. In response, while EPA and the State will work with the commenter to encourage redevelopment, EPA believes that listing is the most appropriate way to study and, if needed, address the contamination at the site. EPA believes that the unsupported statement that it will be difficult to attract financing does not warrant withholding listing of the site. The commenter does not provide information relating to Long Lake in the comment, but only considers the reprocessing of the sludge and slag. Moreover, the commenter did not raise any issues with the HRS score for the site, and therefore, the HRS score for the site remains unchanged.

All comments that were received by EPA are contained in the Headquarters Docket and are also listed in EPA's electronic public Docket and comment system at *http://www.regulations.gov.*

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

1. What Is Executive Order 12866?

Under Executive Order 12866 (58 FR 51735 (October 4, 1993)), the Agency must determine whether a regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order.

The Order defines "significant regulatory action" as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

2. Is This Final Rule Subject to Executive Order 12866 Review?

No. The listing of sites on the NPL does not impose any obligations on any entities. The listing does not set standards or a regulatory regime and imposes no liability or costs. Any liability under CERCLA exists irrespective of whether a site is listed. It has been determined that this action is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

B. Paperwork Reduction Act

1. What Is the 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, after initial display in the preamble of the final rules, are listed in 40 CFR part 9.

2. Does the Paperwork Reduction Act Apply to This Final Rule?

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* EPA has determined that the PRA does not apply because this rule does not contain any information collection requirements that require approval of the OMB.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

1. What Is the Regulatory Flexibility Act?

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996) whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

2. How Has EPA Complied With the Regulatory Flexibility Act?

This rule listing sites on the NPL does not impose any obligations on any group, including small entities. This rule also does not establish standards or requirements that any small entity must meet, and imposes no direct costs on any small entity. Whether an entity, small or otherwise, is liable for response costs for a release of hazardous substances depends on whether that entity is liable under CERCLA 107(a). Any such liability exists regardless of whether the site is listed on the NPL through this rulemaking. Thus, this rule does not impose any requirements on any small entities. For the foregoing reasons, I certify that this rule will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act

1. What Is the Unfunded Mandates Reform Act (UMRA)?

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. Before EPA promulgates a rule where a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

2. Does UMRA Apply to This Final Rule?

This final rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. Listing a site on the NPL does not itself impose any costs. Listing does not mean that EPA necessarily will

undertake remedial action. Nor does listing require any action by a private party or determine liability for response costs. Costs that arise out of site responses result from site-specific decisions regarding what actions to take, not directly from the act of placing a site on the NPL. Thus, this rule is not subject to the requirements of section 202 and 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. As is mentioned above, site listing does not impose any costs and would not require any action of a small government.

E. Executive Order 13132: Federalism

1. What Is Executive Order 13132?

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), 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."

2. Does Executive Order 13132 Apply to This Final Rule?

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it does not contain any requirements applicable to States or other levels of government. Thus, the requirements of the Executive Order do not apply to this final rule.

EPA believes, however, that this final rule may be of significant interest to State governments. In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA therefore consulted with State officials and/or representatives of State governments early in the process of developing the rule to permit them to have meaningful and timely input into its development. All sites included in this final rule were referred to EPA by States for listing. For all sites in this rule, EPA received letters of support either from the Governor or a State official who was delegated the authority by the Governor to speak on their behalf regarding NPL listing decisions.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

1. What Is Executive Order 13175?

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000), 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."

2. Does Executive Order 13175 Apply to This Final Rule?

This final rule does not have Tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). Listing a site on the NPL does not impose any costs on a Tribe or require a Tribe to take remedial action. Thus, Executive Order 13175 does not apply to this final rule.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

1. What Is Executive Order 13045?

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

2. Does Executive Order 13045 Apply to This Final Rule?

This rule is not subject to Executive Order 13045 because it is not an economically significant rule as defined by Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this section present a disproportionate risk to children.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Usage

1. What Is Executive Order 13211?

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," (66 FR 28355 (May 22, 2001)) requires Federal agencies to prepare a "Statement of Energy Effects" when undertaking certain regulatory actions. A Statement of Energy Effects describes the adverse effects of a "significant energy action" on energy supply, distribution and use, reasonable alternatives to the action, and the expected effects of the alternatives on energy supply, distribution and use.

2. Does Executive Order 13211 Apply to This Final Rule?

This action is not a "significant energy action" as defined in Executive Order 13211, because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, we have concluded that this final rule is not likely to have any adverse energy impacts because adding a site to the NPL does not require an entity to conduct any action that would require energy use, let alone that which would significantly affect energy supply, distribution, or usage. Thus, Executive Order 13175 does not apply to this action.

I. National Technology Transfer and Advancement Act

1. What Is the National Technology Transfer and Advancement Act?

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note), directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

2. Does the National Technology Transfer and Advancement Act Apply to This Final Rule?

No. This rulemaking does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

1. What Is Executive Order 12898?

Executive Order (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

2. Does Executive Order 12898 Apply to This Rule?

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. As this rule does not impose any enforceable duty upon State, Tribal or local governments, this rule will neither increase nor decrease environmental protection.

K. Congressional Review Act

1. Has EPA Submitted This Rule to Congress and the Government Accountability Office?

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

2. Could the Effective Date of This Final Rule Change?

Provisions of the Congressional Review Act (CRA) or section 305 of CERCLA may alter the effective date of this regulation.

Under the CRA, 5 U.S.C. 801(a), before a rule can take effect the Federal agency promulgating the rule must submit a report to each House of the Congress and to the Comptroller General. This report must contain a copy of the rule, a concise general statement relating to the rule (including whether it is a major rule), a copy of the cost-benefit analysis of the rule (if any), the agency's actions relevant to provisions of the Regulatory Flexibility Act (affecting small businesses) and the Unfunded Mandates Reform Act of 1995 (describing unfunded Federal requirements imposed on State and local governments and the private sector), and any other relevant information or requirements and any relevant Executive Orders.

EPA has submitted a report under the CRA for this rule. The rule will take effect, as provided by law, within 30 days of publication of this document, since it is not a major rule. Section 804(2) defines a major rule as any rule that the Administrator of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB) finds has resulted in or is likely to result in: an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. NPL listing is not a major rule because, as explained above, the listing, itself, imposes no monetary costs on any person. It establishes no enforceable duties, does not establish that EPA necessarily will undertake remedial action, nor does it require any action by any party or determine its liability for site response costs. Costs that arise out of site responses result from site-by-site decisions about what actions to take, not directly from the act of listing itself. Section 801(a)(3) provides for a delay in the effective date of major rules after this report is submitted.

3. What Could Cause a Change in the Effective Date of This Rule?

Under 5 U.S.C. 801(b)(1) a rule shall not take effect, or continue in effect, if Congress enacts (and the President signs) a joint resolution of disapproval, described under section 802.

Another statutory provision that may affect this rule is CERCLA section 305, which provides for a legislative veto of regulations promulgated under CERCLA. Although *INS* v. *Chadha,* 462 U.S. 919,103 S. Ct. 2764 (1983) and *Bd. of Regents of the University of Washington* v. *EPA,* 86 F.3d 1214,1222 (DC Cir. 1996) cast the validity of the legislative veto into question, EPA has transmitted a copy of this regulation to the Secretary of the Senate and the Clerk of the House of Representatives.

If action by Congress under either the CRA or CERCLA section 305 calls the effective date of this regulation into question, EPA will publish a document of clarification in the **Federal Register**.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Natural resources, Oil pollution, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Dated: February 24, 2010.

Mathy Stanislaus,

Assistant Administrator, Office of Solid Waste and Emergency Response.

■ 40 CFR part 300 is amended as follows:

PART 300—[AMENDED]

■ 1. The authority citation for part 300 continues to read as follows:

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

■ 2. Table 1 of Appendix B to part 300 is amended by adding the following sites in alphabetical order to read as follows:

Appendix B to Part 300—National Priorities List

TABLE 1—GENERAL SUPERFUND SECTION

State	Site name	City/County	Notes [a]
AK	Salt Chuck Mine	Outer Ketchikan County.	
*	* * * * *	*	*
FL	JJ Seifert Machine	Ruskin.	
FL	Kerr-McGee Chemical Corp-Jacksonville	Jacksonville.	
*	* * * * *	*	*
IL	Chemetco	Madison County.	
*	* * * * *	*	*
IL	Lake Calumet Cluster	Chicago.	
*	* * * * *	*	*
MI	Gratiot County Golf Course	St. Louis.	
*	* * * * *	*	*
NC	Kerr-McGee Chemical Corp-Navassa	Navassa.	
*	* * * * *	*	*
OR	Black Butte Mine	Cottage Grove.	
*	* * * * *	*	*
TX	Van der Horst USA Corporation	Terrell.	
*	* * * * *	*	*

[a] A = Based on issuance of health advisory by Agency for Toxic Substance and Disease Registry (HRS score need not be ≥ 28.50).
C = Sites on Construction Completion list.
S = State top priority (HRS score need not be ≥ 28.50)
P = Sites with partial deletion(s).

* * * * *

[FR Doc. 2010–4304 Filed 3–3–10; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–2009–0063; FRL–9120–8]

RIN 2050–AD75

National Priorities List, Final Rule—Gowanus Canal

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA" or "the Act"), as amended, requires that the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP") include a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States. The National Priorities List ("NPL") constitutes this list. The NPL is intended primarily to guide the Environmental Protection Agency ("EPA" or "the Agency") in determining which sites warrant further investigation. These further investigations will allow EPA to assess the nature and extent of public health and environmental risks associated with the site and to determine what CERCLA-financed remedial action(s), if any, may be appropriate. This rule adds the Gowanus Canal, located in Brooklyn, New York, to the General Superfund section of the NPL.

DATES: *Effective Date:* The effective date for this amendment to the NCP is April 5, 2010.

ADDRESSES: For addresses for the Headquarters and Region 2 dockets, as well as further details on what these dockets contain, see section II, "Availability of Information to the Public" in the **SUPPLEMENTARY INFORMATION** portion of this preamble.

FOR FURTHER INFORMATION CONTACT: Terry Jeng, phone: (703) 603–8852, e-mail: *jeng.terry@epa.gov*, Site Assessment and Remedy Decisions Branch; Assessment and Remedial Division; Office of Superfund Remediation and Technology Innovation (mail code 5204P); U.S. Environmental Protection Agency; 1200 Pennsylvania Avenue, NW., Washington, DC 20460; or the Superfund Hotline, phone (800) 424–9346 or (703) 412–9810 in the Washington, DC, metropolitan area.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

A. What Are CERCLA and SARA?

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601–9675 (“CERCLA” or “the Act”), in response to the dangers of uncontrolled releases or threatened releases of hazardous substances, and releases or substantial threats of releases into the environment of any pollutant or contaminant that may present an imminent or substantial danger to the public health or welfare. CERCLA was amended on October 17, 1986, by the Superfund Amendments and Reauthorization Act (“SARA”), Public Law 99–499, 100 Stat. 1613 *et seq.*

B. What Is the NCP?

To implement CERCLA, EPA promulgated the revised National Oil and Hazardous Substances Pollution Contingency Plan (“NCP”), 40 CFR part 300, on July 16, 1982 (47 FR 31180), pursuant to CERCLA section 105 and Executive Order 12316 (46 FR 42237, August 20, 1981). The NCP sets guidelines and procedures for responding to releases and threatened releases of hazardous substances, or releases or substantial threats of releases into the environment of any pollutant or contaminant that may present an imminent or substantial danger to the public health or welfare. EPA has revised the NCP on several occasions. The most recent comprehensive revision was on March 8, 1990 (55 FR 8666).

As required under section 105(a)(8)(A) of CERCLA, the NCP also includes “criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable, taking into account the potential urgency of such action, for the purpose of taking removal action.” “Removal” actions are defined broadly and include a wide range of actions taken to study, clean up, prevent or otherwise address releases and threatened releases of hazardous substances, pollutants or contaminants (42 U.S.C. 9601(23)).

C. What Is the National Priorities List (NPL)?

The NPL is a list of national priorities among the known or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States. The list, which is appendix B of the NCP (40 CFR part 300), was required under section 105(a)(8)(B) of CERCLA, as amended. Section 105(a)(8)(B) defines the NPL as a list of “releases” and the highest priority “facilities” and requires that the NPL be revised at least annually. The NPL is intended primarily to guide EPA in determining which sites warrant further investigation to assess the nature and extent of public health and environmental risks associated with a release of hazardous substances, pollutants or contaminants. The NPL is only of limited significance, however, as it does not assign liability to any party or to the owner of any specific property. Also, placing a site on the NPL does not mean that any remedial or removal action necessarily need be taken.

For purposes of listing, the NPL includes two sections, one of sites that are generally evaluated and cleaned up by EPA (the “General Superfund Section”), and one of sites that are owned or operated by other Federal agencies (the “Federal Facilities Section”). With respect to sites in the Federal Facilities Section, these sites are generally being addressed by other Federal agencies. Under Executive Order 12580 (52 FR 2923, January 29, 1987) and CERCLA section 120, each Federal agency is responsible for carrying out most response actions at facilities under its own jurisdiction, custody, or control, although EPA is responsible for preparing a Hazard Ranking System (“HRS”) score and determining whether the facility is placed on the NPL.

D. How Are Sites Listed on the NPL?

There are three mechanisms for placing sites on the NPL for possible remedial action (see 40 CFR 300.425(c) of the NCP): (1) A site may be included on the NPL if it scores sufficiently high on the HRS, which EPA promulgated as appendix A of the NCP (40 CFR part 300). The HRS serves as a screening tool to evaluate the relative potential of uncontrolled hazardous substances, pollutants or contaminants to pose a threat to human health or the environment. On December 14, 1990 (55 FR 51532), EPA promulgated revisions to the HRS partly in response to CERCLA section 105(c), added by SARA. The revised HRS evaluates four pathways: ground water, surface water, soil exposure, and air. As a matter of Agency policy, those sites that score 28.50 or greater on the HRS are eligible for the NPL. (2) Pursuant to 42 U.S.C. 9605(a)(8)(B), each State may designate a single site as its top priority to be listed on the NPL, without any HRS score. This provision of CERCLA requires that, to the extent practicable, the NPL include one facility designated by each State as the greatest danger to public health, welfare, or the environment among known facilities in the State. This mechanism for listing is set out in the NCP at 40 CFR 300.425(c)(2). (3) The third mechanism for listing, included in the NCP at 40 CFR 300.425(c)(3), allows certain sites to be listed without any HRS score, if all of the following conditions are met:

- The Agency for Toxic Substances and Disease Registry (ATSDR) of the U.S. Public Health Service has issued a health advisory that recommends dissociation of individuals from the release.
- EPA determines that the release poses a significant threat to public health.
- EPA anticipates that it will be more cost-effective to use its remedial

authority than to use its removal authority to respond to the release.

EPA promulgated an original NPL of 406 sites on September 8, 1983 (48 FR 40658) and generally has updated it at least annually.

E. What Happens to Sites on the NPL?

A site may undergo remedial action financed by the Trust Fund established under CERCLA (commonly referred to as the "Superfund") only after it is placed on the NPL, as provided in the NCP at 40 CFR 300.425(b)(1). ("Remedial actions" are those "consistent with permanent remedy, taken instead of or in addition to removal actions. * * *" 42 U.S.C. 9601(24).) However, under 40 CFR 300.425(b)(2), placing a site on the NPL "does not imply that monies will be expended." EPA may pursue other appropriate authorities to respond to the releases, including enforcement action under CERCLA and other laws.

F. Does the NPL Define the Boundaries of Sites?

The NPL does not describe releases in precise geographical terms; it would be neither feasible nor consistent with the limited purpose of the NPL (to identify releases that are priorities for further evaluation), for it to do so. Indeed, the precise nature and extent of the site are typically not known at the time of listing.

Although a CERCLA "facility" is broadly defined to include any area where a hazardous substance has "come to be located" (CERCLA section 101(9)), the listing process itself is not intended to define or reflect the boundaries of such facilities or releases. Of course, HRS data (if the HRS is used to list a site) upon which the NPL placement was based will, to some extent, describe the release(s) at issue. That is, the NPL site would include all releases evaluated as part of that HRS analysis.

When a site is listed, the approach generally used to describe the relevant release(s) is to delineate a geographical area (usually the area within an installation or plant boundaries) and identify the site by reference to that area. However, the NPL site is not necessarily coextensive with the boundaries of the installation or plant, and the boundaries of the installation or plant are not necessarily the "boundaries" of the site. Rather, the site consists of all contaminated areas within the area used to identify the site, as well as any other location where that contamination has come to be located, or from where that contamination came.

In other words, while geographic terms are often used to designate the site (e.g., the "Jones Co. plant site") in terms of the property owned by a particular party, the site, properly understood, is not limited to that property (e.g., it may extend beyond the property due to contaminant migration), and conversely may not occupy the full extent of the property (e.g., where there are uncontaminated parts of the identified property, they may not be, strictly speaking, part of the "site"). The "site" is thus neither equal to, nor confined by, the boundaries of any specific property that may give the site its name, and the name itself should not be read to imply that this site is coextensive with the entire area within the property boundary of the installation or plant. In addition, the site name is merely used to help identify the geographic location of the contamination, and is not meant to constitute any determination of liability at a site. For example, the name "Jones Co. plant site," does not imply that the Jones company is responsible for the contamination located on the plant site.

EPA regulations provide that the Remedial Investigation ("RI") "is a process undertaken * * * to determine the nature and extent of the problem presented by the release" as more information is developed on site contamination, and which is generally performed in an interactive fashion with the Feasibility Study ("FS") (40 CFR 300.5). During the RI/FS process, the release may be found to be larger or smaller than was originally thought, as more is learned about the source(s) and the migration of the contamination. However, the HRS inquiry focuses on an evaluation of the threat posed and therefore the boundaries of the release need not be exactly defined. Moreover, it generally is impossible to discover the full extent of where the contamination "has come to be located" before all necessary studies and remedial work are completed at a site. Indeed, the known boundaries of the contamination can be expected to change over time. Thus, in most cases, it may be impossible to describe the boundaries of a release with absolute certainty.

Further, as noted above, NPL listing does not assign liability to any party or to the owner of any specific property. Thus, if a party does not believe it is liable for releases on discrete parcels of property, it can submit supporting information to the Agency at any time after it receives notice it is a potentially responsible party.

For these reasons, the NPL need not be amended as further research reveals more information about the location of the contamination or release.

G. How Are Sites Removed From the NPL?

EPA may delete sites from the NPL where no further response is appropriate under Superfund, as explained in the NCP at 40 CFR 300.425(e). This section also provides that EPA shall consult with states on proposed deletions and shall consider whether any of the following criteria have been met:

(i) Responsible parties or other persons have implemented all appropriate response actions required;

(ii) All appropriate Superfund-financed response has been implemented and no further response action is required; or

(iii) The remedial investigation has shown the release poses no significant threat to public health or the environment, and taking of remedial measures is not appropriate.

H. May EPA Delete Portions of Sites From the NPL as They Are Cleaned Up?

In November 1995, EPA initiated a policy to delete portions of NPL sites where cleanup is complete (60 FR 55465, November 1, 1995). Total site cleanup may take many years, while portions of the site may have been cleaned up and made available for productive use.

I. What Is the Construction Completion List (CCL)?

EPA also has developed an NPL construction completion list ("CCL") to simplify its system of categorizing sites and to better communicate the successful completion of cleanup activities (58 FR 12142, March 2, 1993). Inclusion of a site on the CCL has no legal significance.

Sites qualify for the CCL when: (1) Any necessary physical construction is complete, whether or not final cleanup levels or other requirements have been achieved; (2) EPA has determined that the response action should be limited to measures that do not involve construction (e.g., institutional controls); or (3) the site qualifies for deletion from the NPL. For the most up-to-date information on the CCL, see EPA's Internet site at *http://www.epa.gov/superfund/cleanup/ccl.htm.*

J. What Is the Sitewide Ready for Anticipated Use Measure?

The Sitewide Ready for Anticipated Use measure (formerly called Sitewide Ready-for-Reuse) represents important Superfund accomplishments and the measure reflects the high priority EPA places on considering anticipated future land use as part of our remedy selection

process. See Guidance for Implementing the Sitewide Ready-for-Reuse Measure, May 24, 2006, OSWER 9365.0–36. This measure applies to final and deleted sites where construction is complete, all cleanup goals have been achieved, and all institutional or other controls are in place. EPA has been successful on many occasions in carrying out remedial actions that ensure protectiveness of human health and the environment, including current and future land users, in a manner that allows contaminated properties to be restored to environmental and economic vitality. For further information, please go to *http://www.epa.gov/superfund/programs/recycle/tools/index.html.*

II. Availability of Information to the Public

A. May I Review the Documents Relevant to This Final Rule?

Yes, documents relating to the evaluation and scoring of the site in this final rule are contained in dockets located both at EPA Headquarters and in the EPA Region 2 office.

An electronic version of the public docket is available through *http://www.regulations.gov.* Use docket identification number EPA–HQ–SFUND–2009–0063. Although not all Docket materials may be available electronically, you may still access any of the publicly available Docket materials through the Docket facilities identified below in section II D.

B. What Documents Are Available for Review at the Headquarters Docket?

The Headquarters Docket for this rule contains the HRS score sheets, the Documentation Record describing the information used to compute the score, pertinent information regarding statutory requirements or EPA listing policies that affect the site, and a list of documents referenced in the Documentation Record. Since this site received comments during the comment period, the Headquarters Docket also contains a Support Document that includes EPA's responses to comments.

C. What Documents Are Available for Review at the Region 2 Docket?

The Region 2 Docket contains all the information in the Headquarters Docket, plus the actual reference documents containing the data principally relied upon by EPA in calculating or evaluating the HRS score. These reference documents are available only in the Regional Dockets. Since this site received comments during the comment period, the Region 2 Docket also contains a Support Document that includes EPA's responses to comments.

D. How Do I Access the Documents?

You may view the documents, by appointment only, after the publication of this rule. The hours of operation for the Headquarters Docket are from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. Please contact the Region 2 Docket for hours.

Following is the contact information for the EPA Headquarters: Docket Coordinator, Headquarters; U.S. Environmental Protection Agency; CERCLA Docket Office; 1301 Constitution Avenue, NW.; EPA West, Room 3334, Washington, DC 20004, 202/566–0276.

The contact information for the Region 2 Docket is as follows: Ildefonso Acosta, Region 2 (NJ, NY, PR, VI), U.S. EPA, 290 Broadway, New York, NY 10007–1866; 212/637–4344.

E. How May I Obtain a Current List of NPL Sites?

You may obtain a current list of NPL sites via the Internet at *http://www.epa.gov/superfund/* (look under the Superfund sites category) or by contacting the Superfund Docket (see contact information above).

III. Contents of This Final Rule

A. Addition to the NPL

This final rule adds the Gowanus Canal, located in Brooklyn, NY, to the General Superfund Section of the NPL.

B. What Did EPA Do With the Public Comments It Received?

EPA received a large number of comments on the proposal to list the Gowanus Canal. EPA's responses to the comments, and the impacts, if any, on the HRS score, are presented in a support document that has been placed in the Headquarters and Region 2 dockets concurrently with the publication of this rule.

All comments that were received by EPA are contained in the Headquarters Docket and are also listed in EPA's electronic public Docket and comment system at *http://www.regulations.gov.*

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

1. What Is Executive Order 12866?

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether a regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

2. Is This Final Rule Subject to Executive Order 12866 Review?

No. The listing of sites on the NPL does not impose any obligations on any entities. The listing does not set standards or a regulatory regime and imposes no liability or costs. Any liability under CERCLA exists irrespective of whether a site is listed. It has been determined that this action is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

B. Paperwork Reduction Act

1. What Is the 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, after initial display in the preamble of the final rules, are listed in 40 CFR part 9.

2. Does the Paperwork Reduction Act Apply to This Final Rule?

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* EPA has determined that the PRA does not apply because this rule does not contain any information collection requirements that require approval of the OMB.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose

or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

1. What Is the Regulatory Flexibility Act?

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996) whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

2. How Has EPA Complied With the Regulatory Flexibility Act?

This rule listing sites on the NPL does not impose any obligations on any group, including small entities. This rule also does not establish standards or requirements that any small entity must meet, and imposes no direct costs on any small entity. Whether an entity, small or otherwise, is liable for response costs for a release of hazardous substances depends on whether that entity is liable under CERCLA 107(a). Any such liability exists regardless of whether the site is listed on the NPL through this rulemaking. Thus, this rule does not impose any requirements on any small entities. For the foregoing reasons, I certify that this rule will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act

1. What Is the Unfunded Mandates Reform Act (UMRA)?

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. Before EPA promulgates a rule where a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

2. Does UMRA Apply to This Final Rule?

This final rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Listing a site on the NPL does not itself impose any costs. Listing does not mean that EPA necessarily will undertake remedial action. Nor does listing require any action by a private party or determine liability for response costs. Costs that arise out of site responses result from site-specific decisions regarding what actions to take, not directly from the act of placing a site on the NPL. Thus, this rule is not subject to the requirements of section 202 and 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. As is mentioned above, site listing does not impose any costs and would not require any action of a small government.

E. Executive Order 13132: Federalism

1. What Is Executive Order 13132?

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), 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."

2. Does Executive Order 13132 Apply to This Final Rule?

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it does not contain any requirements applicable to States or other levels of government. Thus, the requirements of the Executive Order do not apply to this final rule.

EPA believes, however, that this final rule may be of significant interest to the State government. In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA therefore consulted with State officials early in the process of developing the rule to permit them to have meaningful and timely input into its development. The site in this final rule was referred to EPA by the State for listing. EPA

received a letter of support from the Commissioner of the New York Department of Environmental Conservation who was delegated the authority by the Governor to speak on his behalf regarding NPL listing decisions.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

1. What Is Executive Order 13175?

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000), 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."

2. Does Executive Order 13175 Apply to This Final Rule?

This final rule does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). Listing a site on the NPL does not impose any costs on a tribe or require a tribe to take remedial action. Thus, Executive Order 13175 does not apply to this final rule.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

1. What Is Executive Order 13045?

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

2. Does Executive Order 13045 Apply to This Final Rule?

This rule is not subject to Executive Order 13045 because it is not an economically significant rule as defined by Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this section present a disproportionate risk to children.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Usage

1. What Is Executive Order 13211?

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," (66 FR 28355 (May 22, 2001)) requires federal agencies to prepare a "Statement of Energy Effects" when undertaking certain regulatory actions. A Statement of Energy Effects describes the adverse effects of a "significant energy action" on energy supply, distribution and use, reasonable alternatives to the action, and the expected effects of the alternatives on energy supply, distribution and use.

2. Does Executive Order 13211 Apply to This Final Rule?

This action is not a "significant energy action" as defined in Executive Order 13211, because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, we have concluded that this final rule is not likely to have any adverse energy impacts because adding a site to the NPL does not require an entity to conduct any action that would require energy use, let alone that which would significantly affect energy supply, distribution, or usage. Thus, Executive Order 13175 does not apply to this action.

I. National Technology Transfer and Advancement Act

1. What Is the National Technology Transfer and Advancement Act?

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note), directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

2. Does the National Technology Transfer and Advancement Act Apply to This Final Rule?

No. This rulemaking does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

1. What Is Executive Order 12898?

Executive Order (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

2. Does Executive Order 12898 Apply to This Rule?

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. As this rule does not impose any enforceable duty upon State, tribal or local governments, this rule will neither increase nor decrease environmental protection.

K. Congressional Review Act

1. Has EPA Submitted This Rule to Congress and the Government Accountability Office?

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, that includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA has submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A "major rule"

cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

2. Could the Effective Date of This Final Rule Change?

Provisions of the Congressional Review Act (CRA) or section 305 of CERCLA may alter the effective date of this regulation.

Under the CRA, 5 U.S.C. 801(a), before a rule can take effect, the Federal agency promulgating the rule must submit a report to each House of the Congress and to the Comptroller General. This report must contain a copy of the rule, a concise general statement relating to the rule (including whether it is a major rule), a copy of the cost-benefit analysis of the rule (if any), the agency's actions relevant to provisions of the Regulatory Flexibility Act (affecting small businesses) and the Unfunded Mandates Reform Act of 1995 (describing unfunded federal requirements imposed on State and local governments and the private sector), and any other relevant information or requirements and any relevant Executive Orders.

EPA has submitted a report under the CRA for this rule. The rule will take effect, as provided by law, within 30 days of publication of this document, since it is not a major rule. Section 804(2) defines a major rule as any rule that the Administrator of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB) finds has resulted in or is likely to result in: an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. NPL listing is not a major rule because, as explained above, the listing, itself, imposes no monetary costs on any person. It establishes no enforceable duties, does not establish that EPA necessarily will undertake remedial action, nor does it require any action by any party or determine its liability for site response costs. Costs that arise out of site responses result from site-by-site decisions about what actions to take, not directly from the act of listing itself. Section 801(a)(3) provides for a delay in the effective date of major rules after this report is submitted.

3. What Could Cause a Change in the Effective Date of This Rule?

Under 5 U.S.C. 801(b)(1) a rule shall not take effect, or continue in effect, if Congress enacts (and the President signs) a joint resolution of disapproval, described under section 802.

Another statutory provision that may affect this rule is CERCLA section 305, which provides for a legislative veto of regulations promulgated under CERCLA. Although *INS* v. *Chadha,* 462 U.S. 919,103 S. Ct. 2764 (1983) and *Bd. of Regents of the University of Washington* v. *EPA,* 86 F.3d 1214,1222 (D.C. Cir. 1996) cast the validity of the legislative veto into question, EPA has transmitted a copy of this regulation to the Secretary of the Senate and the Clerk of the House of Representatives.

If action by Congress under either the CRA or CERCLA section 305 calls the effective date of this regulation into question, EPA will publish a document of clarification in the **Federal Register**.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Natural resources, Oil pollution, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Dated: February 24, 2010.

Barry N. Breen,

Principal Deputy Assistant Administrator, Office of Solid Waste and Emergency Response.

■ 40 CFR part 300 is amended as follows:

PART 300—[AMENDED]

■ 1. The authority citation for part 300 continues to read as follows:

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

■ 2. Table 1 of Appendix B to part 300 is amended by adding the following site in alphabetical order to read as follows:

Appendix B to Part 300—National Priorities List

TABLE 1—GENERAL SUPERFUND SECTION

State	Site name	City/county	Notes [a]
* * * * * * *			
NY	Gowanus Canal	Brooklyn.	
* * * * * * *			

[a] A = Based on issuance of health advisory by Agency for Toxic Substance and Disease Registry (HRS score need not be > 28.50).
C = Sites on Construction Completion list.
S = State top priority (HRS score need not be > 28.50)
P = Sites with partial deletion(s).

* * * * *

[FR Doc. 2010–4325 Filed 3–3–10; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[WT Docket No. 10–18; DA 10–288]

Procedural Amendments to Commission Competitive Bidding Rules

AGENCY: Federal Communications Commission.

ACTION: Correcting amendment.

SUMMARY: The Federal Communications Commission published a document in the **Federal Register** at 75 FR 4701, January 29, 2010, revising Commission rules. This summary corrects the final rules by amending the headings of 47 CFR 1.2105 and 1.2105(c) and the statutory authority for part 1. The change and restoration of language conforms the headings to the Commission's intent. These corrections make no change to the substance of the rule, or the Commission's interpretation or application of the rule.

DATES: Effective March 4, 2010.

FOR FURTHER INFORMATION CONTACT: *Wireless Telecommunications Bureau, Auctions and Spectrum Access Division:* Sayuri Rajapakse at (202) 418–0660.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Part 1 Procedural Amendments Order and Errata* adopted February 24, 2010, and released on February 24, 2010. The complete text of the *Part 1 Procedural Amendments Order and Errata* is available for public inspection and copying from 8 a.m. to 4:30 p.m. ET Monday through Thursday or from 8 a.m. to 11:30 a.m. ET on Fridays in the FCC Reference Information Center, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The *Part 1 Procedural Amendments Order and Errata* may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–488–5300, fax 202–488–5563, or you may contact BCPI at its Web site: *http://www.BCPIWEB.com.* When ordering documents from BCPI, please provide the appropriate FCC document number, for example, DA 10–288. The *Part 1 Procedural Amendments Order and Errata* is also available on the Internet at the Commission's Web site: *http://wireless.fcc.gov/auctions*, or by using the search function for WT Docket No. 10–18 on the ECFS Web page at *http://www.fcc.gov/cgb/ecfs/*.

1. The Wireless Telecommunications Bureau (Bureau) makes a conforming amendment to a recent Commission order and corrects errors in the **Federal Register** summary of that order, which made procedural amendments to section 1.2105 of the Commission's competitive bidding rules.

2. On January 7, 2010, the Commission issued an *Order* which amended the rule specifying how to report potential violations of 47 CFR 1.2105(c) and amended the rules specifying how quickly applicants must modify pending auction applications to satisfy the requirements of 47 CFR 1.65(a) and 1.2105(b). The *Order* also modified the heading of paragraph 47 CFR 1.2105(c). A summary of the *Order* was published in the **Federal Register**, 75 FR 4701, January 29, 2010, but the changes made therein were not consistent with the *Order* as released.

3. The Bureau now amends the heading of 47 CFR 1.2105 to read: Bidding application and certification procedures; prohibition of certain communications. The *Order* inadvertently preserved the phrase *prohibition of collusion* in the heading, and the **Federal Register** summary of the *Order* inadvertently deleted a portion of the rule's heading. This change and restoration of language conforms the heading to the Commission's intent underlying the *Order.* In the *Order*, the Commission recognized that collusion is a term used in many contexts, legal and economic, and that its use in connection with 47 CFR 1.2105's prohibition of certain communications by auction applicants may cause confusion. This amendment makes no change to the substance of the rule, or the Commission's interpretation or application of the rule.

4. The Bureau also confirms the Commission's intention to amend the heading of paragraph 1.2105(c) to read *Prohibition of certain communications* rather than *Prohibition of collusion.* While this change is reflected in the *Order*, the **Federal Register** summary inadvertently omitted this language from the paragraph's heading.

5. The Bureau amends the list of statutory authorities for part 1 to correct inaccuracies that exist in the current version of the Code of Federal Regulations.

List of Subjects in 47 CFR Part 1

Administrative practice and procedures, Competitive bidding, Telecommunications.

Federal Communications Commission.

Jane E. Jackson,

Associate Chief, Wireless Telecommunications Bureau.

Correcting Amendment

■ Accordingly, 47 CFR part 1 is corrected by the following amendments:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 15 U.S.C. 79 *et seq.;* 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 303(r), and 309.

■ 2. Amend § 1.2105 by revising the section heading and the heading to paragraph (c) to read as follows:

§ 1.2105 Bidding application and certification procedures; prohibition of certain communications.

* * * * *

(c) *Prohibition of certain communications.* * * *

* * * * *

[FR Doc. 2010–4425 Filed 3–3–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 09–52; FCC 10–24]

Policies To Promote Rural Radio Service and To Streamline Allotment and Assignment Procedures

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission adopted a number of procedures, procedural changes, and clarifications of existing rules and procedures, designed to promote ownership and programming diversity, especially by Native American tribes, and to streamline processing of AM and FM auction applications.

DATES: Effective April 5, 2010.

FOR FURTHER INFORMATION CONTACT: Peter Doyle, Chief, Media Bureau, Audio Division, (202) 418–2700 or *Peter.Doyle@fcc.gov;* Thomas Nessinger, Attorney-Advisor, Media Bureau, Audio Division, (202) 418–2700 or *Thomas.Nessinger@fcc.gov.* For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Cathy Williams at 202–418–2918, or via the Internet at *Cathy.Williams@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's First Report and Order (First R&O), FCC 10–24, adopted January 28, 2010, and released February 3, 2010. The full text of the First R&O is available for inspection and copying during regular business hours in the FCC Reference Center, 445 Twelfth Street, SW., Room CY–A257, Portals II, Washington, DC 20554, and may also be purchased from the Commission's copy contractor, BCPI, Inc., Portals II, 445 Twelfth Street, SW., Room CY–B402, Washington, DC 20554. Customers may contact BCPI, Inc. via their Web site, *http://www.bcpi.com*, or call 1–800–378–3160. This document is available in alternative formats (computer diskette, large print, audio record, and Braille). Persons with disabilities who need documents in these formats may contact Brian Millin at (202) 418–7426 (voice), (202) 418–7365 (TTY), or via e-mail at *Brian.Millin@fcc.gov.*

Paperwork Reduction Act of 1995 Analysis

This First Report and Order (First R&O) adopts new or revised information collection requirements, subject to the Paperwork Reduction Act of 1995 (PRA) (Pub. L. 104–13, 109 Stat. 163 (1995) (codified in 44 U.S.C. 3501–3520)). These information collection requirements will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. The Commission will publish a separate notice in the **Federal Register** inviting comment on the new or revised information collection requirements adopted in this document. The requirements will not go into effect until OMB has approved them and the Commission has published a notice announcing the effective date of the information collection requirements. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

Synopsis of Order

With this First R&O, the Commission addresses some, but not all, of the proposals set forth in the Rural NPRM. It adopts, with modification, its proposal in the Rural NPRM for a Tribal Priority, as well as a number of other proposals codifying or clarifying auction procedures. The record provides ample support for immediate action on these matters. Accordingly, in this First R&O the Commission adopts the Tribal Priority with modifications. With regard specifically to AM application processing, the Commission adopts, with certain modifications, the proposal to prohibit the downgrading of proposed AM facilities that receive a dispositive preference under Section 307(b) and thus are not awarded through competitive bidding. It also adopts the proposal that technical proposals for AM facilities filed with Form 175 applications meet certain minimum technical standards to be eligible for further auction processing, with some modifications, and adopts the proposal to grant the Media Bureau and the Wireless Telecommunications Bureau (collectively, the "Bureaus") delegated authority to cap the number of AM applications that may be filed in an AM auction filing window. The Commission also adopts proposals to streamline auction application processing; to codify the permissibility of non-universal engineering solutions and settlement proposals; to give the staff delegated authority and flexibility in setting the post-auction long-form application filing deadline; to clarify application of the new entrant bidding credit unjust enrichment rule; and to clarify maximum new entrant bidding credit eligibility.

In the Rural NPRM, Commission tentatively concluded that it would be in the public interest to provide federally recognized Native American Tribes and Alaska Native Villages (Tribes) with a priority under Section 307(b) of the Communications Act of 1934, as amended (47 U.S.C. 307(b)), when proposing FM allotments, and when filing AM and noncommercial educational (NCE) FM filing window applications. As set forth in the Rural NPRM, an applicant would qualify for the Tribal Priority if: (1) The applicant (including a party filing a Petition for Rule Making to amend the FM Table of Allotments, 47 CFR 73.202) is either a federally recognized Tribe or tribal consortium, a member of a Tribe, or an entity more than 70 percent owned or controlled by members of a Tribe or Tribes; (2) at least 50 percent of the daytime principal community contour of the proposed facilities covers tribal lands; (3) the applicant proposed a first (Priority (1)) or second (Priority (2)) aural (reception) service to more than a de minimis population, or proposed a first local transmission service (Priority (3)) at the proposed community of license; and (4) the proposed community of license is located on tribal lands. The Commission further proposed that such a Tribal Priority rank between the current Priority (1) and co-equal Priorities (2) and (3), that is, the Tribal Priority would not take precedence over a proposal to provide first reception service to a greater than de minimis population, but would take precedence over a proposal to provide second local reception service or first local transmission service. The proposed Tribal Priority would apply only at the allotment stage of the commercial FM licensing procedures; as part of the threshold Section 307(b) analysis with respect to commercial or NCE AM applications filed during an AM filing window; and as the first part of the fair distribution analysis of applications filed in an NCE FM filing window, before application of the "first or second reserved channel NCE service" criterion set forth in 47 CFR 73.7002(b). NCE applicants also would be required to meet all NCE eligibility and licensing requirements (47 CFR 73.503 and 73.561). Certain "holding period" restrictions, commencing with the award of a construction permit until the completion of four years of on-air operation, would apply to any station or allotment awarded pursuant to the Tribal Priority. In the case of an AM or NCE FM construction permit awarded pursuant to a Tribal Priority, the permittee/licensee would be prohibited during this period from making any change in ownership that would lower tribal ownership below the required threshold, changing the station's community of license, or implementing a facility modification that would cause the principal community contour to cover less than 50 percent of tribal lands. In the case of a commercial FM allotment, the restriction would apply only to any proposed change of community of license or technical change as described in the preceding sentence. However, even a non-tribal owner that is awarded a permit would still be required to provide broadcast service primarily to tribal lands for four years.

Based on its examination of the record in this proceeding, the Commission adopts a Section 307(b) priority for Tribes or tribal consortia, and entities majority owned or controlled by Tribes, proposing service to tribal lands as proposed in the Rural NPRM. The Tribal Priority as adopted includes some modifications suggested by commenters. In addition, on its own motion the Commission clarifies the application of the Tribal Priority in commercial and NCE contexts, and modifies ownership requirements, eliminating the priority for individual members of Tribes or entities owned by such individuals, and

instead extending the Tribal Priority only to Tribes, consortia of Tribes, and to entities that are majority owned or controlled by a Tribe or Tribes.

The Commission finds that application of its traditional allocation priorities has not realized Section 307(b)'s mandate to "make such distribution of licenses * * * among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service" with regard to tribal lands.[1] Tribal governments have a unique legal relationship with the federal government as domestic dependent nations with inherent sovereign powers over their members and territory. Because of their status as sovereign nations responsible for, among other things, maintaining and sustaining their sacred histories, languages, and traditions, tribal-owned radio stations have a vital role to play in serving the needs and interests of their local communities, yet only 41 radio stations currently are licensed to federally-recognized Indian Tribes or affiliated groups. The Commission concludes that the establishment of an allocation priority for the provision of radio service to tribal lands by Indian tribal government-owned stations will advance its Section 307(b) goals and serve the public interest by enabling Indian tribal governments to provide radio service tailored to the needs and interests of their local communities that they are uniquely capable of providing. The Commission also finds that the Tribal Priority will advance the Commission's longstanding commitment, in accordance with the federal trust relationship, to ensure, through its regulations and policy initiatives, that Indian Tribes have adequate access to communications services. The new Tribal Priority will promote Tribes' sovereign rights by enabling them to provide vital radio services to their communities. Further, the Commission concludes that the establishment of a Tribal Priority will promote the policies and purposes of the Communications Act favoring diversity of media voices, and strengthening the diverse and robust marketplace of ideas that is essential to our democracy.

In response to the Commission's query regarding the constitutionality of the Tribal Priority, Native Public Media and the National Congress of American Indians (NPM/NCAI) concluded that the Tribal Priority would not trigger the strict scrutiny analysis of the case of *Adarand Constructors, Inc.* v. *Pena,* 515 U.S. 200 (1995), but rather a rational basis standard of review. This is because, as stated in the Supreme Court case of *Morton* v. *Mancari,* 417 U.S. 535 (1974), the proposed benefit would be granted to Tribes and their members not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed in a unique fashion. The Commission agrees that the priority established herein for the benefit of federally recognized Tribes is not constitutionally suspect because it is based on the unique legal status of Indian Tribes under Federal law. Accordingly, the Commission believes that the Tribal Priority is consistent with the Equal Protection Clause of the Fifth Amendment to the United States Constitution.

As proposed, the Tribal Priority also tied the application preference to the needs of tribal communities by requiring that, to qualify for the priority, commercial applicants must propose either a first or second aural service, or a first local transmission service at a community located on tribal lands. The existence of a non-tribal commercial station or stations at a community located on tribal lands should not preclude the establishment of a first local transmission service owned by a Tribe or Tribes. Thus, the Commission modifies the service criterion for the Tribal Priority to require that a qualifying commercial applicant propose first or second aural (reception) service, or a first local tribal-owned transmission service at the proposed community. Thus, a commercial tribal-owned applicant may qualify for a Tribal Priority, notwithstanding the fact that a tribal-owned NCE station is licensed at the same community. As the Commission proposed in the Rural NPRM, however, the Tribal Priority will not take precedence over a bona fide proposal to provide first reception service to a significant population.

The Commission makes certain modifications to the Tribal Priority suggested by commenters. First, the Commission will allow assignments or transfers within the four-year holding period provided that the assignee/transferee also qualifies for the Tribal Priority in all respects. Second, the Commission will permit gradual changes in the governing board of an NCE permittee or licensee during the four-year holding period, as is the case with other NCE holding period restrictions, as long as the majority tribal control threshold (discussed below) is maintained. Third, the Commission finds that the goals underlying the Tribal Priority are not undermined by allowing Tribes to claim the Tribal Priority for both commercial and NCE stations in the same community. A tribal-owned NCE applicant may qualify for a Tribal Priority, notwithstanding the fact that a tribal-owned commercial station is licensed to the same community (in the same way that the existence of a tribal-owned NCE station does not preclude use of the priority by a commercial applicant, as discussed above). The Commission thus modifies the third prong of the test for tribal-owned NCE applicants to state that, to qualify for the Tribal Priority, a tribal applicant seeking NCE facilities will promote Section 307(b) goals by meeting the tribal lands 50 percent signal coverage and community of license requirements, and also by demonstrating that it will provide the first tribal-owned NCE transmission service at the proposed community of license. If a tribal NCE applicant meets these criteria, it will not be compared to other mutually exclusive applicants on a fair distribution basis, but will be the tentative selectee. As is the case with commercial applicants, the Tribal Priority for an NCE applicant will not take precedence over a bona fide proposal to provide first aural reception service to a significant population. If two or more mutually exclusive proposals from tribal NCE applicants qualify for a Tribal Priority, proposing first local tribal-owned NCE service at the same community, the tentative selectee will be the applicant proposing service to the greatest population on tribal lands. The Commission will not

[1] As used here, "tribal lands" means both "reservations" and "near reservation" lands. "Reservations" is defined as any federally recognized Indian tribe's reservation, pueblo or colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlements Act (85 Stat. 688), and Indian allotments. 47 CFR 54.400(e). "Near reservation" is defined as "those areas or communities adjacent or contiguous to reservations which are designated by the Department of Interior's Commission of Indian Affairs upon recommendation of the Local Bureau of Indian Affairs Superintendent, which recommendation shall be based upon consultation with the tribal governing body of those reservations, as locales appropriate for the extension of financial assistance and/or social services on the basis of such general criteria as: Number of Indian people native to the reservation residing in the area; a written designation by the tribal governing body that members of their tribe and family members who are Indian residing in the area, are socially, culturally and economically affiliated with their tribe and reservation; geographical proximity of the area to the reservation and administrative feasibility of providing an adequate level of services to the area." *Id.* Thus, "tribal lands" includes American Indian Reservations and Trust Lands, Tribal Jurisdiction Statistical Areas, Tribal Designated Statistical Areas, Hawaiian Homelands, and Alaska Native Village Statistical Areas, as well as the communities situated on such lands.

require the 5,000-person population differential that exists in the current NCE analysis, but adds the "on tribal lands" requirement so as to award the permit to the applicant most successfully meeting the Tribal Priority's goal of providing service to underserved tribal communities that meets their unique cultural needs. Moreover, the Commission will make this comparison even if the mutually exclusive tribal applicants propose first local NCE service at different communities, unlike the usual Priority (3) analysis, under which the most populous community receives a dispositive Section 307(b) preference. The goals of the Tribal Priority are better served by selecting a smaller community that provides greater reception service than by choosing a more remote, but slightly larger, community. Thus, the foregoing comparison will be applied between mutually exclusive NCE applicants claiming the Tribal Priority, whether they propose the same or different communities of license. For the same reason, mutually exclusive applicants claiming the Tribal Priority for commercial facilities, and proposing first local transmission service at the same community or at different communities, will be compared based on service to the greatest population on tribal lands.

The Commission also modifies the Tribal Priority on its own motion. Upon its consideration of the Rural NPRM, and review of pertinent federal law, the Commission is no longer convinced that extending the Tribal Priority to individual members of Tribes, or entities owned by individuals without ownership by the Tribes themselves, advances the Commission's interest in helping promote tribal self-sufficiency and economic development, and endeavoring to ensure that Tribes and tribal communities have adequate access to communications services. It is well established that the Commission's trust relationship is with the Tribes and tribal governments themselves, rather than individual members of Tribes. As an independent federal agency, the Commission looks to the tribal governments, rather than to individual members of Tribes, to determine communications policies that best serve the unique needs of their respective communities, and fulfill the needs of all tribal citizens. Individual members of tribes are not necessarily bound to take such factors into account. By limiting the Tribal Priority to Tribes themselves, the Commission not only furthers the legitimate governmental objective of preserving Native American culture, but also promotes the federal government's interest in furthering tribal self-government. Thus, the Commission concludes that the Tribal Priority should extend only to (1) Tribes; (2) tribal consortia; or (3) entities that are 51 percent or more owned or controlled by a Tribe or Tribes. The Commission's general attribution rules (found in 47 CFR 73.3555 and Notes 1 and 2 to that rule) shall determine the ownership or control of any such qualifying entities. Qualifying Tribes or tribal entities must be those at least a portion of whose tribal lands lie within the proposed station's principal community contour. The principal community contour must still cover at least 50 percent of tribal lands (subject to the provisos proposed in the Rural NPRM, including those on "checkerboarded" tribal lands), but they need not all be the same Tribe's lands. Tribes whose lands are not covered by the proposed facility may invest or sit on controlling boards, but their investments or board membership will not count toward the 51 percent threshold.

The Commission therefore adopts the Tribal Priority as proposed in the Rural NPRM with the following modifications: (1) It will allow assignments or transfers of permits or licenses obtained using the Tribal Priority during the four-year holding period, provided that the assignee/transferee also qualifies for the Tribal priority in all respects; (2) with regard to NCE permittees or licensees who obtained their authorization using the Tribal Priority, it will permit gradual changes in the governing board during the four-year holding period, as long as the 51 percent tribal control threshold is maintained; (3) eligibility to claim the Tribal Priority is limited to Tribes, tribal consortia, or entities 51 percent or more owned or controlled by a Tribe or Tribes; (4) with regard to entities 51 percent or more owned or controlled by Tribes, the 51 or greater percent need not consist of a single Tribe, but the qualifying entity must be 51 percent or more owned or controlled by Tribes at least a portion of whose tribal lands lie within the facility's principal community contour, as defined in the Commission's Rules; (5) the requirement of principal community coverage of 50 percent or more of tribal lands does not require that those lands belong to the same Tribe; (6) to qualify for the priority, a tribal commercial applicant must propose first or second aural (reception) service or first local commercial tribal-owned transmission service at the proposed community of license; and (7) to qualify for the priority, a tribal NCE applicant must propose a first local NCE tribal-owned transmission service at the proposed community of license.

In the Rural NPRM, the Commission stated that when a mutually exclusive AM auction filing window applicant receives a dispositive preference under Section 307(b), it should not be allowed to downgrade that proposal to serve a smaller population, or otherwise negate the factors that led to the award of the dispositive preference, so as not to encourage "gaming" of the Section 307(b) process. The Commission tentatively concluded that AM licensees or permittees receiving Section 307(b) preferences should be required, for a period of four years, to provide service substantially as proposed in their short-form tech box submissions. The Commission adopts a modified version of its proposal to limit the downgrading of proposed AM facilities that receive a dispositive Section 307(b) preference, recognizing that a certain level of flexibility in implementing AM proposals will help expedite the commencement of new service and reduce the possibility of unbuildable construction permits. Thus, to the extent underserved populations or service totals are relevant to a Section 307(b) analysis, the Commission adopts the proposal as follows: an AM licensee or permittee receiving a dispositive Section 307(b) preference may modify its facilities so long as it continues to provide the same priority service to substantially the same number of persons who would have received such service under the initial proposal, even if the population is not the same population that would have received service under the initial proposal. As used here, "substantially" means that any proposed modification must not result in a decrease of more than 20 percent of any population figure that was a material factor in obtaining the dispositive Section 307(b) preference. For example, if an AM licensee or permittee receives a dispositive Priority (4) preference for proposing to provide a third aural service to a population of 500 persons and service to an overall population of 100,000, it may not file an FCC Form 301 application that would provide a third aural service to fewer than 400 persons or service to an overall population of less than 80,000. The same analysis applies to any party that receives a dispositive Priority (1) or Priority (2) preference. In some cases this may result in a reduction of service below that presented by a competing proposal in the Section 307(b) analysis, but there is no guarantee that the

competing proposal could have been effectuated as proposed in such cases. Additionally, a licensee or permittee that has received a dispositive preference under Priority (3) will be prohibited from changing its community of license. These restrictions will be imposed for a period of four years of on-air operations, consistent with Commission rules governing NCE FM stations. Construction permits and licenses issued to these parties will contain conditions delineating these restrictions.

In the Rural NPRM, the Commission observed that its current auction processing rules limit technical review of basic engineering data filed with AM short-form applications only to the extent necessary to determine the mutually exclusive groups of applications. Originally designed to conserve staff resources and expedite auction processing, this practice has contributed to the filing of patently defective applications, potentially undermining the accuracy and reliability of mutual exclusivity and Section 307(b) determinations, and frustrate the staff's ability to manage the window filing process efficiently. Such defective applications may preclude the filing of meritorious modification applications by existing facilities, which must protect the prior-filed defective applications. In the Rural NPRM the Commission tentatively concluded that 47 CFR 73.3571(h)(1)(ii) should be modified to require that applicants in future AM broadcast auctions must, at the time of filing, meet the following basic technical eligibility criteria: community of license coverage (day and night); and protection of existing AM facilities and prior-filed proposed AM facilities (daytime and nighttime). It also tentatively concluded that the rules should be modified to prohibit the amendment of applications that, at time of filing, are technically ineligible to proceed with auction processing, and prohibit applicants that propose such technically ineligible applications from participating in the auction process. This would preclude attempts to amend or correct data submitted in Form 175 or the tech box, including proposals to change community of license before an applicant has been awarded a construction permit. The Commission adopts the proposed rule changes set forth in the Rural NPRM. To alleviate concerns raised by some commenters, the Commission will provide applicants with a one-time opportunity to file a curative amendment to its short-form application. Specifically, if the staff review shows that an application does not meet one or more of the eligibility criteria, it will be deemed "technically ineligible for filing" and will be included on a Public Notice (Technically Ineligible Notice), which will list defective applications identified by the staff during their initial review of the application, identify which of the defects that the applicant must correct, and set the deadline for doing so. Only applicants whose applications are included in the Technically Ineligible Notice may file a curative amendment. Applicants may not modify any part of a proposal not directly related to an identified deficiency in their curative amendments. Applicants may only modify the AM technical parameters of the short-form application, such as power, class (within the limits set forth in 47 CFR 73.21), antenna site or other antenna data.

Amendments seeking to change a proposed community of license or frequency will not be accepted. Notwithstanding this rule change, full technical review of applications will not occur until winning bidders file long-form applications after an auction. This opportunity to cure is not to be considered a settlement opportunity under 47 CFR 73.5002(d). The opportunity to file a curative amendment will occur prior to the disclosure by the Commission of any information on applications submitted during the short-form filing window.

Notwithstanding the broadcast anti-collusion rules, which generally apply upon the filing of a short-form application, 47 CFR 73.5002(d) provides applicants in certain mutually exclusive groups (MX Groups) a limited opportunity to communicate during specified settlement periods in order to resolve conflicts by means of technical amendment or settlement. This exception applies only to those MX Groups that include either (1) At least one AM major modification; (2) at least one NCE application; or (3) applications for new stations in the secondary broadcast services. Currently, the rule neither prohibits the Commission from accepting non-universal technical amendments or settlement proposals—which reduce the number of applicants in a group but do not completely resolve the mutual exclusivities of that group—nor requires it to do so. Given the success of staff auction practice in accepting non-universal technical amendments and settlement proposals, the Commission adopts its proposal to codify the permissibility of non-universal engineering solutions and settlement proposals as proposed in the Rural NPRM, as long as this process results in at least one singleton application that proceeds to long-form processing. Accordingly, the Commission revises its rules to permit non-universal technical amendments and settlement proposals that result in at least one singleton application from an MX Group. An applicant submitting a technical amendment pursuant to this policy is required only to resolve all mutual exclusivities for at least one application in the relevant MX Group, but need not resolve all technical conflicts among all applications in that group.

The Commission observed in the Rural NPRM that the Rules currently do not limit the number of AM Tech Box applications that may be filed with FCC Form 175 during an AM short-form filing window. It noted that an increasing number of applicants had availed themselves of the opportunity to file multiple technical submissions, and questioned whether a significant percentage of AM short-form filing window applications were merely speculative. Accordingly, the Commission sought comment on whether (1) to delegate to the Bureaus authority to limit, in an AM short-form filing window, the number of tech box submissions that an applicant could file with its Form 175 and, if so, the appropriate limitation on this delegation; and (2) to apply Commission attribution standards to determine the number of filings submitted by any party, to guard against the use of affiliates or even sham entities to circumvent such a cap. The Commission finds that delegating authority to the Bureaus to impose application caps in AM short-form filing windows will help to prevent speculative applications, decreasing the likelihood of mutually exclusive applications, and in turn decreasing the likelihood of large, technically complex, and administratively burdensome MX Groups. A cap can also help expedite application processing and prevent abuses of licensing procedures, and will enable the Bureaus to open AM short-form filing windows more frequently, thereby promoting—rather than restricting—new entrant opportunities. Accordingly, the Commission delegates authority to the Bureaus to determine, for each AM short-form window, whether to limit the number of AM applications that may be filed by an applicant and, if so, the appropriate application cap based on the particular circumstances presented by future auctions. The Commission also delegates to the Bureaus authority to adopt attribution standards to effectuate

the goals of an application cap, and to ensure compliance with this restriction. It directs the Bureaus to provide notice and an opportunity for comment on a cap limit and attribution standards prior to imposing these potential filing restrictions. Any such cap limit and attribution standards will be announced in the Public Notice establishing the dates for the Form 175 filing window.

The Commission's Rules currently provide, without exception, that each winning bidder in a broadcast auction must submit an appropriate long-form application within thirty (30) days following the close of bidding. In the Rural NPRM, the Commission observed that this inflexible 30-day time frame has, at times, proved to be problematic, for example, when the close of an auction causes the long-form application filing deadline to fall during the December holiday season, inconveniencing applicants and their consultants. The Commission therefore modifies 47 CFR 73.5005(a) as set forth in the Rural NPRM, to delegate authority to the Bureaus to extend the filing deadline for the post-auction submission of long-form applications.

To promote the objectives of 47 U.S.C. 309(j) and further its long-standing commitment to broadcast facility ownership diversity, the Commission adopted a tiered new entrant bidding credit (NEBC) for broadcast auction applicants with no, or very few, other media interests. To meet the statutory obligation to prevent unjust enrichment, and to ensure that the NEBC would aid eligible individuals and entities to participate in broadcast auctions, the Commission adopted rules requiring, under certain circumstances, reimbursement of bidding credits used to obtain broadcast licenses. In the Rural NPRM, the Commission proposed to clarify certain issues concerning the unjust enrichment provisions of the NEBC that had been raised during previous broadcast auctions. First, under 47 CFR 73.5007(b), a winning bidder is not eligible for the NEBC if it, or any party with an attributable interest in the winning bidder, has an attributable interest in any existing media facility in the "same area" as the proposed new facility, that is, if specified service contours of the two facilities overlap. In the FM service, in the pre-auction Form 175 application, an applicant may submit a set of "preferred site coordinates" as an alternative to the reference coordinates for the vacant FM allotment upon which it intends to bid. The preferred site coordinates specified by prospective auction participants would be entered into the Commission's database and protected from subsequent filings. In the Rural NPRM, the Commission sought to clarify that, for purposes of defining the "same area" restriction for the NEBC, the contour of the proposed FM facility would be identified by the maximum class facilities at the FM allotment site, so that applicants could not attempt to avoid the overlap of contours which defines "same area," and thereby qualify for the bidding credit, by specifying preferred site coordinates in their Form 175 application. The Commission adopts this proposal, which will provide certainty to applicants and help safeguard the diversity and competition goals on which the NEBC is based by eliminating potential applicant manipulation of our "new entrant" standards. The Commission also clarifies, under 47 CFR 73.5007(b)(3), that it will base this proposed FM facility contour standard on an assumption of uniform terrain, which results in a perfectly circular standard 70 dBu contour.

Second, to prevent unjust enrichment by parties that acquire permits through the use of a NEBC, 47 CFR 73.5007(c) requires reimbursement to the Commission of all or part of the credit upon a subsequent assignment or transfer, if the proposed assignee or transferee is not eligible for the same percentage of bidding credit. The rule is routinely applied to "long form" assignment or transfer of control applications filed on FCC Forms 314 and 315, but does not distinguish between pro forma and non-pro forma assignments or transfers of control. In the Rural NPRM the Commission invited comment as to whether the unjust enrichment analysis should also apply to voluntary or involuntary pro forma assignments or transfers filed on Form 316. The Commission tentatively concluded that the unjust enrichment provisions should apply to pro forma assignment and transfer of control applications, thus eliminating any applicant confusion on the issue. The Commission finds it appropriate generally to apply the unjust enrichment provisions contained in 47 CFR 73.5007(c) to pro forma applications to assign or transfer broadcast licenses and permits, pursuant to 47 CFR 73.3540(f), in order to help preserve the integrity of the designated entity measures adopted in prior auction orders. A pro forma assignment or transfer can include new parties, including parties with attributable interest holdings that would nullify or diminish the eligibility of the assignee or transferee for the bidding credit. This is especially the case in transactions eligible for pro forma treatment involving corporate reorganizations where a new attributable interest holder with other media interests is added. Moreover, such an unjust enrichment analysis allows for consistency in the application of the rule. It further ensures that applicants do not use the summary pro forma assignment and transfer procedures to circumvent the unjust enrichment requirements. Thus, the Commission adopts the unjust enrichment analysis recommended in the Rural NPRM, but will only apply the unjust enrichment analysis to voluntary pro forma transactions, and not to involuntary pro forma transactions. Notwithstanding this decision, it will continue to address, on a case-by-case basis, any conduct engaged in by auction participants with the evident intention of manipulating the eligibility standards for, or frustrating the purpose of, the NEBC.

As described in the Rural NPRM, applicants to participate in broadcast auctions are required to establish their qualifications for the NEBC on their short-form applications (FCC Form 175), Application to Participate in an FCC Auction, which is the sole opportunity for the applicant to claim bidding credit eligibility. Applicants meeting the eligibility criteria set forth in 47 CFR 73.5007 qualify for a bidding credit representing the amount by which a winning bidder's gross bid is discounted. The size of a NEBC depends on the number of ownership interests in other media of mass communications that are attributable to the bidder-entity and its attributable interest-holders. In accordance with 47 CFR 73.5008(c), when determining an applicant's eligibility for the NEBC, the interests of the applicant, and of any individuals or entities with an attributable interest in the applicant, in other media of mass communications are considered. An auction applicant's attributable interests, and therefore its maximum NEBC eligibility, are determined as of the Form 175 filing deadline. Consequently, the Commission has consistently held, and has announced in auction Public Notices, that bidders cannot qualify for a bidding credit, nor increase the size of a previously claimed bidding credit, based upon ownership or positional changes occurring after the Form 175 filing deadline. Nonetheless, as noted in the Rural NPRM, certain parties have argued that their NEBC eligibility is maintained or "frozen" as of the Form 175 application filing. Therefore, to prevent applicant confusion, the Commission proposed to

amend 47 CFR 73.5007(a) to codify the current policy, and state explicitly that the NEBC eligibility set forth in an applicant's Form 175 application is the maximum NEBC eligibility for that auction, and that such bidding credit may be reduced or lost upon post-filing changes. The Commission adopts this change, and modifies 47 CFR 73.5007(a) to state unequivocally that: (1) An applicant must specify its eligibility for the NEBC in its Form 175 application; (2) the NEBC specified in an applicant's Form 175 establishes that applicant's maximum NEBC eligibility for that auction; (3) any post-Form 175 filing (post-filing) change in the applicant's circumstances underlying its NEBC eligibility claim, or that of any attributable interest-holder in the applicant, must be reported immediately to the Commission, and no later than five business days after the change occurs; and (4) any such post-filing change may cause a reduction or elimination of the NEBC claimed in the applicant's Form 175 application, if the change would cause the applicant not to qualify for the originally claimed NEBC under the eligibility provisions of 47 CFR 73.5007, and the change occurred prior to grant of the construction permit to the applicant. Under no circumstances will a post-filing change increase an applicant's NEBC eligibility for that auction. The Commission also emphasizes that all of ways in which interests are attributed to individuals and entities (as set forth in 47 CFR 73.3555 and Note 2 to that Section) will be considered to affect NEBC eligibility when they occur after the Form 175 filing deadline.

By auction Public Notices, bidders are also instructed that any change that results in the reduction or loss of the NEBC originally claimed on the Form 175 application, must be reported immediately, and no later than five business days after the change occurs. In the Rural NPRM the Commission proposed to adjust the standard reporting timeframe and codify this immediate reporting requirement. In keeping with the rule amendments it recently adopted in *Procedural Amendments to Commission Part 1 Competitive Bidding Rules,* Order, FCC 10–4 at 5 (rel. Jan. 7, 2010), the Commission codifies the practice that any changes affecting NEBC eligibility must be reported immediately, and in any event no later than five business days after the change occurs, and amends 47 CFR 73.5007(a) accordingly. The Commission will continue to make final determinations regarding an applicant's eligibility to hold a construction permit, including eligibility for and amount of the NEBC, when it is ready to grant the post-auction long form construction permit application.

Final Regulatory Flexibility Analysis. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), 5 U.S.C. 601–612, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Rural NPRM. The Commission sought written public comment on the proposals in the Rural NPRM, including comment on the IRFA. The Commission received no comments on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

Need for, and Objectives of, the Report and Order. This First R&O adopts rule changes and procedures to codify or clarify certain allotment, assignment, auction, and technical procedures. The rules adopted by this First R&O also create a new Tribal Priority to assist Tribes or tribal consortia, or entities controlled by Tribes, in obtaining radio broadcast stations designed to serve their tribal communities.

We turn first to the Tribal Priority. The Commission noted the marked disparity in the Native American and Alaskan Native population of the United States, compared to the number of radio stations licensed to, or providing significant signal coverage to, lands occupied by members of Tribes. Tribal lands comprise 55.7 million acres, or 2.3 percent of the area of the United States (exclusive of the State of Alaska). Roughly one-third of the 4.1 million American Indian and Alaska Native population of the United States lives in tribal lands, yet only 41 radio stations currently are licensed to Tribes or affiliated groups, representing less than one-third of one percent of the more than 14,000 radio stations in the United States. This service disparity belies the goal of fair distribution of radio service mandated by Section 307(b) of the Communications Act of 1934, as amended, as well as the Commission's commitment to promoting diversity of station ownership and programming. The Commission also noted its historic trust relationship with Tribes, and the federal policy goals of assisting Tribes in promoting tribal culture and self-government.

To remedy these problems, the Commission concluded that Tribes seeking new radio stations to serve their citizens should receive a priority in the award of allotments and construction permits. To qualify for the Tribal Priority, an applicant must demonstrate that it meets all of the following eligibility criteria: (1) The applicant is either a federally recognized Tribe or tribal consortium, or an entity 51 percent or more of which is owned or controlled by a Tribe or Tribes, at least part of whose tribal lands (as defined in note 30 of the Rural NPRM) are covered by the principal community contour of the proposed facility. Although the 51 or greater percent need not consist of a single Tribe, the qualifying entity must be 51 percent or more owned or controlled by Tribes at least a portion of whose tribal lands lie within the facility's principal community contour; (2) at least 50 percent of the daytime principal community contour of the proposed facilities covers tribal lands; (3) the proposed community of license must be located on tribal lands; and (4) the applicant proposes first aural, second aural, or first local tribal-owned transmission service at the proposed community of license, in the case of proposed commercial facilities, or at least first local tribal-owned noncommercial educational transmission service, in the case of proposed NCE facilities. In the event that two or more applicants claiming the Tribal Priority are mutually exclusive, the one providing the highest level of service to the greatest population will prevail. The Tribal Priority ranks between the current Priority (1) and co-equal Priorities (2) and (3) in the case of commercial applicants. Thus, the Tribal Priority will not take precedence over a proposal to provide first reception service to a greater than de minimis population, but will take precedence over the provision of second local reception service, or over a proposal for first local non-tribal owned transmission service. Likewise, an NCE applicant qualifying for the Tribal Priority will take precedence over all mutually exclusive applications, except those that propose bona fide first reception service to a greater than de minimis population.

The Tribal Priority will be applied only at the allotment stage of the commercial FM licensing procedures, to commercial AM applications filed during an AM filing window, as part of the threshold Section 307(b) analysis, and to applications filed in an NCE FM filing window as the first part of the fair distribution analysis. NCE applicants must also meet all NCE eligibility and licensing requirements. Holding period restrictions, commencing with the award of a construction permit until the completion of four years of on-air operation, will apply to any authorization or allotment awarded pursuant to the Tribal Priority. In the

case of an AM or NCE FM authorization awarded to a tribal applicant, the permittee/licensee will be prohibited during this period from making any change that would lower tribal ownership below the 51 percent threshold, a change of community of license, or a technical change that would cause less than 50 percent of the principal community contour to cover tribal lands. However, gradual changes in the composition of an NCE board that do not change the nature of the organization or break continuity of control will not violate the four-year holding period restrictions. In the case of a commercial FM allotment, the restrictions will apply only to any proposed change of community of license or technical change as described above. The winner at auction of an FM allotment added to the Table of Allotments under a Tribal Priority, whether Tribal or non-Tribal, must still provide broadcast service primarily to tribal lands for the entire four-year holding period.

Additionally, in the First R&O the Commission requires that applicants receiving dispositive preferences for AM facilities under section 307(b) of the Communications Act of 1934, as amended, be prohibited from substantially downgrading the facilities on which the Section 307(b) award was based. This prohibition was designed to provide basic fairness in the award of a dispositive preference to one proposal in a group of several mutually exclusive proposals. That is, it would be unfair to allow one member of a mutually exclusive group to be awarded a construction permit without auction, based on the superior population coverage in its proposal, only then to allow it to downgrade its proposal to the point where it would no longer be significantly different from the other mutually exclusive proposals.

The First R&O also establishes procedures by which applicants in AM auction filing windows must submit technical proposals that meet minimum technical eligibility criteria. The Commission noted the number of incomplete or technically defective proposals filed in AM auction filing windows. Such proposals undermine the accuracy and reliability of our mutual exclusivity and Section 307(b) determinations, and frustrate the staff's ability to manage the window filing process efficiently. Moreover, such defective applications preclude the filing of meritorious modification applications by existing facilities, which must protect the prior-filed defective applications. In short, allowing the filing of technically defective proposals places a strain on the Commission's resources and, consequently, delays consideration of meritorious proposals and provision of new service to the public.

Likewise, the First R&O contains two other proposals designed to streamline the AM auction process and speed new service to the public: The grant of delegated authority to the Media Bureau to allow AM auction filing window applicants to submit settlements or technical resolutions that do not resolve all the mutual exclusivities in a mutually exclusive group, as long as the proposal results in one "singleton" application from the group; and the grant of delegated authority to the Media Bureau and Wireless Telecommunications Bureau to cap the number of AM applications that may be filed during a filing window. The Commission also grants the Media and Wireless Telecommunications Bureau's delegated authority to extend the deadline for filing post-auction long-form applications, as appropriate, thus providing successful auction applicants with greater flexibility in preparing such applications.

Finally, in the First R&O the Commission clarifies certain aspects of the rules governing the new entrant bidding credit (NEBC): That for purposes of determining whether an auctioned allotment is in the "same area" as an applicant's other media properties, we will use the maximum class facilities at the allotment site, rather than applicant specified-preferred coordinates; that unjust enrichment payments by assignors who used the NEBC in paying for their permit apply even to pro forma assignments or transfers filed on FCC Form 316; and that an applicant's maximum NEBC eligibility is established as of the deadline for filing short-form applications, but that the eligibility may be lost or diminished based on post-filing changes in the applicant's situation. In clarifying these rules and policies, the Commission will provide greater certainty to applicants, reducing any confusion and, therefore, burden when preparing and filing auction applications.

Summary of Significant Issues Raised by Public Comments in Response to the IRFA. There were no comments filed that specifically addressed the rules and policies proposed in the IRFA.

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small government jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

The subject rules and policies potentially will apply to all AM and FM radio broadcasting licensees and potential licensees. A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public. Included in this industry are commercial, religious, educational, and other radio stations. Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included. However, radio stations that are separate establishments and are primarily engaged in producing radio program material are classified under another NAICS number. The SBA has established a small business size standard for this category, which is: Firms having $7 million or less in annual receipts (13 CFR 121.201, NAICS code 515112 (updated for inflation in 2008)). According to BIA Advisory Services, L.L.C., MEDIA Access Pro Database on March 17, 2009, 10,884 (95%) of 11,404 commercial radio stations have revenue of $6 million or less. Therefore, the majority of such entities are small entities. We note, however, that many radio stations are affiliated with much larger corporations having much higher revenue. Our estimate, therefore, likely overstates the number of small entities that might be affected by any ultimate changes to the rules and forms.

Description of Projected Reporting, Recordkeeping and other Compliance Requirements. As described, certain rules and procedures will change, although the changes will not result in substantial increases in burdens on applicants. Questions will be added to FCC Forms 340, 314, and 315 to establish Section 307(b) eligibility for the Tribal Priority or compliance with holding period restrictions in the event of an assignment or transfer. Questions will also be added to FCC Form 316 based on the Commission's conclusion that the new entrant bidding credit unjust enrichment rules apply to pro forma assignment and transfer

applications. These are largely self-identification questions or questions regarding the duration of on-air operation, requiring minimal calculation. In certain cases (AM auction filing window applications and FM allotment proceedings), Section 307(b) information is already required, thus the information needed to be collected from applicants claiming the Tribal Priority is of the same character as that already collected, resulting in little or no increase in burden on such applicants. The remaining procedural changes in the First R&O are either changes in Commission procedures, requiring no input from applicants, or more stringent regulation of existing requirements. For example, AM auction filing window applicants need not submit more technical information than is already collected; the procedural change merely adds consequences when that information does not meet certain already extant technical standards.

Steps Taken To Minimize Significant Impact of Small Entities, and Significant Alternatives Considered. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities (5 U.S.C. 603(c)(1)–(c)(4)).

The Tribal Priority adopted in the First R&O was modified from the original proposal specified in the Rural NPRM, based on comments in the record and on the Commission's evaluation of the legal ramifications of the priority, especially with regard to the Commission's government-to-government relationship with Tribes. As adopted, the Tribal Priority can disadvantage certain applicants whose applications or proposals are mutually exclusive with those of applicants qualifying for the Tribal Priority. However, after due consideration, the Commission believes that the priority is necessary to redress an imbalance in the number of Native American broadcasters vis-à-vis native populations and lands, and to further the Commission's interests in promoting diversity of ownership and programming, in assisting Tribes to promulgate tribal language and culture, and in helping to promote self-government by Tribes. Thus, the Commission has determined that the Tribal Priority as adopted is the least burdensome method to achieve its policy goals, consonant with constitutional and other legal requirements.

With regard to the adopted rule limiting the downgrade of AM facilities awarded based on service proposals, initially the Commission proposed a standard allowing no reduction in population served, much as is done with NCE selectees. However, after consideration, and recognizing the technical complexity of the AM service and the burden such a rigid standard would impose on applicants, most of whom are small businesses, the Commission instead adopted the more flexible "equivalency" standard, which allows a variance of up to 20 percent of the population initially proposed to be served.

Likewise, in adopting the rule requiring that AM technical proposals be technically eligible for auction processing at time of filing, the Commission considered seeking further technical information from applicants. Moreover, as proposed the rule would not have allowed curative amendments. However, upon consideration of the record, the Commission opted not to require additional technical information from applicants, declining to increase the burden on such parties, and also mitigated the firm requirements of the proposed rule by allowing one opportunity for curative amendments.

The remaining proposals adopted in the First R&O fall into one of two categories: Grant of delegated authority to modify certain rules on an as-needed basis, or codification or clarification of existing policies and rules. In the first category, the new authority granted the Commission to place a "cap" on AM filing window applications may deprive certain applicants of the ability to file all the applications they wish. However, application caps will deter speculation, eliminating superfluous applications and enabling faster processing of applications overall. Caps will cause applicants to focus on those facilities that they value most, and in conjunction with the requirement of technically eligible applications will encourage the filing of better and more quickly grantable applications, streamlining the AM auction and award process. Given that, in the most recent AM auction filing window, less than six percent of the applicants filed ten or more applications (accounting for approximately 40 percent of all technical proposals filed), a reasonable application cap will burden only that small percentage of potential applicants whose multiple applications take up disproportionate amounts of Commission time and resources, slowing down the auction process and impeding the authorization of new AM service to the public. The grant of delegated authority to the Media and Wireless Telecommunications Bureaus to extend post-auction filing deadlines will only benefit applicants: It gives the Bureaus the flexibility to provide additional time for parties that need it, while those who wish their applications to be considered sooner may file when they like. In these cases, because of the significant benefits to regulated parties and minimal to no burdens, it was not deemed necessary to consider other options.

With regard to the adopted codifications and clarifications of existing rules, these also present no burden on applicants requiring consideration of less burdensome alternatives. The codification of the policy, used in prior auctions, allowing non-universal settlements that result in at least one singleton application from an MX Group, speeds auctions by simplifying MX groups, and expedites provision of new service by the singleton applicants. Similarly, the clarification of policies regarding new entrant bidding credit eligibility and the new entrant bidding credit unjust enrichment rule does not place any additional burdens on applicants or other parties. Rather, clarifying these policies will benefit applicants, permittees, and licensees by adding certainty to auction and post-auction procedures. As such, consideration of less burdensome alternatives was unnecessary.

Report to Congress. The Commission will send a copy of the First R&O, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801(a)(1)(A)). In addition, the Commission will send a copy of the First R&O, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the First R&O and FRFA (or summaries thereof) will also be published in the **Federal Register** (See 5 U.S.C. 604(b)).

Ordering Clauses

Accordingly, *it is ordered,* pursuant to the authority contained in Sections 1, 2, 4(i), 303, 307, and 309(j) of the Communications Act of 1934, 47 U.S.C. 151, 152, 154(i), 303, 307, and 309(j),

that this First Report and Order *is adopted.*

It is further ordered that, pursuant to the authority found in Sections 4(i), 303(r), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and 548, the Commission's Rules *are hereby amended* as set forth in Appendix E to the First R&O.

It is further ordered that the rules adopted herein *will become effective* 30 days after the date of publication in the **Federal Register,** except for sections 73.3571(k), 73.7000, 73.7002(b), and 73.7002(c), which contain new or modified information collection requirements that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA), and which *will become effective* after the Commission publishes a notice in the **Federal Register** announcing such approval and the relevant effective date.

List of Subjects in 47 CFR Part 73

Radio broadcast services.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Rule Changes

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336, and 339.

■ 2. Section 73.3571 is amended by revising paragraphs (h)(1)(ii) and (h)(4)(iii), and adding new paragraph (k) to read as follows:

§ 73.3571 Processing of AM broadcast station applications.

* * * * *

(h) * * *

(1) * * *

(ii) Such AM applicants will be subject to the provisions of §§ 1.2105 and 73.5002 regarding the submission of the short-form application, FCC Form 175, and all appropriate certifications, information and exhibits contained therein. Applications must include the following engineering data: community of license; frequency; class; hours of operations (day, night, critical hours); power (day, night, critical hours); antenna location (day, night, critical hours); and all other antenna data. Applications lacking data (including any form of placeholder, such as inapposite use of "0" or "not applicable" or an abbreviation thereof) in any of these categories will be immediately dismissed as incomplete without an opportunity for amendment. The staff will review the remaining applications to determine whether they meet the following basic eligibility criteria: community of license coverage (day and night) as set forth in § 73.24(i), and protection of co- and adjacent-channel station licenses, construction permits and prior-filed applications (day and night) as set forth in §§ 73.37 and 73.182. If the staff review shows that an application does not meet one or more of the basic eligibility criteria listed above, it will be deemed "technically ineligible for filing" and will be included on a Public Notice listing defective applications and setting a deadline for the submission of curative amendments. An application listed on that Public Notice may be amended only to the extent directly related to an identified deficiency in the application. The amendment may modify the proposed power, class (within the limits set forth in § 73.21), antenna location or antenna data, but not the proposed community of license or frequency. Except as set forth in the preceding two sentences, amendments to short-form (FCC Form 175) applications will not be accepted at any time. Applications that remain technically ineligible after the close of this amendment period will be dismissed, and the staff will determine which remaining applications are mutually exclusive.

* * * * *

(4) * * *

(iii) All long-form applications will be cutoff as of the date of filing with the FCC and will be protected from subsequently filed long-form applications. Applications will be required to protect all previously filed commercial and noncommercial applications. Subject to the restrictions set forth in paragraph (k) of this section, winning bidders filing long-form applications may change the technical proposals specified in their previously submitted short-form applications, but such change may not constitute a major change. If the submitted long-form application would constitute a major change from the proposal submitted in the short-form application, the long-form application will be returned pursuant to paragraph (h)(1)(i) of this section.

* * * * *

(k)(1) An AM applicant receiving a dispositive Section 307(b) preference is required to construct and operate technical facilities substantially as proposed in its FCC Form 175. An AM applicant, licensee, or permittee receiving a dispositive Section 307(b) preference based on its proposed service to underserved populations (under Priority (1), Priority (2), and Priority (4)) or service totals (under Priority (4)) may modify its facilities so long as it continues to provide the same priority service to substantially the same number of persons who would have received service under the initial proposal, even if the population is not the same population that would have received such service under the initial proposal. For purposes of this provision, "substantially" means that any proposed modification must not result in a decrease of more than 20 percent of any population figure that was a material factor in obtaining the dispositive Section 307(b) preference.

(2) An AM applicant, licensee, or permittee that has received a dispositive preference under Priority (3) will be prohibited from changing its community of license.

(3) The restrictions set forth in paragraphs (k)(1) and (k)(2) of this section will be applied for a period of four years of on-air operations. This holding period does not apply to construction permits that are awarded on a non-comparative basis, such as those awarded to non-mutually exclusive applicants or through settlement.

■ 3. Section 73.5002 is amended by adding new paragraph (e) to read as follows:

§ 73.5002 Application and certification procedures; return of mutually exclusive applications not subject to competitive bidding procedures; prohibition of collusion.

* * * * *

(e) Applicants seeking to resolve their mutual exclusivities by means of engineering solution or settlement during a limited period as specified by public notice, pursuant to paragraph (d) of this section, may submit a non-universal engineering solution or settlement proposal, so long as such engineering solution or settlement proposal results in the grant of at least one application from the mutually exclusive group. A technical amendment submitted under this subsection must resolve all of the applicant's mutual exclusivities with respect to the other applications in the specified mutually exclusive application group.

■ 4. Section 73.5005 is amended by revising the first sentence of paragraph (a) to read as follows:

§ 73.5005 Filing of long-form applications.

(a) Within thirty (30) days following the close of bidding and notification to the winning bidders, unless a longer period is specified by public notice, each winning bidder must submit an appropriate long-form application (FCC Form 301, FCC Form 346, or FCC Form 349) for each construction permit or license for which it was the high bidder.

* * *

* * * * *

■ 5. Section 73.5007 is amended by revising paragraph (a) and by adding Note 1 to read as follows:

§ 73.5007 Designated entity provisions.

(a) *New entrant bidding credit.* A winning bidder that qualifies as a "new entrant" may use a bidding credit to lower the cost of its winning bid on any broadcast construction permit. Any winning bidder claiming new entrant status must have de facto, as well as de jure, control of the entity utilizing the bidding credit. A thirty-five (35) percent bidding credit will be given to a winning bidder if it, and/or any individual or entity with an attributable interest in the winning bidder, have no attributable interest in any other media of mass communications, as defined in § 73.5008. A twenty-five (25) percent bidding credit will be given to a winning bidder if it, and/or any individual or entity with an attributable interest in the winning bidder, have an attributable interest in no more than three mass media facilities. No bidding credit will be given if any of the commonly owned mass media facilities serve the same area as the proposed broadcast or secondary broadcast station, or if the winning bidder, and/or any individual or entity with an attributable interest in the winning bidder, have attributable interests in more than three mass media facilities. Attributable interests held by a winning bidder in existing low power television, television translator or FM translator facilities will not be counted among the bidder's other mass media interests in determining eligibility for a bidding credit. Eligibility for the new entrant bidding credit must be specified in an applicant's FCC Form 175 application, and the new entrant bidding credit specified in an applicant's FCC Form 175 application establishes that applicant's maximum bidding credit eligibility for that auction. Any post-FCC Form 175 filing change in the applicant's circumstances underlying its new entrant bidding credit eligibility claim, or that of any attributable interest-holder in the applicant, must be reported to the Commission immediately, and no later than five business days after the change occurs. Any such post-FCC Form 175 filing change may cause a reduction or elimination of the new entrant bidding credit claimed in the applicant's FCC Form 175 application, if the change would cause the applicant not to qualify for the originally claimed new entrant bidding credit under the eligibility provisions of § 73.5007, and the change occurred prior to grant of the construction permit to the applicant. Final determinations regarding new entrant status will be made at the time of long form construction permit application grant. Applicants whose eligibility is lost or reduced subsequent to the FCC Form 175 filing must, before a construction permit will be issued, make such payments as are necessary to account for the difference between claimed and actual bidding credit eligibility.

* * * * *

Note 1 to § 73.5007: For purposes of paragraph (b)(3)(ii) of this section, the contour of the proposed new FM broadcast station is based on the maximum class facilities at the FM allotment site, which is defined as the perfectly circular standard 70 dBu contour distance for the class of station.

■ 6. Section 73.7000 is amended by adding six new definitions to read as follows:

§ 73.7000 Definition of terms (as used in subpart K only).

* * * * *

Near reservation lands. Those areas or communities adjacent or contiguous to reservation or other Trust lands which are designated by the Department of Interior's Commission of Indian Affairs upon recommendation of the Local Bureau of Indian Affairs Superintendent, which recommendation shall be based upon consultation with the tribal governing body of those reservations, as locales appropriate for the extension of financial assistance and/or social services on the basis of such general criteria as: Number of Indian people native to the reservation residing in the area; a written designation by the tribal governing body that members of their tribe and family members who are Indian residing in the area, are socially, culturally and economically affiliated with their tribe and reservation; geographical proximity of the area to the reservation and administrative feasibility of providing an adequate level of services to the area.

* * * * *

Reservations. Any federally recognized Indian tribe's reservation, pueblo or colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlements Act (85 Stat. 688) and Indian allotments, for which a Tribe exercises regulatory jurisdiction.

* * * * *

Tribe. Any Indian or Alaska Native tribe, band, nation, pueblo, village or community which is acknowledged by the federal government to constitute a government-to-government relationship with the United States and eligible for the programs and services established by the United States for Indians. *See The Federally Recognized Indian Tribe List Act of 1994* (Indian Tribe Act), Public Law 103–454. 108 Stat. 4791 (1994) (the Secretary of the Interior is required to publish in the **Federal Register** an annual list of all Indian Tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians).

Tribal applicant. (1) A Tribe or consortium of Tribes, or

(2) An entity that is 51 percent or more owned or controlled by a Tribe or Tribes that occupy Tribal Lands that receive Tribal Coverage.

Tribal coverage. Coverage of Tribal Lands by at least 50 percent of a facility's 60 dBu (1 mV/m) contour. To the extent that Tribal Lands include fee lands not owned by Tribes or members of Tribes, the outer boundaries of such lands shall delineate the coverage area, with no deduction of area for fee lands not owned by Tribes or members of Tribes.

Tribal Lands. Both Reservations and Near reservation lands. This definition includes American Indian Reservations and Trust Lands, Tribal Jurisdiction Statistical Areas, Tribal Designated Statistical Areas, Hawaiian Homelands, and Alaska Native Village Statistical Areas, as well as the communities situated on such lands.

■ 7. Section 73.7002 is amended by revising paragraphs (b) and (c) to read as follows:

§ 73.7002 Fair distribution of service on reserved band FM channels.

* * * * *

(b) In an analysis performed pursuant to paragraph (a) of this section, a full-service FM applicant that identifies itself as a Tribal Applicant, that proposes Tribal Coverage, and that proposes the first reserved channel NCE service owned by any Tribal Applicant at a community of license located on Tribal Lands, will be awarded a construction permit. If two or more full-service FM applicants identify

themselves as Tribal Applicants and meet the above criteria, the applicant providing the most people with reserved channel NCE service to Tribal Lands will be awarded a construction permit, regardless of the magnitude of the superior service or the populations of the communities of license proposed, if different. If two or more full-service FM applicants identifying themselves as Tribal Applicants each meet the above criteria and propose identical levels of NCE aural service to Tribal Lands, only those applicants shall proceed to be considered together in a point system analysis. In an analysis performed pursuant to paragraph (a) of this section that does not include a Tribal Applicant, a full service FM applicant that will provide the first or second reserved channel noncommercial educational (NCE) aural signal received by at least 10% of the population within the station's 60dBu (1mV/m) service contours will be considered to substantially further fair distribution of service goals and to be superior to mutually exclusive applicants not proposing that level of service, provided that such service to fewer than 2,000 people will be considered insignificant. First service to 2,000 or more people will be considered superior to second service to a population of any size. If only one applicant will provide such first or second service, that applicant will be selected as a threshold matter. If more than one applicant will provide an equivalent level (first or second) of NCE aural service, the size of the population to receive such service from the mutually exclusive applicants will be compared. The applicant providing the most people with the highest level of service will be awarded a construction permit, if it will provide such service to 5,000 or more people than the next best applicant. If none of the applicants in a mutually exclusive group would substantially further fair distribution goals, all applicants will proceed to examination under a point system. If two or more applicants will provide the same level of service to an equivalent number of people (differing by less than 5,000), only those equivalent applicants will be considered together in a point system.

(c) For a period of four years of on-air operations, an applicant receiving a decisive preference pursuant to this section is required to construct and operate technical facilities substantially as proposed and shall not downgrade service to the area on which the preference was based. Additionally, for a period beginning from the award of a construction permit through four years of on-air operations, a Tribal Applicant receiving a decisive preference pursuant to this section may not:

(1) Assign or transfer the authorization except to another party that qualifies as a Tribal Applicant;

(2) Change the facility's community of license; or

(3) Effect a technical change that would cause the facility to provide less than full Tribal Coverage.

[FR Doc. 2010–3491 Filed 3–3–10; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register
Vol. 75, No. 42
Thursday, March 4, 2010

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 TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0177; Directorate Identifier 2009–NM–222–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A330–243, –341, –342, and –343 Airplanes; and Model A340–541 and –642 Airplanes; Equipped With Rolls-Royce Trent 500 and Trent 700 Series Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as: It has been evidenced by test that the tightening torque settings on the Rolls Royce Trent 500 and Trent 700 forward (FWD) and aft (AFT) engine mount link pin retention bolts have always been higher than the design value. These bolts retain the washers that maintain the engine mount vertical load pins in position. If bolts, as a consequence of the over-torque, fail and move away, it would lead to loss of the vertical load pins, which could result in loss of the primary and/or secondary load path of the forward and/or aft engine mount which could potentially lead to engine separation.

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by April 19, 2010.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Airbus SAS—Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80; e-mail *airworthiness.A330–A340@airbus.com;* Internet *http://www.airbus.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1138; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–0177; Directorate Identifier 2009–NM–222–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We have lengthened the 30-day comment period for proposed ADs that address MCAI originated by aviation authorities of other countries to provide adequate time for interested parties to submit comments. The comment period for these proposed ADs is now typically 45 days, which is consistent with the comment period for domestic transport ADs.

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

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2009–0204, dated September 30, 2009 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

> It has been evidenced by test that the tightening torque settings on the Rolls Royce Trent 500 and Trent 700 forward (FWD) and aft (AFT) engine mount link pin retention bolts have always been higher than the design value. These bolts retain the washers that maintain the engine mount vertical load pins in position.
>
> If bolts, as a consequence of the over-torque, fail and move away, it would lead to loss of the vertical load pins, which could result in loss of the primary and/or secondary load path of the forward and/or aft engine mount which could potentially lead to engine separation.
>
> As a short term action, EASA AD 2008–0019 was issued to require a one-time visual inspection of the impacted FWD and AFT engine mount link pin retention bolts in order to detect any broken or missing bolts. This AD, which supersedes EASA AD 2008–0019, mandates a one-time [detailed] visual inspection of the FWD and AFT engine mount link pin retention bolts, in order to ensure that any over-torqued bolt is replaced.

You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Airbus has issued Mandatory Service Bulletins A330–71–3022 and A340–71–5004, both including Appendices 01, 02, and 03, both dated May 5, 2009. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

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

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

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 1 product of U.S. registry. We also estimate that it would take about 10 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $10,842 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on the U.S. operator to be $11,692.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Airbus: Docket No. FAA–2010–0177; Directorate Identifier 2009–NM–222–AD.

Comments Due Date

(a) We must receive comments by April 19, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Airbus Model A330–243, –341, –342, and –343 airplanes; and Model A340–541 and –642 airplanes; certificated in any category; equipped with Rolls-Royce Trent 500 and Trent 700 series engines.

Subject

(d) Air Transport Association (ATA) of America Code 71: Powerplant.

Reason

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

It has been evidenced by test that the tightening torque settings on the Rolls Royce Trent 500 and Trent 700 forward (FWD) and aft (AFT) engine mount link pin retention bolts have always been higher than the design value. These bolts retain the washers that maintain the engine mount vertical load pins in position.

If bolts, as a consequence of the over-torque, fail and move away, it would lead to loss of the vertical load pins, which could result in loss of the primary and/or secondary load path of the forward and/or aft engine mount which could potentially lead to engine separation.

As a short term action, EASA AD 2008–0019 was issued to require a one-time visual inspection of the impacted FWD and AFT engine mount link pin retention bolts in order to detect any broken or missing bolts. This AD, which supersedes EASA AD 2008–0019, mandates a one-time [detailed] visual inspection of the FWD and AFT engine mount link pin retention bolts, in order to ensure that any over-torqued bolt is replaced.

Compliance

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

Actions

(g) Except as provided by paragraph (h) of this AD, at the applicable time specified in paragraph (g)(1) or (g)(2) of this AD, perform a one-time detailed visual inspection for the presence of an "X" marked on the heads of the link pin retention bolts of the forward and aft engine mount on all Rolls-Royce Trent 500 and Trent 700 series engines, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A330–71–3022 (for Models A330–243, –341, –342, and –343 airplanes) or A340–71–5004 (for Model A340–541 and

–642 airplanes), both dated May 5, 2009. If the bolt head is not marked with an "X," before further flight, replace this bolt with a new bolt marked with an "X" on the bolt head in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A330–71–3022 (for Models A330–243, –341, –342, and –343 airplanes) or A340–71–5004 (for Model A340–541 and –642 airplanes), both dated May 5, 2009.

(1) For Model A330–243, –341, –342, and –343 airplanes: Within 4,500 flight cycles after the effective date of this AD.

(2) For Model A340–541 and –642 airplanes: Within 2,500 flight cycles after the effective date of this AD.

(h) The actions specified in paragraph (g) of this AD are not required for any engine installed on the airplanes listed in paragraph (g)(1) of this AD, having serial number 964 and subsequent; and the airplanes listed in paragraph (g)(2) of this AD, having serial number 981 and subsequent; if data records conclusively prove that this engine has not been replaced or re-installed since first flight of the airplane.

(i) After the effective date of this AD, no person may install a Rolls Royce Trent 500 or Trent 700 series engine on any airplane, unless it is in compliance with the requirements of this AD.

(j) Although Airbus Mandatory Service Bulletins A330–71–3022 and A340–71–5004, both dated May 5, 2009, specify to submit certain information to the manufacturer, this AD does not include that requirement.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows:

(1) The MCAI lists certain Airbus model A330–200 series and –300 series, and A340 series airplanes. Airbus Mandatory Service Bulletins A330–71–3022 and A340–71–5004, both dated May 5, 2009, clarify this effectivity by adding "with Rolls-Royce Trent 500 and Trent 700 series engines." Airplanes with engines other than Rolls-Royce Trent 500 and Trent 700 are not affected by this AD.

(2) Although the MCAI or service information specifies submitting information to the manufacturer, paragraph (j) of this AD specifies that such submittal is not required.

Other FAA AD Provisions

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

(1) Alternative Methods of Compliance (AMOCs): The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1138; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

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

Related Information

(l) Refer to MCAI EASA Airworthiness Directive 2009–0204, dated September 30, 2009; Airbus Mandatory Service Bulletin A330–71–3022, dated May 5, 2009; and Airbus Mandatory Service Bulletin A340–71–5004, dated May 5, 2009; for related information.

Issued in Renton, Washington, on February 25, 2010.

Jeffrey E. Duven,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–4503 Filed 3–3–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0176; Directorate Identifier 2009–NM–201–AD]

RIN 2120–AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model ERJ 170 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as: During ERJ 170 airplane full scale fatigue test, cracks were found in some structural components of the airplane. Analysis of these cracks resulted in modifications on the airplane Airworthiness Limitation Items (ALI), to include new inspections tasks or modification of existing ones and its respective thresholds and intervals. Failure to inspect these components according to the new tasks, thresholds and intervals could prevent a timely detection of fatigue cracks. Undetected fatigue cracks in these areas could adversely affect the structural integrity of these airplanes.

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by April 19, 2010.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Empresa Brasileira de Aeronautica S.A. (EMBRAER), Technical Publications Section (PC 060), Av. Brigadeiro Faria Lima, 2170—Putim—12227–901 São Jose dos Campos-SP–BRASIL; telephone: +55 12 3927–5852 or +55 12 3309–0732; fax: +55 12 3927–7546; e-mail: *distrib@embraer.com.br;* Internet: *http://www.flyembraer.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Kenny Kaulia, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2848; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–0176; Directorate Identifier 2009–NM–201–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We have lengthened the 30-day comment period for proposed ADs that address MCAI originated by aviation authorities of other countries to provide adequate time for interested parties to submit comments. The comment period for these proposed ADs is now typically 45 days, which is consistent with the comment period for domestic transport ADs.

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

Discussion

The Agência Nacional de Aviação Civil (ANAC), which is the aviation authority for Brazil, has issued Brazilian Airworthiness Directive 2009–04–01, effective April 29, 2009 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

> During ERJ 170 airplane full scale fatigue test, cracks were found in some structural components of the airplane. Analysis of these cracks resulted in modifications on the airplane Airworthiness Limitation Items (ALI), to include new inspections tasks or modification of existing ones and its respective thresholds and intervals.
>
> Failure to inspect these components according to the new tasks, thresholds and intervals could prevent a timely detection of fatigue cracks. Undetected fatigue cracks in these areas could adversely affect the structural integrity of these airplanes.
>
> * * * * *

The corrective action is revising the Airworthiness Limitations Section of the Instructions for Continued Airworthiness to incorporate new structural inspection requirements. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Embraer has issued temporary revisions to Appendix A—Part 2 of the Embraer 170 Maintenance Review Board Report MRB–1621, as identified in the following table.

EMBRAER 170 TEMPORARY REVISIONS

Temporary revision	Date
TR 4–1	October 15, 2007.
TR 4–3	December 6, 2007.
TR 4–4	January 18, 2008.

The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

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

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

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 166 products of U.S. registry. We also estimate that it would take about 1 work-hour per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $14,110, or $85 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Empresa Brasileira De Aeronautica S.A. (EMBRAER): Docket No. FAA–2010–0176; Directorate Identifier 2009–NM–201–AD.

Comments Due Date

(a) We must receive comments by April 19, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model ERJ 170–100 LR, –100 STD, –100 SE, –100 SU, –200 LR, –200 STD, and –200 SU airplanes; certificated in any category.

Note 1: This AD requires revisions to certain operator maintenance documents to include new inspections. Compliance with these inspections is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, the operator may not be able to accomplish the inspections described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (h) of this AD. The request should include a description of changes to the required inspections that will ensure the continued operational safety of the airplane. The FAA has provided guidance for this determination in Advisory Circular (AC) 25–1529–1A.

Subject

(d) Air Transport Association (ATA) of America Code 53: Fuselage; 57: Wings.

Reason

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

During ERJ 170 airplane full scale fatigue test, cracks were found in some structural components of the airplane. Analysis of these cracks resulted in modifications on the airplane Airworthiness Limitation Items (ALI), to include new inspections tasks or modification of existing ones and its respective thresholds and intervals.

Failure to inspect these components according to the new tasks, thresholds and intervals, could prevent a timely detection of fatigue cracks. Undetected fatigue cracks in these areas could adversely affect the structural integrity of these airplanes.

* * * * *

The corrective action is revising the Airworthiness Limitations Section (ALS) of the Instructions for Continued Airworthiness to incorporate new structural inspection requirements.

Compliance

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

Actions

(g) Unless already done, do the following actions.

(1) Within 90 days after the effective date of this AD revise the ALS of the Instructions for Continued Airworthiness (ICA) to incorporate the inspection tasks identified in the Embraer temporary revisions (TRs) to Appendix A—Part 2 of the Embraer 170 Maintenance Review Board Report MRB–1621, listed in Table 1 of this AD. The initial compliance times for the tasks start from the applicable threshold times specified in the TRs for the corresponding tasks of the maintenance review board report or within 500 flight cycles after the effective date of this AD, whichever occurs later. For certain tasks, the compliance times depend on the pre-modification and post-modification status of the actions specified in the associated service bulletin, as specified in the "Applicability" column of the applicable TRs identified in Table 1 of this AD. The threshold values stated in the TRs referenced in Table 1 of this AD are total flight cycles on the airplane since the date of issuance of the original Brazilian airworthiness certificate or the date of issuance of the original Brazilian export certificate of airworthiness.

TABLE 1—MRBR INSPECTION TASKS

TR	Date	Subject	Task No.
TR 4–1	October 15, 2007	Ram air turbine compartment, support structure and cutout structure—internal.	53–10–012–0002
			53–10–012–0003
		Nose landing gear wheel well metallic structure	53–10–021–0005
			53–10–021–0006
TR 4–3	December 6, 2007	Wing stub spar 3 side fitting—internal	57 –01–012–001
		Wing upper skin panels—external	57–10–010–0002
		Fixed trailing edge lower skin panel—external	57–50–002–0002
		Fixed trailing edge rib 4A—external	57–50–005–0003
		Fixed trailing edge rib 6—internal	57–50–005–0004
TR 4–4	January 18, 2008	Wing stub main box lower—internal	57–01–002–003

(2) After accomplishing the actions specified in paragraph (g)(1) of this AD, no alternative inspections or inspection intervals may be used unless the inspection or inspection interval is approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, or the Agência Nacional de Aviação Civil (ANAC) (or its delegated agent); or unless the inspection or interval is approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (h)(1) of this AD.

FAA AD Differences

Note 2: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

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

(1) Alternative Methods of Compliance (AMOCs): The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Kenny Kaulia, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2848; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

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

(3) Reporting Requirements: For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(i) Refer to MCAI Brazilian Airworthiness Directive 2009–04–01, dated April 29, 2009; and the TRs to Appendix A—Part 2 of the Embraer 170 Maintenance Review Board Report MRB–1621, identified in Table 2 of this AD; for related information.

TABLE 2—TEMPORARY REVISIONS

Temporary revisions	Date
TR 4–1	October 15, 2007.
TR 4–3	December 6, 2007.
TR 4–4	January 18, 2008.

Issued in Renton, Washington, on February 25, 2010.

Jeffrey E. Duven,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–4504 Filed 3–3–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0175; Directorate Identifier 2009–NM–187–AD]

RIN 2120–AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model ERJ 190–100 STD,–100 LR,–100 IGW,–200 STD,–200 LR, and–200 IGW Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as: During ERJ 190 airplane full scale fatigue test, cracks were found in some structural components of the airplane. Analysis of these cracks resulted in modifications on the airplane Airworthiness Limitation Items (ALI), to include new inspections tasks or modification of existing ones and its respective thresholds and intervals. Failure to inspect these components according to the new tasks, thresholds and intervals could prevent a timely detection of fatigue cracks. Undetected fatigue cracks in these areas could adversely affect the structural integrity of these airplanes.

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by April 19, 2010.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Empresa Brasileira de Aeronautica S.A. (EMBRAER), Technical Publications Section (PC 060), Av. Brigadeiro Faria Lima, 2170—Putim—12227–901 São Jose dos Campos—SP—BRASIL; telephone: +55 12 3927–5852 or +55 12 3309–0732; fax: +55 12 3927–7546; e-mail: *distrib@embraer.com.br;* Internet: *http://www.flyembraer.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Kenny Kaulia, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2848; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–0175; Directorate Identifier 2009–NM–187–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We have lengthened the 30-day comment period for proposed ADs that address MCAI originated by aviation authorities of other countries to provide adequate time for interested parties to submit comments. The comment period for these proposed ADs is now typically 45 days, which is consistent with the comment period for domestic transport ADs.

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

Discussion

The Agência Nacional de Aviação Civil (ANAC), which is the aviation authority for Brazil, has issued Brazilian Airworthiness Directive 2009–04–02, effective April 29, 2009 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

> During ERJ 190 airplane full scale fatigue test, cracks were found in some structural components of the airplane. Analysis of these cracks resulted in modifications on the airplane Airworthiness Limitation Items (ALI), to include new inspections tasks or modification of existing ones and its respective thresholds and intervals.
>
> Failure to inspect these components according to the new tasks, thresholds and intervals could prevent a timely detection of fatigue cracks. Undetected fatigue cracks in these areas could adversely affect the structural integrity of these airplanes.

* * * * *

The corrective action is revising the Airworthiness Limitations Section of the Instructions for Continued Airworthiness to incorporate new and modified structural inspections. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Embraer has issued Temporary Revision (TR) 2–5, dated December 6, 2007; and TR 2–6, dated February 12,

2008; to Appendix A, Part 2, Airworthiness Limitation Inspections, of the Embraer 190 Maintenance Review Board Report MRB–1928. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

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

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

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 65 products of U.S. registry. We also estimate that it would take about 1 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $5,525, or $85 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Empresa Brasileira De Aeronautica S.A. (EMBRAER): Docket No. FAA–2010–0175; Directorate Identifier 2009–NM–187–AD.

Comments Due Date

(a) We must receive comments by April 19, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model ERJ 190–100 STD, –100 LR, –100 IGW, –200 STD, –200 LR, and –200 IGW airplanes, certificated in any category.

Note 1: This AD requires revisions to certain operator maintenance documents to include new inspections. Compliance with these inspections is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, the operator may not be able to accomplish the inspections described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (g)(1) of this AD. The request should include a description of changes to the required inspections that will ensure the continued operational safety of the airplane.

Subject

(d) Air Transport Association (ATA) of America Code 53: Fuselage; 57: Wings.

Reason

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

During ERJ 190 airplane full scale fatigue test, cracks were found in some structural components of the airplane. Analysis of these cracks resulted in modifications on the airplane Airworthiness Limitation Items (ALI), to include new inspections tasks or modification of existing ones and its respective thresholds and intervals.

Failure to inspect these components according to the new tasks, thresholds and intervals could prevent a timely detection of fatigue cracks. Undetected fatigue cracks in these areas could adversely affect the structural integrity of these airplanes.

* * * * *

The corrective action is revising the Airworthiness Limitations Section (ALS) of the Instructions for Continued Airworthiness to incorporate new and modified structural inspections.

Actions and Compliance

(f) Unless already done, do the following actions.

(1) Within 90 days after the effective date of this AD: Revise the ALS of the Instructions for Continued Airworthiness to include the tasks specified in Table 1 of this AD. These tasks are identified in Embraer Temporary Revision (TR) 2–5, dated December 6, 2007; and Embraer TR 2–6, dated February 12, 2008; to Appendix A, Part 2, Airworthiness Limitation Inspections (ALI), of the Embraer 190 Maintenance Review Board Report (MRBR) MRB–1928.

Note 2: The actions required by paragraph (f)(1) of this AD may be done by inserting a copy of TR 2–5 and TR 2–6 into the ALS of

Embraer 190 MRBR MRB–1928. When these TRs have been included in general revisions of the Embraer 190 MRBR MRB–1928, the general revisions may be inserted in the Embraer 190 MRBR MRB–1928, provided the relevant information in the general revision is identical to that in TR 2–5 and TR 2–6, and the TRs may be removed.

(2) The initial compliance times for the tasks specified in Embraer TR 2–5, dated December 6, 2007; and Embraer TR 2–6, dated February 12, 2008; start at the later of the times specified in paragraphs (f)(2)(i) and (f)(2)(ii) of this AD. For certain tasks, the compliance times depend on the pre-modification and post-modification condition of the associated service bulletin, as specified in the "Applicability" column of the TRs.

(i) Within the applicable threshold times specified in the TRs.

(ii) At the applicable compliance time specified in Table 1 of this AD.

TABLE 1—MRBR TRS AND TASKS, WITH COMPLIANCE TIMES

MRBR TR	Subject	MRBR task No.	Compliance time
TR 2–5	Wing stub main box lower skin and splices—internal.	57–01–002–0002	250 flight cycles after effective date of this AD.
TR 2–5	Wing stub spar 3—internal/external	57–01–008–0003	500 flight cycles after effective date of this AD.
TR 2–5	Wing stub spar 3—external	57–01–008–0004	500 flight cycles after effective date of this AD.
TR 2–5	Wing lower skin panel stringers—internal	57–10–007–0004	500 flight cycles after effective date of this AD.
TR 2–5	Wing main box rib 11—internal	57–10–012–0003	500 flight cycles after effective date of this AD.
TR 2–6	Nose landing gear wheel well metallic structure.	53–10–021–0004	500 flight cycles after effective date of this AD.

(iii) Thereafter, except as provided in paragraph (g) of this AD, no alternative replacement times or structural inspection intervals may be approved for these tasks.

FAA AD Differences

Note 3: This AD differs from the MCAI and/or service information as follows:

Although the MCAI specifies both revising the airworthiness limitations and doing repetitive inspections, this AD only specifies the revision. Requiring revision of the airworthiness limitations, rather than requiring individual repetitive inspections, is advantageous for operators because it allows them to record AD compliance status only at the time that they make the revision, rather than after every inspection. It also has the advantage of keeping all airworthiness limitations, whether imposed by original certification or by AD, in one place within the operator's maintenance program, thereby reducing the risk of non-compliance because of oversight or confusion.

Other FAA AD Provisions

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

(1) Alternative Methods of Compliance (AMOCs): The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Kenny Kaulia, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2848; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

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

(3) Reporting Requirements: For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI Brazilian Airworthiness Directive 2009–04–02, dated April 29, 2009; TR 2–5, dated December 6, 2007; and TR 2–6, dated February 12, 2008; for related information.

Issued in Renton, Washington, on February 24, 2010.

Jeffrey E. Duven,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–4506 Filed 3–3–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0174; Directorate Identifier 2009–NM–186–AD]

RIN 2120–AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model ERJ 170 and ERJ 190 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above that would supersede an existing AD. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI for EMBRAER Model ERJ 170 describes the unsafe condition as: It has been found the occurrence of an engine in-flight shutdown caused by the LPCV [low pressure check valves] failing to close due to excessive wear, which leads to the concern that such fault may be present in both engines of a given aircraft. The MCAI for EMBRAER Model ERJ 190 describes the unsafe condition as: An occurrence of an uncommanded engine in-flight shutdown (IFSD) was reported, which was caused by an ERJ 170 defective LPCV. The valve failed to close due to excessive wear. Despite

there were no IFSD related to LPCV failure, some ERJ 190 valves were inspected and presented cracks due to low cycle fatigue. Since this failure mode also might lead to an engine in-flight shutdown and since both engines of the airplane have the same valves, there is a possibility of an occurrence of a dual engine IFSD due to LPCV failure. The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by April 19, 2010.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Empresa Brasileira de Aeronautica S.A. (EMBRAER), Technical Publications Section (PC 060), Av. Brigadeiro Faria Lima, 2170–Putim–12227–901 São Jose dos Campos–SP—BRASIL; telephone: +55 12 3927–5852 or +55 12 3309–0732; fax: +55 12 3927–7546; e-mail: *distrib@embraer.com.br;* Internet: *http://www.flyembraer.com*. You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Kenny Kaulia, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2848; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–0174; Directorate Identifier 2009–NM–186–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We have lengthened the 30-day comment period for proposed ADs that address MCAI originated by aviation authorities of other countries to provide adequate time for interested parties to submit comments. The comment period for these proposed ADs is now typically 45 days, which is consistent with the comment period for domestic transport ADs.

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

Discussion

On July 30, 2007, we issued AD 2007–16–09, Amendment 39–15148 (72 FR 44734, August 9, 2007). That AD required actions intended to address an unsafe condition on the products listed above.

Since we issued AD 2007–16–09, we have received reports of cracking in low-stage check valves having part number (P/N) 1001447–4. The Agência Nacional de Aviação Civil (ANAC), which is the aviation authority for Brazil, has issued Brazilian Airworthiness Directive 2005–09–03R2, effective February 25, 2008 and 2006–11–01R4, effective April 9, 2009 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI for EMBRAER Model ERJ 170 states:

> It has been found the occurrence of an engine in-flight shutdown caused by the LPCV [low pressure check valves] failing to close due to excessive wear, which leads to the concern that such fault may be present in both engines of a given aircraft.
>
> * * * * *

The MCAI for EMBRAER Model ERJ 190 states:

> An occurrence of an uncommanded engine in-flight shutdown (IFSD) was reported on 20 Sep. 2005, which was caused by an ERJ 170 defective LPCV [part number] P/N 1001447–3 logging 3900 Flight Hours (FH). The valve failed to close due to excessive wear. Despite there were no IFSD related to LPCV P/N 1001447–4 failure, some ERJ 190 valves P/N 1001447–4 logging around 2472 FH were inspected and presented cracks due to low cycle fatigue. Since this failure mode also might lead to an engine in-flight shutdown and since both engines of the airplane have the same valves, there is a possibility of an occurrence of a dual engine IFSD due to LPCV failure.
>
> * * * * *

The required actions include repetitive replacements of the low-stage check valves and associated seals of the left-hand and right-hand engine bleed system with new or serviceable valves, depending on the model. For certain airplanes, this proposed AD also includes an optional terminating action for the repetitive replacements. This proposed AD would also require, if the terminating action is done, revising the approved maintenance plan to include repetitive functional tests of the low-stage check valve. For certain other airplanes, this proposed AD would require replacing a certain low-stage check valve with an improved low-stage check valve. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

EMBRAER has issued the service information listed in the following table:

SERVICE INFORMATION

Document	Revision	Date
EMBRAER Service Bulletin 170–36–0004	01	March 10, 2008.
EMBRAER Service Bulletin 170–36–0011	02	July 19, 2007.
EMBRAER Service Bulletin 190–36–0006	01	July 19, 2007.
EMBRAER Service Bulletin 190–36–0014	01	January 14, 2009.

SERVICE INFORMATION—Continued

Document	Revision	Date
Task 36–11–02–002 (Low Stage Bleed Check Valve) in Section 1 of the EMBRAER 170 Maintenance Review Board Report MRB–1621.	5	November 5, 2008.

The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

Adding New Airplanes

Since AD 2007–16–09, new models that are affected by the identified unsafe condition have been added to the U.S. type certificate data sheet and are included in this AD. We have added Models ERJ–190–200 STD, –200 LR, and –200 IGW to paragraph (c) of this proposed AD.

Clarification of Applicability

To clarify the affected airplanes, we have reviseds the applicability of this proposed AD. AD 2007–16–09 applied to "all" of the affected models. However, only airplanes equipped with certain LPCVs are affected by the identified unsafe condition. We have revised paragraph (c) of this AD accordingly.

Change to Existing AD

This proposed AD would retain certain requirements of AD 2007–16–09. Since AD 2007–16–09 was issued, the AD format has been revised, and certain paragraphs have been rearranged. As a result, the corresponding paragraph identifiers have changed in this proposed AD, as listed in the following table:

REVISED PARAGRAPH IDENTIFIERS

Requirement in AD 2007–16–09	Corresponding requirement in this proposed AD
paragraph (h)	paragraph (g).
paragraph (i)	paragraph (h).
paragraph (n)	paragraph (i).

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

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

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

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 231 products of U.S. registry.

The actions that are required by AD 2007–16–09 and retained in this proposed AD, which are provided in the following table provide the estimated costs, at an average labor rate of $85 per work hour, for U.S. operators to comply with this AD. The parts manufacturer states that it will supply required parts to operators at no cost.

ESTIMATED COSTS

Action	Work hours	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
Replacement of RH check valves on Model ERJ 170–100 LR, –100 STD, –100 SE, and –100 SU airplanes.	3	$255, per replacement cycle	55	$14,025, per replacement cycle.
Replacement of LH check valves on Model ERJ 170–100 LR, –100 STD, –100 SE, –100 SU, –200 LR, –200 STD, and –200 SU airplanes.	3	$255, per replacement cycle	75	$19,125, per replacement cycle.

We estimate that it would take about 6 work-hours per product to comply with the new basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $4,219 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $1,092,399, or $4,729 per product.

Authority for This Rulemaking

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

We are issuing this rulemaking under the authority described in "Subtitle VII, Part A, Subpart III, Section 44701: General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation

is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing Amendment 39–15148 (72 FR 44734, August 9, 2007) and adding the following new AD:

Empresa Brasileira de Aeronautica S.A. (EMBRAER): Docket No. FAA–2010–0174; Directorate Identifier 2009–NM–186–AD.

Comments Due Date

(a) We must receive comments by April 19, 2010.

Affected ADs

(b) The AD supersedes AD 2007–16–09, Amendment 39–15148.

Applicability

(c) This AD applies to the airplanes identified in paragraphs (c)(1) and (c)(2) of this AD, certificated in any category.

(1) Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model ERJ 170–100 LR, –100 STD, –100 SE, and –100 SU airplanes; and Model ERJ 170–200 LR, –200 STD, and –200 SU airplanes; equipped with Hamilton Sundstrand low pressure check valve (LPCV) having part number (P/N) 1001447–3.

(2) Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model ERJ 190–100 ECJ, –100 LR, –100 IGW, –100 STD airplanes; and Model ERJ 190–200 STD, –200 LR, and –200 IGW airplanes; equipped with Hamilton Sundstrand LPCV having P/N 1001447–3 or 1001447–4.

Subject

(d) Air Transport Association (ATA) of America Code 36: Pneumatic.

Reason

(e) The mandatory continuing airworthiness information (MCAI) for EMBRAER Model ERJ 170 states:

It has been found the occurrence of an engine in-flight shutdown caused by the LPCV failing to close due to excessive wear, which leads to the concern that such fault may be present in both engines of a given aircraft.

* * * * *

The MCAI for EMBRAER Model ERJ 190 states:

An occurrence of an uncommanded engine in-flight shutdown (IFSD) was reported on 20 Sep. 2005, which was caused by an ERJ 170 defective LPCV P/N 1001447–3 logging 3900 Flight Hours (FH). The valve failed to close due to excessive wear. Despite there were no IFSD related to LPCV P/N 1001447–4 failure, some ERJ 190 valves P/N 1001447–4 logging around 2472 FH were inspected and presented cracks due to low cycle fatigue. Since this failure mode also might lead to an engine in-flight shutdown and since both engines of the airplane have the same valves, there is a possibility of an occurrence of a dual engine IFSD due to LPCV failure.

* * * * *

The required actions include repetitive replacements of the low-stage check valves and associated seals of the left-hand and right-hand engine bleed system with new or serviceable valves, depending on the model. For certain airplanes, this AD also includes an optional terminating action for the repetitive replacements. This AD also requires, if the terminating action is done, revising the approved maintenance plan to include repetitive functional tests of the low-stage check valve. For certain other airplanes, this AD requires replacing a certain low-stage check valve with an improved low-stage check valve.

Restatement of Requirements of AD 2005–23–14, With Revised Service Bulletin Reference

Replacement for Right-Hand (RH) Engine on Model ERJ 170–100 LR, –100 STD, –100 SE, and –100 SU Airplanes

(f) For Model ERJ 170–100 LR, –100 STD, –100 SE, and –100 SU airplanes: Within 100 flight hours after November 29, 2005 (the effective date of AD 2005–23–14, which was superseded by AD 2007–16–09), or prior to the accumulation of 3,000 total flight hours, whichever occurs later, replace the low-stage check valve and associated seals of the RH engine's engine bleed system with a new check valve and new seals, in accordance with the Accomplishment Instructions of EMBRAER Alert Service Bulletin 170–36–A004, dated September 28, 2005; or paragraph 3.C. of the Accomplishment Instructions of EMBRAER Service Bulletin 170–36–0004, dated November 18, 2005, or Revision 01, dated March 10, 2008. As of the effective date of this AD, only use EMBRAER Service Bulletin 170–36–0004, Revision 01, dated March 10, 2008. Repeat the replacement thereafter at intervals not to exceed 3,000 flight hours.

Removed Check Valves

(g) Although EMBRAER Alert Service Bulletin 170–36–A004, dated September 28, 2005, specifies to send removed check valves to the manufacturer, this AD does not include that requirement.

Restatement of Certain Requirements of AD 2007–16–09, With Revised Service Bulletin Reference

Replacement for Left-Hand (LH) Engine on All Model ERJ 170 Airplanes

(h) For Model ERJ 170–100 LR, –100 STD, –100 SE, –100 SU, –200 LR, –200 STD, and –200 SU airplanes: Within 300 flight hours after September 13, 2007 (the effective date of AD 2007–16–09) or prior to the accumulation of 3,000 total flight hours, whichever occurs later, replace the low-stage check valve and associated seals of the LH engine's engine bleed system with a new check valve and new seals, in accordance with paragraph 3.B. of the Accomplishment Instructions of EMBRAER Service Bulletin 170–36–0004, dated November 18, 2005; or Revision 01, dated March 10, 2008. As of the effective date of this AD, only use EMBRAER Service Bulletin 170–36–0004, Revision 01, dated March 10, 2008. Repeat the replacement thereafter at intervals not to exceed 3,000 flight hours.

Removed Check Valves in Accordance With New Service Bulletin

(i) Although EMBRAER Service Bulletin 170–36–0004, dated November 18, 2005, specifies to send removed check valves to the manufacturer, this AD does not include that requirement.

New Requirements of This AD: Actions and Compliance

(j) Unless already done, do the following actions.

(1) For Model ERJ 170–200 LR, –200 STD, –and –200 SU airplanes: Within 100 flight hours after the effective date of this AD, or prior to the accumulation of 3,000 total flight hours, whichever occurs later, replace the low-stage check valve and associated seals of the RH engine's engine bleed system with a new check valve and new seals, in accordance with the Accomplishment Instructions of EMBRAER Service Bulletin 170–36–0004, Revision 01, dated March 10,

2008. Repeat the replacement thereafter at intervals not to exceed 3,000 flight hours.

(2) For Model ERJ 170–100 LR, –100 STD, –100 SE, –100 SU, –200 LR, –200 STD, and –200 SU airplanes: Replacing the LPCV having P/N 1001447–3 with a new one having P/N 1001447–4 in accordance with EMBRAER Service Bulletin 170–36–0011, Revision 02, dated July 19, 2007, is a terminating action for the repetitive replacements required by paragraphs (f), (h), and (j)(1) of this AD.

(3) For Model ERJ 170–100 LR, –100 STD, –100 SE, –100 SU, –200 LR, –200 STD, and –200 SU airplanes, at the earlier of the times specified in paragraphs (j)(3)(i) and (j)(3)(ii) of this AD, revise the maintenance program to include maintenance Task Number 36–11–02–002 (Low Stage Bleed Check Valve), specified in Section 1, of the EMBRAER 170 Maintenance Review Board Report (MRBR), MRB–1621, Revision 5, dated November 5, 2008. Thereafter, except as provided by paragraph (k) of this AD, no alternative inspection intervals may be approved for the task.

(i) Within 180 days after accomplishing paragraph (j)(2) of this AD.

(ii) Before any LPCV having P/N 1001447–4 accumulates 3,000 total flight hours, or within 300 flight hours after the effective date of this AD, whichever occurs later.

(4) For Model ERJ 170–100 LR, –100 STD, –100 SE, –100 SU, –200 LR, –200 STD, and –200 SU airplanes: As of the effective date of this AD, no person may install any LPCV identified in paragraph (j)(4)(i) or (j)(4)(ii) of this AD on any airplane.

(i) Any LPCV having P/N 1001447–3, installed on Model ERJ–170 airplanes, that has accumulated more than 3,000 total flight hours.

(ii) Any LPCV having P/N 1001447–3, installed on Model ERJ–170 and ERJ–190 airplanes that has accumulated 3,000 or more total flight hours. To calculate the equivalent number of flight hours for a LPCV having P/N 1001447–3 that was installed on Model ERJ–190 airplane to be installed on a Model ERJ–170 airplane, the flight hours accumulated in operation on ERJ–190 models must be multiplied by a factor of 2 (100 percent).

(5) For Model ERJ 190–100 ECJ, –100 LR, –100 IGW, –100 STD, –200 STD, –200 LR, and –200 IGW airplanes: Within 100 flight hours after the effective date of this AD, replace all LPCVs having P/N 1001447–3 that have accumulated 1,500 total flight hours or more as of the effective date of this AD, with a new or serviceable LPCV having P/N 1001447–4 that has accumulated less than 2,000 total flight hours since new or since overhaul, in accordance with the Accomplishment Instructions of EMBRAER Service Bulletin 190–36–0006, Revision 01, dated July 19, 2007.

(6) For Model ERJ 190–100 ECJ, –100 LR, –100 IGW, –100 STD, –200 STD, –200 LR, and –200 IGW airplanes: Replace all LPCVs having P/N 1001447–3 that have accumulated less than 1,500 total flight hours as of the effective date of this AD, before the LPCV accumulates 1,500 total flight hours or within 100 flight hours after the effective date of this AD, whichever occurs later. Replace that LPCV with a new or serviceable LPCV having P/N 1001447–4 that has accumulated less than 2,000 total flight hours since new or since overhaul, in accordance with the Accomplishment Instructions of EMBRAER Service Bulletin 190–36–0006, Revision 01, dated July 19, 2007.

(7) For Model ERJ 190–100 ECJ, –100 LR, –100 IGW, –100 STD, –200 STD, –200 LR, and –200 IGW airplanes: Within 200 flight hours after the effective date of this AD, or before any LPCV having P/N 1001447–4 installed on the right engine accumulates 2,000 total flight hours since new or since overhaul, whichever occurs later, replace the valve with a new or serviceable LPCV having P/N 1001447–4 that has accumulated less than 2,000 total flight hours since new or since overhaul, in accordance with the Accomplishment Instructions of EMBRAER Service Bulletin 190–36–0014, Revision 01, dated January 14, 2009. Repeat the replacement on the right engine at intervals not to exceed 2,000 total flight hours on the LPCV since new or last overhaul.

(8) For Model ERJ 190–100 ECJ, –100 LR, –100 IGW, –100 STD, –200 STD, –200 LR, and –200 IGW airplanes: Within 200 flight hours after the effective date of this AD, or before any LPCV having P/N 1001447–4 installed on the left engine accumulates 2,000 total flight hours since new or last overhaul, whichever occurs later, replace the valve with a new or serviceable LPCV having P/N 1001447–4 that has accumulated less than 2,000 total flight hours since new or since overhaul, in accordance with the Accomplishment Instructions of EMBRAER Service Bulletin 190–36–0014, Revision 01, dated January 14, 2009. Repeat the replacement on the left engine at intervals not to exceed 2,000 total flight hours on the LPCV since new or last overhaul.

(9) For Model ERJ 190–100 ECJ, –100 LR, –100 IGW, –100 STD, –200 STD, –200 LR, and –200 IGW airplanes: As of the effective date of this AD, installation on the left and right engines with a LPCV 1001447–4 valve is allowed only if the valve has accumulated less than 2,000 total flight hours since new or last overhaul prior to installation.

(10) For Model ERJ 190–100 ECJ, –100 LR, –100 IGW, –100 STD, –200 STD, –200 LR, and –200 IGW airplanes: As of the effective date of this AD, no LPCV having P/N 1001447–3 may be installed on any airplane. Any LPCV having P/N 1001447–3 already installed on an airplane may remain in service until reaching the flight-hour limit defined in paragraphs (j)(5) and (j)(6) of this AD.

(11) Replacing the LPCV is also acceptable for compliance with the requirements of paragraph (j)(2) of this AD if done before the effective date of this AD in accordance with EMBRAER Service Bulletin 170–36–0011, dated January 9, 2007; or EMBRAER Service Bulletin 170–36–0011, Revision 01, dated May 28, 2007.

(12) Replacing the LPCV is also acceptable for compliance with the requirements of paragraphs (j)(5) and (j)(6) of this AD if done before the effective date of this AD in accordance with EMBRAER Service Bulletin 190–36–0006, dated April 9, 2007.

(13) Replacing the LPCV is also acceptable for compliance with the requirements of paragraph (j)(1) of this AD if done before the effective date of this AD in accordance with EMBRAER Service Bulletin 170–36–0004, dated November 18, 2005.

Note 1: The actions in paragraphs (j)(5), (j)(6), (j)(7), (j)(8), (j)(9), and (j)(10) of this AD are considered interim action until a final action is identified, at which time we might consider issuing further rulemaking.

FAA AD Differences

Note 2: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

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

(1) Alternative Methods of Compliance (AMOCs): The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for paragraph (j) of this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Kenny Kaulia, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2848; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD. AMOCs approved previously in accordance with AD 2007–16–09, Amendment 39–15148, are approved as AMOCs for the corresponding provisions of paragraph (j) of this AD.

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

(3) Reporting Requirements: For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(l) Refer to MCAI Brazilian Airworthiness Directives 2005–09–03R2, effective February 25, 2008; and 2006–11–01R4, effective April 9, 2009; and the service information listed in Table 1 of this AD; for related information.

TABLE 1—RELATED SERVICE INFORMATION

Document	Revision	Date
EMBRAER Service Bulletin 170–36–0004	01	March 10, 2008.
EMBRAER Service Bulletin 170–36–0011	02	July 19, 2007.
EMBRAER Service Bulletin 190–36–0006	01	July 19, 2007.
EMBRAER Service Bulletin 190–36–0014	01	January 14, 2009.
Task 36–11–02–002 (Low Stage Bleed Check Valve) in Section 1 of the EMBRAER 170 Maintenance Review Board Report MRB–1621.	5	November 5, 2008.

Issued in Renton, Washington, on February 24, 2010.

Jeffrey E. Duven,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–4505 Filed 3–3–10; 8:45 am]

BILLING CODE 4910–13–P

SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

[Docket No. SSA–2008–0041]

RIN 0960–AG87

Disability Determinations by State Agency Disability Examiners

AGENCY: Social Security Administration.

ACTION: Notice of proposed rulemaking.

SUMMARY: We propose to amend our rules to permit disability examiners in the State agencies to make fully favorable determinations in certain claims for disability benefits under titles II and XVI of the Social Security Act (Act) without the approval of a medical or psychological consultant. The proposed changes would apply on a temporary basis only to claims we consider under our rules for Quick Disability Determinations (QDD) or under our compassionate allowance initiative.

DATES: To be sure that we consider your comments, we must receive them no later than April 5, 2010.

ADDRESSES: You may submit comments by any one of three methods—Internet, fax or mail. Do not submit the same comments multiple times or by more than one method. Regardless of which method you choose, please state that your comments refer to Docket No. SSA–2008–0041 so that we may associate your comments with the correct regulation.

Caution: You should be careful to include in your comments only information that you wish to make publicly available. We strongly urge you not to include in your comments any personal information, such as Social Security numbers or medical information.

1. *Internet:* We strongly recommend this method for submitting your comments. Visit the Federal eRulemaking portal at *http://www.regulations.gov*. Use the *Search* function of the webpage to find docket number SSA–2008–0041, then submit your comment. Once you submit your comment, the system will issue you a tracking number to confirm your submission. You will not be able to view your comment immediately as we must manually post each comment. It may take up to a week for your comment to be viewable.

2. *Fax:* Fax comments to (410) 966–2830.

3. *Mail:* Address your comments to the Office of Regulations, Social Security Administration, 137 Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235–6401.

Comments are available for public viewing on the Federal eRulemaking portal at *http://www.regulations.gov* or in person, during regular business hours, by arranging with the contact person identified below.

FOR FURTHER INFORMATION CONTACT: Nancy Schoenberg, Office of Compassionate Allowances and Disability Outreach, Social Security Administration, 4692 Annex, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 966–9408, for information about this notice. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our Internet site, Social Security Online at *http://www.socialsecurity.gov*.

SUPPLEMENTARY INFORMATION:

Electronic Version

The electronic file of this document is available on the date of publication in the **Federal Register** at *http://www.gpoaccess.gov/fr/index.html*.

What Do Our Current Rules Provide?

Under our current rules, a State agency disability examiner and a State agency medical or psychological consultant generally work together to make disability determinations at the first two levels of the administrative review process for adjudicating disability claims under titles II and XVI of the Act.[1] The members of the team are jointly responsible for the determination.[2] A State agency disability examiner can make the disability determination alone only when there is no medical evidence to evaluate and the claimant fails or refuses, without a good reason, to go to a consultative examination.[3]

Although we evaluate all disability claims using the same criteria, we have developed two methods for expediting certain claims where there is a high probability that we will find the claimant disabled. In the QDD process, we use a computer-based predictive model to analyze specific elements of data in electronic claim files. The predictive model identifies claims in which there is a high potential that the claimant is disabled and in which we can quickly and easily obtain evidence supporting the claimant's allegations.[4] In the compassionate allowance initiative, we use a list of conditions to quickly identify diseases and other medical conditions that invariably qualify under the Listing of Impairments

[1] Sections 404.900 and 416.1400.

[2] Sections 404.1615(c)(1) and 416.1015(c)(1).

[3] Sections 404.1615(c)(2) and 416.1015(c)(2). In some States, we are testing a modification to the disability determination procedures that allows State agency disability examiners called "single decisionmakers" (SDM) to make both favorable and unfavorable determinations alone in some cases; that is, without working in a team with a medical or psychological consultant. Sections 404.906(b)(2) and 416.1406(b)(2). We expect to continue that testing even if we adopt these proposed rules as final rules. However, if we adopt these proposed rules as final rules, the changes would apply in all States, including SDM States. They would allow SDMs and other disability examiners to make fully favorable determinations alone in QDD and compassionate allowance claims.

[4] Sections 404.1619 and 416.1019. Our data demonstrate that the model is working as we intend. See, for example, "Good Practices in Social Security: The Quick Disability Determination (QDD) and Compassionate Allowances (CAL) Initiatives: A case of the Social Security Administration," International Social Security Association (ISSA), 2009, available at: *http://www.issa.int/aiss/Observatory/Good-Practices/The-Quick-Disability-Determination-QDD-and-Compassionate-Allowances-CAL–Initiatives*. In that paper, we reported to ISSA that the processing time for QDD allowances is about 12 days.

("listings") in our regulations [5] based on minimal, but sufficient, objective medical information.[6]

What Changes Are We Proposing, and Why?

We propose to redesignate current §§ 404.1615(c)(3) and 416.1015(c)(3) as (c)(4) and to add new paragraph (c)(3) to allow disability examiners to make fully favorable determinations under our QDD rules or under our compassionate allowance initiative without the approval of a medical or psychological consultant. This proposal is consistent with our goal to allow cases that should be allowed as quickly as possible.[7] It would also help us to process cases more efficiently because it would give State agency medical and psychological consultants more time to work on those complex cases for which we need their expertise.

This proposal is a change from our prior position. When we published final rules extending the QDD process to all States,[8] we declined to adopt a comment to allow disability examiners to make determinations without a medical or psychological consultant's involvement.[9] However, we now have about 2 years of experience using the QDD process nationally, and even longer experience in our Boston region. In light of our experience adjudicating QDD and compassionate allowance cases and our quality assurance reviews of determinations made in States that use single decisionmakers (SDMs), we believe it is appropriate to allow disability examiners to make some fully favorable determinations without a medical or psychological consultation. Our quality assurance reviews for the past 2 fiscal years show that the accuracy rates in the States that use SDMs is comparable to, if not higher than, the accuracy rates in those States that do not use SDMs. Moreover, many of the determinations included in our quality assurance reviews are more complex than QDD and compassionate allowance determinations.

For these reasons, we expect that the accuracy rate of QDD and compassionate allowance determinations made by State agency disability examiners would be comparable to the accuracy rate of the determinations now made by a team. We also have other measures in place that will provide us with information about the quality of QDD and compassionate allowance determinations, including quality assurance reviews. Therefore, we would be monitoring determinations made by State agency disability examiners. If we proceed with final rules, we plan to include a "sunset date"—a date after which the final rules would no longer be effective—of three years after the final rules become effective, subject to further extensions. The sunset date would apply only to the final rules on determinations by State agency disability examiners on QDD and compassionate allowance cases.

State agency disability examiners who make fully favorable determinations under these proposed rules would still have the option of consulting with State agency medical and psychological consultants when they deem it necessary. We would also require State agency disability examiners to consult with State agency medical or psychological consultants before they make a fully favorable determination based on medical equivalence to a listing at step 3 or based on a finding of inability to do other work at step 5 of our sequential evaluation process.[10] Our current rules require adjudicators to consider the opinion of one or more medical or psychological consultants when they determine whether an impairment(s) medically equals a listing at step 3.[11] Further, in order to make a fully favorable determination at step 5, adjudicators must first determine that a claimant does not have an impairment(s) that meets or medically equals a listing; therefore, they will have had to consult with a medical or psychological consultant to determine that there were no impairments that medically equaled a listing.[12] Regardless of whether the State agency disability examiner chooses to consult with a State agency medical or psychological consultant or is required to do so, the disability examiner would be solely responsible for the determination under the proposed rules.

We would not apply these proposed changes to claims for supplemental security income payments under title XVI for individuals under age 18. The Social Security Act requires us to make reasonable efforts to ensure that a qualified pediatrician or other individual who specializes in a field of medicine appropriate to the child's impairment(s) evaluates the child's case.[13] We interpret this statutory requirement to mean that a medical or psychological consultant must participate as part of a team in all State agency determinations of childhood disability under title XVI, including fully favorable determinations.

What Other Changes Are We Proposing?

The change we are proposing would apply only to claims adjudicated under the QDD process or the compassionate allowance initiative. Our current regulations explain the QDD process, but not the compassionate allowance initiative. Therefore, we propose to add a short definition of compassionate allowance in §§ 404.1602 and 416.1002, the sections of subpart Q of part 404 and subpart J of part 416 that provide definitions of terms.

We also propose a number of conforming changes throughout subparts P and Q of part 404 and subparts I and J of part 416 of our regulations to reflect the provisions in proposed new §§ 404.1615(c)(3) and 416.1015(c)(3). For example, we propose revisions to §§ 404.1546 and 416.946 to recognize that it would be possible in some cases for a State agency disability examiner to be responsible for assessing a claimant's residual functional capacity. We also propose revisions to §§ 404.1512, 404.1527, 416.912, and 416.927 to account for situations in which State agency disability examiners would weigh State agency medical or psychological consultant input as opinion evidence; these rules are similar to rules we already have for administrative law judges and the Appeals Council (when the Appeals Council makes a decision). We show all of the proposed changes in the proposed rules section following this preamble.

While the QDD process applies only to the initial level of the administrative review process under §§ 404.1602 and 416.1002 of our regulations, these proposed rules include provisions that apply to both the initial and reconsideration levels. We have two

[5] 20 CFR part 404, subpart P, appendix 1, which also applies to title XVI per § 416.925.

[6] *See generally http://www.socialsecurity.gov/compassionateallowances/.* In October 2008, we issued an initial list of 50 conditions that we consider for compassionate allowance. See *http://www.socialsecurity.gov/compassionateallowances/conditions.htm.* We created this list based on input from a variety of sources, including the public. *See, e.g.,* 72 FR 41649 (2007), 73 FR 10715 (2008), and 73 FR 66563 (2008). We plan to obtain more public input in order to determine whether and how to expand the list over time.

[7] *See* Social Security Administration Strategic Plan 2008–2013, Strategic Goal 2, *http://www.ssa.gov/asp/StrategicGoal2.pdf.*

[8] 72 FR 51173.

[9] *Id.* at 51175.

[10] Sections 404.1520 and 416.920. Fully favorable determinations based on medical equivalence or at step 5 are only a relatively small fraction of the QDD and compassionate allowance determinations we have made so far.

[11] Sections 404.1526(c) and 416.926(c).

[12] Sections 404.1520(a)(4) and 416.920(a)(4).

[13] Section 1614(a)(3)(I) of the Act and §§ 416.903(f) and 416.1015(e) of our regulations.

major reasons for including references to the reconsideration level:

- The compassionate allowance initiative is not limited to the initial level of administrative review; and,
- Any claimant who is dissatisfied with our determination—even a determination that is fully favorable—may request a reconsideration.[14]

Finally, we are proposing minor editorial changes to several rules to recognize that State agency medical consultants are not always physicians. These changes would conform these rules to the provisions of §§ 404.1616 and 416.1016 of our current rules. We also would correct a grammatical error in §§ 404.1619(b)(2) and 416.1019(b)(2) and make other minor editorial changes throughout the proposed rules.

Clarity of These Proposed Rules

Executive Order 12866 requires each agency to write all rules in plain language. In addition to your substantive comments on these proposed rules, we invite your comments on how to make them easier to understand.

For example:

- Have we organized the material to suit your needs?
- Are the requirements in the rules clearly stated?
- Do the rules contain technical language or jargon that isn't clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rules easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rules easier to understand?

What Is Our Authority To Make Rules and Set Procedures for Determining Whether a Person is Disabled Under the Statutory Definition?

Under the Act, we have full power and authority to make rules and regulations and to establish necessary and appropriate procedures to carry out the provisions of the Act. Sections 205(a), 702(a)(5), and 1631(d)(1). In addition, we have the power to promulgate regulations that establish the procedures State agencies must follow when performing the disability determination function for us. Sections 221(a)(2) and 1633.

When Will We Start To Use These Rules?

We will not use these rules until we evaluate public comments and publish final rules in the **Federal Register.** All final rules we issue include an effective date. We will continue to use our current rules until that date. If we publish final rules, we will include a summary of the significant comments we received, along with responses and an explanation of how we will apply the new rules.

Regulatory Procedures

Executive Order 12866

We have consulted with the Office of Management and Budget (OMB) and determined that these proposed rules meet the criteria for a significant regulatory action under Executive Order 12866. Thus, they were subject to OMB review.

The Office of the Chief Actuary provided two estimates of the effects of the proposed rule change, due to uncertainty over the extent to which the predictive models underlying the QDD process and the compassionate allowance initiative are expanded. The first estimate assumes the percent of cases designated QDD or compassionate allowance remains at the recent level (3.8%). The second estimate assumes that we will adjudicate 6% of all cases under the QDD or compassionate allowance models by the end of FY 2012. The following table presents the year-by-year estimates of the effect of the proposed change on OASDI benefit payments and Federal SSI payments for the fiscal year period 2010–19 under these two sets of assumptions. All estimates are based on the assumptions underlying the President's FY 2010 Budget, assuming the proposed changes become effective July 1, 2010. The estimates reflect projected costs should the changes be extended through 2019.

TABLE 1—ESTIMATED INCREASES IN OASDI BENEFITS AND FEDERAL SSI PAYMENTS RETAIN QDD AND COMPASSIONATE ALLOWANCE AT 3.8% OF ALL INITIAL RECEIPTS

[*In millions*]

Fiscal year	OASDI	SSI	Total
2010	*	*	*
2011	*	*	*
2012	$1	*	$1
2013	1	*	1
2014	1	*	1
2015	1	*	1
2016	1	*	1
2017	1	*	1
2018	1	*	2
2019	2	*	2
Totals			
2010–14	2	*	3
2010–19	9	1	10

*Increase in OASDI benefit payments or Federal SSI payments of less than $500,000. (Totals may not equal the sum of components due to rounding.)

TABLE 2—ESTIMATED INCREASES IN OASDI BENEFITS AND FEDERAL SSI PAYMENTS EXPAND QDD AND COMPASSIONATE ALLOWANCE TO 6% OF ALL INITIAL RECEIPTS

[*In millions*]

Fiscal year	OASDI	SSI	Total
2011	*	*	*
2011	*	*	$1
2012	$1	*	1
2013	2	*	2
2014	2	*	2
2015	2	*	3
2016	3	*	3
2017	3	*	3
2018	3	*	4
2019	4	$1	4
Totals			
2010–14	5	1	6
2010–19	20	3	23

*Increase in OASDI benefit payments or Federal SSI payments of less than $500,000. (Totals may not equal the sum of components due to rounding.).

Regulatory Flexibility Act

We certify that these proposed rules, if published in final, would not have a significant economic impact on a substantial number of small entities as they affect only States and individuals. Therefore, a regulatory flexibility analysis as provided in the Regulatory Flexibility Act, as amended, is not required.

Paperwork Reduction Act

This rule does not create any new, or affect any existing, collections and, therefore, does not require Office of Management and Budget approval under the Paperwork Reduction Act.

(Catalog of Federal Domestic Assistance Program No 96.001, Social Security—Disability Insurance; 96.002, Social Security—Retirement Insurance; 96.004, Social Security—Survivors Insurance; 96.006, Supplemental Security Income.)

[14] Sections 404.907 and 416.1407.

List of Subjects

20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-age, Survivors and Disability Insurance, Reporting and recordkeeping requirements, Social Security.

20 CFR Part 416

Administrative practice and procedure, Reporting and recordkeeping requirements, Supplemental Security Income (SSI).

Dated: November 10, 2009.

Michael J. Astrue,

Commissioner of Social Security.

For the reasons set out in the preamble, we propose to amend subparts P and Q of part 404 and subparts I and J of part 416 of chapter III of title 20 of the Code of Federal Regulations as set forth below:

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950–)

Subpart P—[Amended]

1. The authority citation for subpart P of part 404 continues to read as follows:

Authority: Secs. 202, 205(a), (b), and (d)–(h), 216(i), 221(a) and (i), 222(c), 223, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 402, 405(a), (b), and (d)–(h), 416(i), 421(a) and (i), 422(c), 423, 425, and 902(a)(5)); sec. 211(b), Pub. L. 104–193, 110 Stat. 2105, 2189; sec. 202, Pub. L. 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

2. Amend § 404.1512 by removing the word "and" from the end of paragraph (b)(5), redesignating paragraph (b)(6) as paragraph (b)(8) and revising newly redesignated paragraph (b)(8), and adding new paragraphs (b)(6) and (b)(7) to read as follows:

§ 404.1512 Evidence.

* * * * *

(b) * * *

(6) At the initial level of the administrative review process, when a State agency disability examiner makes the initial determination alone (see § 404.1615(c)(3)), opinions provided by State agency medical and psychological consultants based on their review of the evidence in your case record (see § 404.1527(f)(1)(ii));

(7) At the reconsideration level of the administrative review process, when a State agency disability examiner makes the determination alone (see § 404.1615(c)(3)), findings, other than the ultimate determination about whether you are disabled, made by State agency medical or psychological consultants and other program physicians, psychologists, or other medical specialists at the initial level of the administrative review process, and other opinions they provide based on their review of the evidence in your case record at the initial and reconsideration levels (see § 404.1527(f)(1)(iii)); and

(8) At the administrative law judge and Appeals Council levels (including the administrative law judge and Decision Review Board levels in claims adjudicated under the procedures in part 405 of this chapter), findings, other than the ultimate determination about whether you are disabled, made by State agency medical or psychological consultants and other program physicians or psychologists, or other medical specialists, and opinions expressed by medical experts or psychological experts that we consult based on their review of the evidence in your case record. See § 404.1527(f)(2)–(3).

* * * * *

3. Amend § 404.1527 by revising paragraphs (f)(1), and (f)(2)(i) and (f)(2)(ii) to read as follows:

§ 404.1527 Evaluating opinion evidence.

* * * * *

(f) * * *

(1) In claims adjudicated by the State agency, a State agency medical or psychological consultant (or a medical or psychological expert (as defined in § 405.5 of this chapter) in claims adjudicated under the procedures in part 405 of this chapter) may make the determination of disability together with a State agency disability examiner or provide one or more medical opinions to a State agency disability examiner when the disability examiner makes the initial or reconsideration determination alone (see § 404.1615(c)). The following rules apply:

(i) When a State agency medical or psychological consultant makes the determination together with a State agency disability examiner at the initial or reconsideration level of the administrative review process as provided in § 404.1615(c)(1), he or she will consider the evidence in your case record and make findings of fact about the medical issues, including, but not limited to, the existence and severity of your impairment(s), the existence and severity of your symptoms, whether your impairment(s) meets or medically equals the requirements for any impairment listed in appendix 1 to this subpart, and your residual functional capacity. These administrative findings of fact are based on the evidence in your case but are not in themselves evidence at the level of the administrative review process at which they are made.

(ii) When a State agency disability examiner makes the initial determination alone as provided in § 404.1615(c)(3), he or she may obtain the opinion of a State agency medical or psychological consultant about one or more of the medical issues listed in paragraph (f)(1)(i) of this section. In these cases, the State agency disability examiner will consider the opinion of the State agency medical or psychological consultant as opinion evidence and weigh this evidence using the relevant factors in paragraphs (a) through (e) of this section.

(iii) When a State agency disability examiner makes a reconsideration determination alone as provided in § 404.1615(c)(3), he or she will consider findings made by a State agency medical or psychological consultant at the initial level of the administrative review process and any opinions provided by such consultants at the initial and reconsideration levels as opinion evidence and weigh this evidence using the relevant factors in paragraphs (a) through (e) of this section.

(2) * * *

(i) Administrative law judges are not bound by any findings made by State agency medical or psychological consultants, or other program physicians or psychologists. State agency medical and psychological consultants and other program physicians, psychologists, and other medical specialists are highly qualified physicians, psychologists, and other medical specialists who are also experts in Social Security disability evaluation. Therefore, administrative law judges must consider findings and other opinions of State agency medical and psychological consultants and other program physicians, psychologists, and other medical specialists as opinion evidence, except for the ultimate determination about whether you are disabled (see § 404.1512(b)(8)).

(ii) When an administrative law judge considers findings of a State agency medical or psychological consultant or other program physician, psychologist, or other medical specialist, the administrative law judge will evaluate the findings using relevant factors in paragraphs (a) through (e) of this section, such as the consultant's medical specialty and expertise in our rules, the supporting evidence in the case record, supporting explanations the medical or psychological consultant provides, and any other factors relevant to the weighing of the opinions. Unless a treating source's opinion is given controlling weight, the administrative law judge must explain in the decision the weight given to the opinions of a

State agency medical or psychological consultant or other program physician, psychologist, or other medical specialist, as the administrative law judge must do for any opinions from treating sources, nontreating sources, and other nonexamining sources who do not work for us.

* * * * *

4. Amend § 404.1529 by revising the third sentence of paragraph (b) to read as follows:

§ 404.1529 How we evaluate symptoms, including pain.

* * * * *

(b) * * * In cases decided by a State agency (except in disability hearings under §§ 404.914 through 404.918 and in fully favorable determinations made by State agency disability examiners alone under § 404.1615(c)(3)), a State agency medical or psychological consultant or other medical or psychological consultant designated by the Commissioner (or a medical or psychological expert (as defined in § 405.5 of this chapter) in claims adjudicated under the procedures in part 405 of this chapter) directly participates in determining whether your medically determinable impairment(s) could reasonably be expected to produce your alleged symptoms. * * *

* * * * *

5. Revise § 404.1546(a) to read as follows:

§ 404.1546 Responsibility for assessing your residual functional capacity.

(a) *Responsibility for assessing residual functional capacity at the State agency.* When a State agency medical or psychological consultant and a State agency disability examiner make the disability determination as provided in § 404.1615(c)(1), a State agency medical or psychological consultant(s) (or a medical or psychological expert (as defined in § 405.5 of this chapter) in claims adjudicated under the procedures in part 405 of this chapter) is responsible for assessing your residual functional capacity. When a State agency disability examiner makes a disability determination alone as provided in § 404.1615(c)(3), the disability examiner is responsible for assessing your residual functional capacity.

* * * * *

Subpart Q—[Amended]

6. The authority citation for subpart Q of part 404 continues to read as follows:

Authority: Secs. 205(a), 221, and 702(a)(5) of the Social Security Act (42 U.S.C. 405(a), 421, and 902(a)(5)).

7. Amend § 404.1602 by adding the definition "Compassionate allowance" in alphabetical order to read as follows:

§ 404.1602 Definitions.

* * * * *

Compassionate allowance means a determination or decision we make under a process that identifies for expedited handling claims that involve impairments that invariably qualify under the Listing of Impairments in appendix 1 to subpart P based on minimal, but sufficient, objective medical evidence.

* * * * *

8. Amend § 404.1615 by revising paragraph (c) introductory text, removing the word "or" at the end of paragraph (c)(2), redesignating paragraph (c)(3) as paragraph (c)(4), and adding a new paragraph (c)(3) to read as follows:

§ 404.1615 Making disability determinations.

* * * * *

(c) Disability determinations will be made by:

* * * * *

(3) A State agency disability examiner alone if the claim is adjudicated under the quick disability determination process (see § 404.1619) or as a compassionate allowance (see § 404.1602), and the initial or reconsidered determination is fully favorable to you. This paragraph will no longer be effective on [INSERT DATE THREE YEARS AFTER EFFECTIVE DATE OF FINAL RULES] unless we terminate it earlier or extend it beyond that date by notice of a final rule in the **Federal Register**; or

* * * * *

9. Amend § 404.1619 by revising paragraphs (b) introductory text, (b)(1), (b)(2), and (c) to read as follows:

§ 404.1619 Quick disability determination process.

* * * * *

(b) If we refer a claim to the State agency for a quick disability determination, a designated quick disability determination examiner must do all of the following:

(1) Subject to the provisions in paragraph (c) of this section, make the disability determination after consulting with a State agency medical or psychological consultant if the State agency disability examiner determines consultation is appropriate or if consultation is required under § 404.1526(c). The State agency may certify the disability determination forms to us without the signature of the medical or psychological consultant.

(2) Make the quick disability determination based only on the medical and nonmedical evidence in the file.

* * * * *

(c) If the quick disability determination examiner cannot make a determination that is fully favorable to the individual, or if there is an unresolved disagreement between the disability examiner and the medical or psychological consultant (except when a disability examiner makes the determination alone under § 404.1615(c)(3)), the State agency will adjudicate the claim using the regularly applicable procedures in this subpart.

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

Subpart I—[Amended]

10. The authority citation for subpart I of part 416 continues to read as follows:

Authority: Secs. 221(m), 702(a)(5), 1611, 1614, 1619, 1631(a), (c), (d)(1), and (p), and 1633 of the Social Security Act (42 U.S.C. 421(m), 902(a)(5), 1382, 1382c, 1382h, 1383(a), (c), (d)(1), and (p), and 1383b); secs. 4(c) and 5, 6(c)–(e), 14(a), and 15, Pub. L. 98–460, 98 Stat. 1794, 1801, 1802, and 1808 (42 U.S.C. 421 note, 423 note, and 1382h note).

11. Amend § 416.912 by removing the word "and" from the end of paragraph (b)(5), redesignating paragraph (b)(6) as paragraph (b)(8) and revising newly redesignated paragraph (b)(8), and adding new paragraphs (b)(6) and (b)(7) to read as follows:

§ 416.912 Evidence.

* * * * *

(b) * * *

(6) At the initial level of the administrative review process, when a State agency disability examiner makes the initial determination alone (see § 416.1015(c)(3)), opinions provided by State agency medical and psychological consultants based on their review of the evidence in your case record (see § 416.927(f)(1)(ii));

(7) At the reconsideration level of the administrative review process, when a State agency disability examiner makes the determination alone (see § 416.1015(c)(3)), findings, other than the ultimate determination about whether you are disabled, made by State agency medical or psychological consultants and other program physicians, psychologists, or other medical specialists at the initial level of

the administrative review process, and other opinions they provide based on their review of the evidence in your case record at the initial and reconsideration levels (see § 416.927(f)(1)(iii)); and

(8) At the administrative law judge and Appeals Council levels (including the administrative law judge and Decision Review Board levels in claims adjudicated under the procedures in part 405 of this chapter), findings, other than the ultimate determination about whether you are disabled, made by State agency medical or psychological consultants and other program physicians or psychologists, or other medical specialists, and opinions expressed by medical experts or psychological experts that we consult based on their review of the evidence in your case record. See § 416.927(f)(2)–(3).

* * * * *

12. Amend § 416.927 by revising paragraphs (f)(1), (f)(2)(i) and (f)(2)(ii) to read as follows:

§ 416.927 Evaluating opinion evidence.

* * * * *

(f) * * *

(1) In claims adjudicated by the State agency, a State agency medical or psychological consultant (or a medical or psychological expert (as defined in § 405.5 of this chapter) in claims adjudicated under the procedures in part 405 of this chapter) may make the determination of disability together with a State agency disability examiner or provide one or more medical opinions to a State agency disability examiner when the disability examiner makes the initial or reconsideration determination alone (see § 416.1015(c)). The following rules apply:

(i) When a State agency medical or psychological consultant makes the determination together with a State agency disability examiner at the initial or reconsideration level of the administrative review process as provided in § 416.1015(c)(1), he or she will consider the evidence in your case record and make findings of fact about the medical issues, including, but not limited to, the existence and severity of your impairment(s), the existence and severity of your symptoms, whether your impairment(s) meets or medically equals the requirements for any impairment listed in appendix 1 to subpart P of part 404 of this chapter, and your residual functional capacity. These administrative findings of fact are based on the evidence in your case but are not in themselves evidence at the level of the administrative review process at which they are made.

(ii) When a State agency disability examiner makes the initial determination alone as provided in § 416.1015(c)(3), he or she may obtain the opinion of a State agency medical or psychological consultant about one or more of the medical issues listed in paragraph (f)(1)(i) of this section. In these cases, the State agency disability examiner will consider the opinion of the State agency medical or psychological consultant as opinion evidence and weigh this evidence using the relevant factors in paragraphs (a) through (e) of this section.

(iii) When a State agency disability examiner makes a reconsideration determination alone as provided in § 416.1015(c)(3), he or she will consider findings made by a State agency medical or psychological consultant at the initial level of the administrative review process and any opinions provided by such consultants at the initial and reconsideration levels as opinion evidence and weigh this evidence using the relevant factors in paragraphs (a) through (e) of this section.

(2) * * *

(i) Administrative law judges are not bound by any findings made by State agency medical or psychological consultants, or other program physicians or psychologists. State agency medical and psychological consultants and other program physicians, psychologists, and other medical specialists are highly qualified physicians, psychologists, and other medical specialists who are also experts in Social Security disability evaluation. Therefore, administrative law judges must consider findings and other opinions of State agency medical and psychological consultants and other program physicians, psychologists, and other medical specialists as opinion evidence, except for the ultimate determination about whether you are disabled (see § 416.912(b)(8)).

(ii) When an administrative law judge considers findings of a State agency medical or psychological consultant or other program physician, psychologist, or other medical specialist, the administrative law judge will evaluate the findings using relevant factors in paragraphs (a) through (e) of this section, such as the consultant's medical specialty and expertise in our rules, the supporting evidence in the case record, supporting explanations the medical or psychological consultant provides, and any other factors relevant to the weighing of the opinions. Unless a treating source's opinion is given controlling weight, the administrative law judge must explain in the decision the weight given to the opinions of a State agency medical or psychological consultant or other program physician, psychologist, or other medical specialist, as the administrative law judge must do for any opinions from treating sources, nontreating sources, and other nonexamining sources who do not work for us.

* * * * *

13. Amend § 416.929 by revising the third sentence of paragraph (b) to read as follows:

§ 416.929 How we evaluate symptoms, including pain.

* * * * *

(b) * * * In cases decided by a State agency (except in disability hearings under §§ 416.1414 through 416.1418 and in fully favorable determinations made by State agency disability examiners alone under § 416.1015(c)(3)), a State agency medical or psychological consultant or other medical or psychological consultant designated by the Commissioner (or a medical or psychological expert (as defined in § 405.5 of this chapter) in claims adjudicated under the procedures in part 405 of this chapter) directly participates in determining whether your medically determinable impairment(s) could reasonably be expected to produce your alleged symptoms. * * *

* * * * *

14. Revise § 416.946(a) to read as follows:

§ 416.946 Responsibility for assessing your residual functional capacity.

(a) *Responsibility for assessing residual functional capacity at the State agency.* When a State agency medical or psychological consultant and a State agency disability examiner make the disability determination as provided in § 416.1015(c)(1), a State agency medical or psychological consultant(s) (or a medical or psychological expert (as defined in § 405.5 of this chapter) in claims adjudicated under the procedures in part 405 of this chapter) is responsible for assessing your residual functional capacity. When a State agency disability examiner makes a disability determination alone as provided in § 416.1015(c)(3), the disability examiner is responsible for assessing your residual functional capacity.

* * * * *

Subpart J—[Amended]

15. The authority citation for subpart J of part 416 continues to read as follows:

Authority: Secs. 702(a)(5), 1614, 1631, and 1633 of the Social Security Act (42 U.S.C. 902(a)(5), 1382c, 1383, and 1383b).

16. Amend § 416.1002 by adding a definition of "Compassionate allowance" in alphabetical order to read as follows:

§ 416.1002 Definitions.

* * * * *

Compassionate allowance means a determination or decision we make under a process that identifies for expedited handling claims that involve impairments that invariably qualify under the Listing of Impairments in appendix 1 to subpart P of part 404 of this chapter based on minimal, but sufficient, objective medical evidence.

* * * * *

17. Amend § 416.1015 by revising paragraph (c) introductory text, removing the word "or" at the end of paragraph (c)(2), redesignating paragraph (c)(3) as paragraph (c)(4), and adding a new paragraph (c)(3) to read as follows:

§ 416.1015 Making disability determinations.

* * * * *

(c) Disability determinations will be made by:

* * * * *

(3) A State agency disability examiner alone if you are not a child (a person who has not attained age 18), and the claim is adjudicated under the quick disability determination process (see § 416.1019) or as a compassionate allowance (see § 416.1002), and the initial or reconsidered determination is fully favorable to you. This paragraph will no longer be effective on [INSERT DATE THREE YEARS AFTER EFFECTIVE DATE OF FINAL RULES] unless we terminate it earlier or extend it beyond that date by notice of a final rule in the **Federal Register**; or

* * * * *

18. Amend § 416.1019 by revising paragraphs (b) introductory text, (b)(1), (b)(2), and (c) to read as follows:

§ 416.1019 Quick disability determination process.

* * * * *

(b) If we refer a claim to the State agency for a quick disability determination, a designated quick disability determination examiner must do all of the following:

(1) Subject to the provisions in paragraph (c) of this section, make the disability determination after consulting with a State agency medical or psychological consultant if the State agency disability examiner determines consultation is appropriate or if consultation is required under § 416.926(c). The State agency may certify the disability determination forms to us without the signature of the medical or psychological consultant.

(2) Make the quick disability determination based only on the medical and nonmedical evidence in the file.

* * * * *

(c) If the quick disability determination examiner cannot make a determination that is fully favorable to the individual, or if there is an unresolved disagreement between the disability examiner and the medical or psychological consultant (except when a disability examiner makes the determination alone under § 416.1015(c)(3)), the State agency will adjudicate the claim using the regularly applicable procedures in this subpart.

[FR Doc. 2010–4283 Filed 3–3–10; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 9

[Docket No. TTB–2010–0001; Notice No. 103]

RIN 1513–AB31

Proposed Expansion of the Santa Maria Valley Viticultural Area (2008R–287P)

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Alcohol and Tobacco Tax and Trade Bureau proposes to expand the Santa Maria Valley viticultural area in Santa Barbara and San Luis Obispo Counties, California, by 18,790 acres. We designate viticultural areas to allow vintners to better describe the origin of their wines and to allow consumers to better identify wines they may purchase. We invite comments on this proposed change to our regulations.

DATES: We must receive your comments on or before May 3, 2010.

ADDRESSES: You may send comments on this notice to one of the following addresses:

- *http://www.regulations.gov* (via the online comment form for this notice as posted within Docket No. TTB–2010–0001 at "Regulations.gov," the Federal e-rulemaking portal);
- Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, P.O. Box 14412, Washington, DC 20044–4412; or
- *Hand delivery/courier in lieu of mail:* Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street, NW., Suite 200–E, Washington, DC 20005.

See the Public Participation section of this notice for specific instructions and requirements for submitting comments, and for information on how to request a public hearing.

You may view copies of this notice, selected supporting materials, and any comments we receive about this proposal at *http://www.regulations.gov* within Docket No. TTB–2010–0001. A direct link to this docket is posted on the TTB Web site at *http://www.ttb.gov/wine/wine_rulemaking.shtml* under Notice No. 103. You also may view copies of this notice, all related petitions, maps or other supporting materials, and any comments we receive about this proposal by appointment at the TTB Information Resource Center, 1310 G Street, NW., Washington, DC 20220. Please call 202–453–2270 to make an appointment.

FOR FURTHER INFORMATION CONTACT: N.A. Sutton, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 925 Lakeville St., No. 158, Petaluma, CA 94952; telephone 415–271–1254.

SUPPLEMENTARY INFORMATION:

Background on Viticultural Areas

TTB Authority

Section 105(e) of the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. 205(e), authorizes the Secretary of the Treasury to prescribe regulations for the labeling of wine, distilled spirits, and malt beverages. The FAA Act requires that these regulations, among other things, prohibit consumer deception and the use of misleading statements on labels, and ensure that labels provide the consumer with adequate information as to the identity and quality of the product. The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers the regulations promulgated under the FAA Act.

Part 4 of the TTB regulations (27 CFR part 4) allows the establishment of definitive viticultural areas and the use of their names as appellations of origin on wine labels and in wine advertisements. Part 9 of the TTB regulations (27 CFR part 9) contains the list of approved viticultural areas.

Definition

Section 4.25(e)(1)(i) of the TTB regulations (27 CFR 4.25(e)(1)(i)) defines a viticultural area for American wine as a delimited grape-growing region distinguishable by geographical features, the boundaries of which have been recognized and defined in part 9 of the regulations. These designations

allow vintners and consumers to attribute a given quality, reputation, or other characteristic of a wine made from grapes grown in an area to its geographic origin. The establishment of viticultural areas allows vintners to describe more accurately the origin of their wines to consumers and helps consumers to identify wines they may purchase. Establishment of a viticultural area is neither an approval nor an endorsement by TTB of the wine produced in that area.

Requirements

Section 4.25(e)(2) of the TTB regulations outlines the procedure for proposing an American viticultural area and provides that any interested party may petition TTB to establish a grape-growing region as a viticultural area. Petitioners may use the same procedure to request changes involving existing viticultural areas. Section 9.3(b) of the TTB regulations requires the petition to include—

- Evidence that the proposed viticultural area is locally and/or nationally known by the name specified in the petition;
- Historical or current evidence that supports setting the boundary of the proposed viticultural area as the petition specifies;
- Evidence relating to the geographical features, such as climate, soils, elevation, and physical features, that distinguish the proposed viticultural area from surrounding areas;
- A description of the specific boundary of the proposed viticultural area, based on features found on United States Geological Survey (USGS) maps; and
- A copy of the appropriate USGS map(s) with the proposed viticultural area's boundary prominently marked.

Santa Maria Valley Expansion Petition

Background

On August 5, 1981, the Bureau of Alcohol, Tobacco, and Firearms (ATF), our predecessor agency, published T.D. ATF–89 in the **Federal Register** (46 FR 39811), establishing the Santa Maria Valley viticultural area (27 CFR 9.28). TTB notes that the Santa Maria Valley viticultural area lies entirely within the Central Coast viticultural area (27 CFR 9.75) and covers 97,483 acres in southern San Luis Obispo County and northern Santa Barbara County, California. In the Geographical Evidence section, T.D. ATF–89 stated that prevailing ocean winds blow west to east, into and through the Santa Maria Valley. The winds create a climate where air temperatures are comparatively cooler in summer and winter, but warmer in fall, than the surrounding areas.

In March 2006, Sara Schorske of Compliance Service of America, Inc., on behalf of a group of local winery and vineyard owners, submitted a petition proposing an expansion of the southern and western boundaries of the current Santa Maria Valley viticultural area. The petition presented evidence and documentation in recognition of the geographical name of the proposed southern expansion area and in support of the similarities of its climate, soils, terrain, and watershed with those of the current viticultural area. The petition also documented significant commercial viticulture to the south of the current southern boundary line. However, TTB returned the March 2006 petition to expand the Santa Maria Valley viticultural area with a letter recommending that the petitioner delete the western expansion portion, about which sufficient justification was not presented.

Ms. Schorske then submitted the current petition, under consideration in this notice, which requests only a southern expansion (consisting of 18,700 acres) of the existing Santa Maria Valley viticultural area. The proposed expansion area lies in northern Santa Barbara County, according to the written boundary description and accompanying USGS maps, and also is within the Central Coast viticultural area. The proposed expansion area includes 9 vineyards, 255 acres of commercial viticulture, and 60 to 200 acres under viticultural development, according to the petition.

Name Evidence

The current petition explains that the original petition supporting the establishment of the Santa Maria Valley viticultural area in 1981 documented the "Santa Maria Valley" name for the geographical area. Hence, T.D. ATF–89, in establishing the Santa Maria Valley viticultural area, determined that the most appropriate name for the geographical area was Santa Maria Valley.

The current petition states that the proposed southern expansion of the Santa Maria Valley viticultural area generally follows the watershed boundary line between the Santa Maria Valley to the north and the Los Alamos Valley to the south. The current petition relies on the Santa Maria River watershed for name recognition of the expansion area.

Boundary Evidence

The current southern boundary line of the Santa Maria Valley viticultural area follows Foxen Canyon Road and Clark Avenue, at Sisquoc, 4.2 miles inside the southern perimeter of the Santa Maria River watershed, according to the current written boundary description and the accompanying USGS maps. On the south side of the Santa Maria Valley watershed, the creeks drain northward to lower elevations, through the valley, into the Santa Maria River, as shown on the USGS Foxen Canyon, Sisquoc, and Orcutt maps. Computer-generated watershed maps show that the proposed expansion of the southern boundary line conforms to the Santa Maria River watershed, according to the petition.

The boundary line of the proposed southern expansion of the Santa Maria Valley viticultural area, going clockwise, starts at the southeast corner of the current viticultural area boundary and travels generally in a straight line west-northwest over the Solomon Hills to its intersection with U.S. Route 101, according to the written boundary description and accompanying USGS maps. Following U.S. 101, the proposed boundary line continues north to Clark Avenue in Orcutt, rejoining the current boundary line of the Santa Maria Valley viticultural area.

Distinguishing Features

Santa Maria Valley Viticultural Area as Established by T.D. ATF–89

TTB notes that in establishing the Santa Maria Valley viticultural area, T.D. ATF–89 cited terrain, soils, and climate as distinguishing features.

Terrain: According to T.D. ATF–89, the boundary line of the Santa Maria Valley viticultural area surrounds the Santa Maria Valley floor, adjacent canyons, and sloping terraces. Elevations vary from a low of 200 feet at the Santa Maria River to a high of 3,200 feet at Tepusquet Peak. As shown on the USGS Foxen Canyon map, a westward projection of the San Rafael Mountains, peaking at 1,801 feet in elevation, extends approximately 4 miles into the southeast portion of the current Santa Maria Valley viticultural area. According to the USGS maps, the current southern boundary line varies from 600 to 1,000 feet in elevation. Vineyards within the original viticultural area were planted between elevations of 300 feet on the valley floor and 800 feet on the slopes of the rolling hillsides.

Soils and Climate: According to T.D. ATF–89, the soils of the Santa Maria Valley viticultural area are well drained, fertile, and range in texture from sandy

loam to clay loam. Of climatic importance to the viticultural area, as compared to the surrounding regions, are the prevailing, cooling, marine-influenced ocean winds.

Current Petition To Expand the Santa Maria Valley Viticultural Area

Terrain: The petition states that the geography of the proposed southern expansion of the Santa Maria Valley viticultural area is similar to that inside the current southern boundary line. The valley lies generally along an east-southeast axis, and is approximately 16 miles long within the existing viticultural area and the proposed expansion area, as shown on "Locations of Weather Stations and Selected Vineyards and Wineries" (map, undated), which the petitioner created and submitted with the petition. In the southern expansion area, gently rolling hills give way to a more rugged terrain of canyons and steep slopes, as shown on the USGS Foxen Canyon and Sisquoc maps. Elevations in the southern expansion area vary between approximately 440 feet near Sisquoc to 1,360 feet at the southeast corner of the current Santa Maria Valley viticultural area, and are comparable to those in areas on or surrounding the Santa Maria Valley floor.

The petition includes a table, shown below, with the elevations of commercial vineyards in the southern portion of the current Santa Maria Valley viticultural area and in the proposed southern expansion area. Elevations of vineyards within the southern portion of the current Santa Maria Valley viticultural area range from 600 to 950 feet; similarly, those of vineyards in the proposed southern expansion area range from 600 to 930 feet.

Vineyard	Location	Approximate elevation in feet
Rancho Ontiveros	Within the AVA	650
Solomon Hills	Within the AVA	700
Good Child	Within the AVA	750–800
Riverbench	Within the AVA	950
Rancho Sisquoc	Within the AVA	600–750
Foxen	Within the AVA	720
Addamo Estate	Within the proposed expansion	760–840
Solomon Hills	Within the proposed expansion	640–840
Casa Torres	Within the proposed expansion	720–800
Le Bon Climate	Within the proposed expansion	600
Lucas Lewellan	Within the proposed expansion	700
Foxen	Within the proposed expansion	800–900
Rancho Real	Within the proposed expansion	650–930
Murphy	Within the proposed expansion	750–880

Climate: The petition explains that the Santa Maria Valley has a "maritime fringe" climate ("The Climate of Southern California," by Harry P. Bailey, University of California Press, 1966). The maritime fringe climate derives from the Pacific Ocean, causing foggy and windy conditions in the Santa Maria Valley. In contrast, some other inland, high-elevation areas nearby have either less or no marine influence.

The petition states that during the summer growing season, the marine air moves onshore, passing through low-elevation passes in the Coast Range, inland to the Santa Maria Valley. (T.D. ATF–89 describes the Santa Maria Valley as a "natural funnel-shaped" valley.) Temperatures remain consistent throughout the gentle west-to-east rise in elevations of the Santa Maria Valley. The petition states that the cooling wind and fog encounter little resistance in any direction until they meet the Sierra Madre Mountains on the north side of the valley and the Solomon Hills on the south side, where the valley terminates. The boundary of the proposed southern expansion extends to the Solomon Hills, where the petition asserts that the cooling wind and fog encounter resistance.

The petition includes a map that shows the broad, westerly opening between these mountains and hills and how they would funnel the cooling wind and fog in an east-southeast direction, into the valley. T.D. ATF–89 states that "* * * the prevailing winds from the ocean [cause] the valley to have a generally cooler summer, warmer fall, and cooler winter than surrounding areas."

The current petition provides data from two weather stations, one within the established Santa Maria Valley viticultural area and one within the proposed expansion area. Both stations are nestled along foothills, slightly above the valley floor. A graph in the petition presents heat accumulation data recorded in 2004 at the two stations.

The graph shows that growing season totals for 2004 in the current viticultural area and in the proposed expansion area were both just less than 3,000 degree days. (As a measurement of heat accumulation during the growing season, 1 degree day accumulates for each degree Fahrenheit that a day's mean temperature is above 50 degrees, the minimum temperature required for grapevine growth. See pages 61–64 of "General Viticulture," Albert J. Winkler, University of California Press, 1975.)

Soils: According to the petition, the current Santa Maria Valley viticultural area consists of a wide variety of soils without a single dominant soil type. The petition provides a table listing the soil map units in the current Santa Maria Valley viticultural area and in the proposed expansion area. The table is divided into four general areas. Three areas are within the current Santa Maria Valley viticultural area: (1) Valley floor, (2) hills (the Solomon Hills), and (3) mountains (the foothills of the Sierra Madre Mountains, northeast of the Santa Maria River). The fourth is the proposed southern expansion area.

As shown in the table, the soils are mainly sand, sandy loam, and loam on the valley floor, but are mixed sandy loam, clay loam, shaly loam, and silt loam on mountains. However, without exception, the soils that are in the proposed expansion area are also in the existing Santa Maria Valley viticultural area. In both the proposed expansion area and on hills in the current viticultural area, the soils are sand, sandy loam, clay loam, and shaly clay loam, but are mostly loam and shaly loam.

TTB Determination

TTB concludes that the petition to expand the Santa Maria Valley American viticultural area merits consideration and public comment, as invited in this notice.

Boundary Description

See the narrative boundary description incorporating the petitioned-for viticultural area expansion in the proposed regulatory text amendments published at the end of this notice.

Maps

The petitioner provided the required maps, and we list them below in the proposed regulatory text amendment.

Impact on Current Wine Labels

The proposed expansion of the Santa Maria Valley viticultural area will not affect currently approved wine labels. The approval of this proposed expansion may allow additional vintners to use "Santa Maria Valley" as an appellation of origin on their wine labels. Part 4 of the TTB regulations prohibits any label reference on a wine that indicates or implies an origin other than the wine's true place of origin. For a wine to be labeled with a viticultural area name or with a brand name that includes a viticultural area name or other term identified as viticulturally significant in part 9 of the TTB regulations, at least 85 percent of the wine must be derived from grapes grown within the area represented by that name or other term, and the wine must meet the other conditions listed in 27 CFR 4.25(e)(3). Different rules apply if a wine has a brand name containing a viticultural area name or other viticulturally significant term that was used as a brand name on a label approved before July 7, 1986. See 27 CFR 4.39(i)(2) for details.

Public Participation

Comments Invited

We invite comments from interested members of the public on whether we should expand the Santa Maria Valley viticultural area as described above. We are especially interested in comments concerning the similarity of the proposed expansion area to the current Santa Maria Valley viticultural area, the geographical features that distinguish the viticultural features of the proposed expansion area from the area beyond it to the south, and the use of the Santa Maria River watershed to justify the proposed expansion of the southern boundary line. Please support your comments with specific information about the proposed expansion area's name, proposed boundaries, or distinguishing features.

Submitting Comments

You may submit comments on this notice by using one of the following three methods:

- *Federal e-Rulemaking Portal:* You may send comments via the online comment form posted with this notice in Docket No. TTB–2010–0001 on "Regulations.gov," the Federal e-rulemaking portal, at *http://www.regulations.gov.* A direct link to that docket is available under Notice No. 103 on the TTB Web site at *http://www.ttb.gov/wine/wine_rulemaking.shtml.* Supplemental files may be attached to comments submitted via Regulations.gov. For complete instructions on how to use Regulations.gov, visit the site and click on "User Guide" under "How to Use this Site."
- *U.S. Mail:* You may send comments via postal mail to the Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, P.O. Box 14412, Washington, DC 20044–4412.
- *Hand Delivery/Courier:* You may hand-carry your comments or have them hand-carried to the Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street, NW., Suite 200–E, Washington, DC 20005.

Please submit your comments by the closing date shown above in this notice. Your comments must reference Notice No. 103 and include your name and mailing address. Your comments also must be made in English, be legible, and be written in language acceptable for public disclosure. We do not acknowledge receipt of comments, and we consider all comments as originals.

If you are commenting on behalf of an association, business, or other entity, your comment must include the entity's name as well as your name and position title. If you comment via *http://www.regulations.gov,* please enter the entity's name in the "Organization" blank of the comment form. If you comment via mail, please submit your entity's comment on letterhead.

You may also write to the Administrator before the comment closing date to ask for a public hearing. The Administrator reserves the right to determine whether to hold a public hearing.

Confidentiality

All submitted comments and attachments are part of the public record and subject to disclosure. Do not enclose any material in your comments that you consider to be confidential or inappropriate for public disclosure.

Public Disclosure

On the Federal e-rulemaking portal, Regulations.gov, we will post, and you may view, copies of this notice, selected supporting materials, and any electronic or mailed comments we receive about this proposal. A direct link to the Regulations.gov docket containing this notice and the posted comments received on it is available on the TTB Web site at *http://www.ttb.gov/wine/wine_rulemaking.shtml* under Notice No. 103. You may also reach the docket containing this notice and the posted comments received on it through the Regulations.gov search page at *http://www.regulations.gov.*

All posted comments will display the commenter's name, organization (if any), city, and State, and, in the case of mailed comments, all address information, including e-mail addresses. We may omit voluminous attachments or material that we consider unsuitable for posting.

You also may view copies of this notice, all related petitions, maps and other supporting materials, and any electronic or mailed comments we receive about this proposal by appointment at the TTB Information Resource Center, 1310 G Street, NW., Washington, DC 20220. You may also obtain copies at 20 cents per 8.5 x 11-inch page. Contact our information specialist at the above address or by telephone at 202–453–2270 to schedule an appointment or to request copies of comments or other materials.

Regulatory Flexibility Act

We certify that this proposed regulation, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposed regulation imposes no new reporting, recordkeeping, or other administrative requirement. Any benefit derived from the use of a viticultural area name would be the result of a proprietor's efforts and consumer acceptance of wines from that area. Therefore, no regulatory flexibility analysis is required.

Executive Order 12866

This proposed rule is not a significant regulatory action as defined by Executive Order 12866. Therefore, it requires no regulatory assessment.

Drafting Information

N.A. Sutton of the Regulations and Rulings Division drafted this notice.

List of Subjects in 27 CFR Part 9

Wine.

Proposed Regulatory Amendment

For the reasons discussed in the preamble, we propose to amend 27 CFR, chapter I, part 9, as follows:

PART 9—AMERICAN VITICULTURAL AREAS

1. The authority citation for part 9 continues to read as follows:

Authority: 27 U.S.C. 205.

Subpart C—Approved American Viticultural Areas

2. Section 9.28 is revised to read as follows:

§ 9.28 Santa Maria Valley.

(a) *Name.* The name of the viticultural area described in this section is "Santa Maria Valley". For purposes of part 4 of this chapter, "Santa Maria Valley" is a term of viticultural significance.

(b) *Approved maps.* The six United States Geological Survey maps used to determine the boundary of the Santa Maria Valley viticultural area are titled:

(1) Orcutt Quadrangle, California-Santa Barbara Co., 7.5 minute series, 1959, photorevised 1967 and 1974, photoinspected 1978;

(2) Santa Maria Quadrangle, California, 7.5 minute series, 1959, photorevised 1982;

(3) "San Luis Obispo", N.I. 10–3, series V 502, scale 1: 250,000;

(4) "Santa Maria", N.I. 10–6, 9, series V 502, scale 1: 250,000;

(5) Foxen Canyon Quadrangle, California-Santa Barbara Co., 7.5-minute series, 1995; and

(6) Sisquoc Quadrangle, California-Santa Barbara Co., 7.5 minute series, 1959, photoinspected 1974.

(c) *Boundary.* The Santa Maria Valley viticultural area is located in Santa Barbara and San Luis Obispo Counties, California. The boundary is as follows:

(1) The point of beginning is on the Orcutt quadrangle map at the intersection of U.S. Route 101 and Clark Avenue, section 18 north boundary line, T9N/R33W, then proceed generally north along U.S. Route 101 approximately 10 miles onto the Santa Maria quadrangle map to its intersection with State Route 166 (east), T10N/R34W; then

(2) Proceed generally northeast along State Route 166 (east) onto the San Luis Obispo N.I. 10–3 map to its intersection with the section line southwest of Chimney Canyon, T11N/R32W; then

(3) Proceed south in a straight line onto the Santa Maria N.I. 10–6 map to the 3,015-foot summit of Los Coches Mountain; then

(4) Proceed southeast in a straight line onto the Foxen Canyon quadrangle map to the 2,822-foot summit of Bone Mountain, T9N/R32W; then

(5) Proceed south-southwest in a straight line approximately 6 miles to the line's intersection with secondary highways Foxen Canyon Road and Alisos Canyon Road, T8N/R32W; then

(6) Proceed west-northwest in a straight line approximately 6 miles onto the Sisquoc quadrangle map to the Gato Ridge Oil Field and the section 4 southeast corner, T8N/R32W; then

(7) Proceed west-northwest in a straight line approximately 6.2 miles, crossing over the Solomon Hills, to its intersection with U.S. Route 101 and a private, unnamed light-duty road that meanders east into the Cat Canyon Oil Field, T9N/R33W; then

(8) Proceed north 3.75 miles along U.S. Route 101 onto the Orcutt quadrangle map and return to the point of beginning.

Signed: February 5, 2010.

John J. Manfreda,

Administrator.

[FR Doc. 2010–4569 Filed 3–3–10; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 9

[Docket No. TTB–2010–0002; Notice No. 104]

RIN 1513–AB65

Proposed Renaming of the Yamhill-Carlton District Viticultural Area (2008R–305P)

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Alcohol and Tobacco Tax and Trade Bureau proposes to rename the established Yamhill-Carlton District viticultural area located in Yamhill and Washington Counties, Oregon, as the "Yamhill-Carlton" viticultural area. The size and boundary description of the renamed viticultural area would remain the same. We designate viticultural areas to allow vintners to better describe the origin of their wines and to allow consumers to better identify wines they may purchase. We invite comments on this proposed addition to our regulations.

DATES: We must receive written comments on or before May 3, 2010.

ADDRESSES: You may send comments on this notice to one of the following addresses:

- *http://www.regulations.gov* (via the online comment form for this notice as posted within Docket No. TTB–2010–0002 at "Regulations.gov," the Federal e-rulemaking portal);
- Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, P.O. Box 14412, Washington, DC 20044–4412; or
- *Hand delivery/courier in lieu of mail:* Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street, NW., Suite 200–E, Washington, DC 20005.

See the Public Participation section of this notice for specific instructions and requirements for submitting comments, and for information on how to request a public hearing.

You may view copies of this notice, selected supporting materials, and any comments we receive about this proposal at *http://www.regulations.gov* within Docket No. TTB–2010–0002. A link to that docket is posted on the TTB Web site at *http://www.ttb.gov/wine/wine_rulemaking.shtml* under Notice No. 104. You also may view copies of this notice, all related petitions, maps, or other supporting materials, and any comments we receive about this proposal by appointment at the TTB Information Resource Center, 1310 G Street, NW., Washington, DC 20220. Please call 202–453–2270 to make an appointment.

FOR FURTHER INFORMATION CONTACT: N.A. Sutton, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 925 Lakeville St., No. 158, Petaluma, CA 94952; phone 415–271–1254.

SUPPLEMENTARY INFORMATION:

Background on Viticultural Areas

TTB Authority

Section 105(e) of the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. 205(e), authorizes the Secretary of the Treasury to prescribe regulations for the labeling of wine, distilled spirits, and malt beverages. The FAA Act requires that these regulations, among other things, prohibit consumer deception and the use of misleading statements on labels, and ensure that labels provide the consumer with adequate information as to the identity and quality of the product. The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers the regulations promulgated under the FAA Act.

Part 4 of the TTB regulations (27 CFR part 4) allows the establishment of

definitive viticultural areas and the use of their names as appellations of origin on wine labels and in wine advertisements. Part 9 of the TTB regulations (27 CFR part 9) contains the list of approved viticultural areas.

Definition

Section 4.25(e)(1)(i) of the TTB regulations (27 CFR 4.25(e)(1)(i)) defines a viticultural area for American wine as a delimited grape-growing region distinguishable by geographic features, the boundaries of which have been recognized and defined in part 9 of the regulations. These designations allow vintners and consumers to attribute a given quality, reputation, or other characteristic of a wine made from grapes grown in an area to its geographic origin. The establishment of viticultural areas allows vintners to describe more accurately the origin of their wines to consumers and helps consumers to identify wines they may purchase. Establishment of a viticultural area is neither an approval nor an endorsement by TTB of the wine produced in that area.

Requirements

Section 4.25(e)(2) of the TTB regulations outlines the procedure for proposing an American viticultural area and provides that any interested party may petition TTB to establish a grape-growing region as a viticultural area. Section 9.3(b) of the TTB regulations requires the petition to include—

- Evidence that the proposed viticultural area is locally and/or nationally known by the name specified in the petition;
- Historical or current evidence that supports setting the boundary of the proposed viticultural area as the petition specifies;
- Evidence relating to the geographic features, such as climate, soils, elevation, and physical features, that distinguish the proposed viticultural area from surrounding areas;
- A description of the specific boundary of the proposed viticultural area, based on features found on United States Geological Survey (USGS) maps; and
- A copy of the appropriate USGS map(s) with the proposed viticultural area's boundary prominently marked.

Establishment of the Yamhill-Carlton District Viticultural Area

In 2002, TTB's predecessor Agency, the Bureau of Alcohol, Tobacco and Firearms, received petitions from Mr. Alex Sokol-Blosser, Secretary of the North Willamette Valley [American Viticultural Area] Group, and from Mr. Ken Wright, on behalf of certain grape growers, to establish a new viticultural area to be called the "Yamhill-Carlton District." Located in northwestern Oregon, the proposed Yamhill-Carlton District was approximately 35 miles southwest of Portland, Oregon, and 25 miles from the Pacific Ocean, in Yamhill and Washington Counties, Oregon, and entirely within the larger Willamette Valley viticultural area (27 CFR 9.90).

On October 7, 2003, TTB published in the **Federal Register** (68 FR 57845) Notice No. 19, proposing the establishment of the Yamhill-Carlton District viticultural area. In response to that notice, the only comment TTB received was in support of the proposed establishment. On December 9, 2004, TTB published in the **Federal Register** (69 FR 71372) Treasury Decision (T.D.) TTB–20, establishing the Yamhill-Carlton District viticultural area (27 CFR 9.183) as originally proposed.

The T.D. states that the Yamhill-Carlton District viticultural area boundary line surrounds the towns of Yamhill and Carlton, which lie 3 miles apart along Route 47 in Yamhill County. In the "Name Evidence" section, it states that the first time the two names were used together was in the 1853 establishment of the Yamhill-Carlton Pioneer Cemetery. The cemetery is identified on the USGS Carlton quadrangle map (published in 1957; revised in 1992). Local usage of the "Yamhill-Carlton" name has continued into the modern era. For example, in 1955, the Yamhill-Carlton Union High School was established in the Yamhill-Carlton School District.

Petition To Change the Yamhill-Carlton District Viticultural Area Name

In 2008, Mr. Ken Wright, of Ken Wright Cellars, submitted a petition to TTB to change the name of the viticultural area from "Yamhill-Carlton District" to "Yamhill-Carlton." In the current petition, Mr. Wright asserts that when the viticultural area was originally proposed "[t]he inclusion of the word 'District' was completely discretionary and added only to enforce the idea of the AVA [American viticultural area] being a regionalized area." Further, he states that "[h]istorically the area has always been referred to as simply 'Yamhill-Carlton' Additionally, the length of the current name is very difficult to fit on a [wine] label. Many wineries have found it impossible, given their current label graphics, to utilize the name."

Many others joined Mr. Wright, writing letters included with the petition, in support of renaming the Yamhill-Carlton District viticultural area as the Yamhill-Carlton viticultural area. Kathie Oriet, Mayor of the City of Carlton, Oregon, wrote, "As Mayor of the small city of Carlton, I feel the viticultural area designation should represent the more commonly known name of Yamhill-Carlton. Many area joint ventures are known as Yamhill-Carlton in both Yamhill and Carlton, including the local school district, local sports groups and even the community luncheon group." Laurent Montalieu, winemaker at Solena Cellars, stated, "Historically, the area has been more commonly referred to [as] Yamhill-Carlton rather than the Yamhill-Carlton District, as well as the wines." Mr. Mantalieu also noted that a change to the shorter "Yamhill-Carlton" would be helpful in printing [wine] labels. David Grooters, owner of Carlton Cellars, explained, "The area is always referred to as Yamhill-Carlton. As in: 'I went to Yamhill-Carlton High School,' or 'I grew up in Yamhill-Carlton.' The simpler Yamhill-Carlton AVA [name] would be much preferable for use in our labeling and marketing materials." Brian O'Donnell of Belle Pente Vineyard and Winery stated that the region is more generally known as "Yamhill-Carlton," not "Yamhill-Carlton District * * *. I believe that there is a broad consensus with the Yamhill-Carlton winegrower community that making this change is the right thing to do, and I hope that the TTB will be able to take action." Finally, Jacki Bessler of Barbara Thomas Wines stated that shortening the name "will greatly impact our ability to attractively place the AVA designation on our label. Perhaps more important, however, is that by adding the word 'District' to Yamhill-Carlton, we have actually moved away [from] historical and geographic accuracy. I personally know of no other geographic, public, historic, or other Yamhill-Carlton name that has the term 'district' attached. We are known, simply, by Yamhill-Carlton."

Name Evidence

TTB notes that the original 2002 petition to establish the Yamhill-Carlton District viticultural area included entries in the local telephone book for the Yamhill-Carlton School District and the Yamhill-Carlton High School.

The current petition provides several recent examples of local usage of the Yamhill-Carlton name without the word "District." On March 17, 2007, the Community Press newspaper ran an advertisement for a dance sponsored by the Yamhill-Carlton Booster Club at the Yamhill-Carlton High School cafeteria. The Lincoln County School District, Boys Basketball, online schedule

(accessed February 11, 2008) showed that the Yamhill-Carlton Tournament had been scheduled for November 30 and December 1, 2007. According to the petition, The Oregonian, a newspaper published in Portland, reported "Yamhill-Carlton 6, Seaside 5" in prep baseball (date unknown). A printed flyer, distributed by the Yamhill-Carlton Anti-Drug Coalition to announce it was to meet on January 25th [2008] at 7:00 p.m., was addressed to "Dear Yamhill-Carlton Community Partner." On February 11, 2008, "The Statesman Journal" reported biographical information online about Ed Glad, candidate for State Representative and formerly a member of the Yamhill-Carlton High School Site Council.

Additional examples of the use of the Yamhill-Carlton name provided with the petition include the following: (1) An e-mail announcing the Yamhill-Carlton Community Luncheon; (2) a brown bag lunch event with the guest speakers being the police chiefs of Yamhill and Carlton, February 12, 2008, at the Yamhill City Hall; (3) a June 1, 2008, photograph showing the sign for the "Historic Yamhill-Carlton Pioneer Memorial Cemetery, Established 1853"; and (4) a listing for the "Yamhill-Carlton FFA Alumni" with the Oregon Future Farmers of America Association.

Search for the Term "Yamhill-Carlton"

A TTB query of the "Yamhill-Carlton" name on the USGS Geographic Names Information System (GNIS) database yielded no hits for the exact "Yamhill-Carlton" name usage. However, our query of the "Yamhill-Carlton" name using an Internet search engine yielded 44,000 results, a sampling of which reference the existing Yamhill-Carlton District viticultural area within the general area of the Yamhill-Carlton region in northwest Oregon.

TTB Determination

TTB concludes that this petition to rename the Yamhill-Carlton District viticultural area as the Yamhill-Carlton viticultural area merits consideration and public comment as invited in this notice.

Impact on Current Wine Labels

Part 4 of the TTB regulations prohibits any label reference on a wine that indicates or implies an origin other than the wine's true place of origin. If we approve this proposed viticultural area name change, the new name, "Yamhill-Carlton," will be recognized as the name of the viticultural area. This name change will affect vintners who currently use the "Yamhill-Carlton District" name as an appellation of origin because only the approved viticultural name may be so used. Under 27 CFR 4.39(i)(3), "Yamhill-Carlton" has been recognized as a term of viticultural significance by TTB since the establishment of the Yamhill-Carlton District AVA. Accordingly, dropping "District" from the viticultural area name will not change the viticultural significance of the term "Yamhill-Carlton."

For a wine to be labeled with a viticultural area name or with a brand name that includes a viticultural area name or other term identified as being viticulturally significant in part 9 of the TTB regulations, at least 85 percent of the wine must be derived from grapes grown within the area represented by that name or other term, and the wine must meet the other conditions listed in 27 CFR 4.25(e)(3). If the wine is not eligible for labeling with the viticultural area name or other viticulturally significant term and that name or term appears in the brand name, then the label is not in compliance and the bottler must change the brand name and obtain approval of a new label. Similarly, if the viticultural area name or other term of viticultural significance appears in another reference on the label in a misleading manner, the bottler would have to obtain approval of a new label.

Different rules apply if a wine has a brand name containing a viticultural area name or other term of viticultural significance that was used as a brand name on a label approved before July 7, 1986. *See* 27 CFR 4.39(i)(2) for details.

Transition Period for "Yamhill-Carlton District" Labels

If we adopt a final rule renaming this viticultural area, under the proposed regulatory text, current holders of labels that were approved before the effective date of the final rule that use the "Yamhill-Carlton District" name to designate a viticultural area will be permitted to use those approved labels during a 2-year transition period. At the end of the 2-year period, holders of approved "Yamhill-Carlton District" wine labels must discontinue their use, as their certificates of label approval would be revoked by operation of the final rule. (*See* 27 CFR 13.51 and 13.72(a)(2).) The proposed regulatory text includes a statement to this effect as a new paragraph (d) in § 9.183. We believe the 2-year period will provide such label holders with adequate time to use up their supply of previously approved labels.

TTB notes that label holders who continue to use labels showing the "Yamhill-Carlton District" name during the transition period also may apply for Certificates of Label Approval with the Yamhill-Carlton name, and use such labels, if approved.

Public Participation

Comments Invited

We invite comments from interested members of the public on the appropriateness of changing the name of the existing "Yamhill-Carlton District" viticultural area to "Yamhill-Carlton," and the 2-year transition period. We are particularly interested in comments on any possible effects that this name change would have on label holders using the Yamhill-Carlton District appellation of origin. We are also interested in comments regarding any negative economic impact which might result from the proposed change in the name of the viticultural area, including whether a transition period is necessary to alleviate the economic impact, whether 2 years constitute the appropriate length of time for a transition period in order to alleviate the economic impact, or whether a transition period may not be effective in alleviating such impact. If a transition period would not be effective or if there are other valid reasons that are relevant to this rulemaking, we are interested in comments as to whether both "Yamhill-Carlton District" and "Yamhill-Carlton" should be the names of the viticultural area.

Submitting Comments

You may submit comments on this notice by using one of the following three methods:

- *Federal e-Rulemaking Portal:* You may send comments via the online comment form posted with this notice in Docket No. TTB–2010–0002 on "Regulations.gov," the Federal e-rulemaking portal, at *http://www.regulations.gov.* A direct link to that docket is available under Notice No. 104 on the TTB Web site at *http://www.ttb.gov/wine/wine_rulemaking.shtml.* Supplemental files may be attached to comments submitted via Regulations.gov. For complete instructions on how to use Regulations.gov, visit the site and click on "User Guide" under "How to Use this Site."
- *U.S. Mail:* You may send comments via postal mail to the Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, P.O. Box 14412, Washington, DC 20044–4412.
- *Hand Delivery/Courier:* You may hand-carry your comments or have them hand-carried to the Alcohol and

Tobacco Tax and Trade Bureau, 1310 G Street, NW., Suite 200–E, Washington, DC 20005.

Please submit your comments by the closing date shown above in this notice. Your comments must reference Notice No. 104 and include your name and mailing address. Your comments also must be made in English, be legible, and be written in language acceptable for public disclosure. We do not acknowledge receipt of comments, and we consider all comments as originals.

If you are commenting on behalf of an association, business, or other entity, your comment must include the entity's name as well as your name and position title. If you comment via *http://www.regulations.gov,* please enter the entity's name in the "Organization" blank of the comment form. If you comment via mail, please submit your entity's comment on letterhead.

You may also write to the Administrator before the comment closing date to ask for a public hearing. The Administrator reserves the right to determine whether to hold a public hearing.

Confidentiality

All submitted comments and attachments are part of the public record and subject to disclosure. Do not enclose any material in your comments that you consider to be confidential or inappropriate for public disclosure.

Public Disclosure

On the Federal e-rulemaking portal, Regulations.gov, we will post, and you may view, copies of this notice, selected supporting materials, and any electronic or mailed comments we receive about this proposal. A direct link to the Regulations.gov docket containing this notice and the posted comments received on it is available on the TTB Web site at *http://www.ttb.gov/wine/wine_rulemaking.shtml* under Notice No. 104. You may also reach the docket containing this notice and the posted comments received on it through the Regulations.gov search page at *http://www.regulations.gov.*

All posted comments will display the commenter's name, organization (if any), city, and State, and, in the case of mailed comments, all address information, including e-mail addresses. We may omit voluminous attachments or material that we consider unsuitable for posting.

You also may view copies of this notice, all related petitions and other supporting materials, and any electronic or mailed comments we receive about this proposal by appointment at the TTB Information Resource Center, 1310 G Street, NW., Washington, DC 20220. You may also obtain copies at 20 cents per 8.5- x 11-inch page. Contact our information specialist at the above address or by telephone at 202–453–2270 to schedule an appointment or to request copies of comments or other materials.

Regulatory Flexibility Act

We certify that this proposed regulatory amendment, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposed regulation imposes no new reporting, recordkeeping, or other administrative requirement. Any benefit derived from the use of a viticultural area name would be the result of a proprietor's efforts and consumer acceptance of wines from that area. Therefore, no regulatory flexibility analysis is required.

Executive Order 12866

This proposed rule is not a significant regulatory action as defined by Executive Order 12866. Therefore, it requires no regulatory assessment.

Drafting Information

N.A. Sutton of the Regulations and Rulings Division drafted this notice.

List of Subjects in 27 CFR Part 9

Wine.

Proposed Regulatory Amendment

For the reasons discussed in the preamble, we propose to amend 27 CFR, chapter I, part 9, as follows:

PART 9—AMERICAN VITICULTURAL AREAS

1. The authority citation for part 9 continues to read as follows:

Authority: 27 U.S.C. 205.

Subpart C—Approved American Viticultural Areas

2. Section 9.183 is amended by revising the section heading, paragraph (a) and the introductory text of paragraphs (b) and (c), and by adding a new paragraph (d), to read as follows:

§ 9.183 Yamhill-Carlton.

(a) *Name.* The name of the viticultural area described in this section is "Yamhill-Carlton". For purposes of part 4 of this chapter, "Yamhill-Carlton" is a term of viticultural significance.

(b) *Approved maps.* The appropriate maps for determining the boundary of the Yamhill-Carlton viticultural area are eight 1:24,000 scale United States Geological Survey topography maps. They are titled:

* * * * *

(c) *Boundary.* The Yamhill-Carlton viticultural area is located in Yamhill and Washington Counties, Oregon, and is entirely within the Willamette Valley viticultural area. The Yamhill-Carlton viticultural area is limited to lands at or above 200 feet in elevation and at or below 1,000 feet in elevation within its boundary, which is described as follows—

* * * * *

(d) From February 7, 2005, until [*INSERT DATE ONE DAY BEFORE EFFECTIVE DATE OF THE FINAL RULE*], the name of this viticultural area was "Yamhill-Carlton District". Effective [*INSERT EFFECTIVE DATE OF THE FINAL RULE*], this viticulture area is named "Yamhill-Carlton". Existing certificates of label approval showing "Yamhill-Carlton District" as an appellation of origin are revoked by operation of this regulation on [*INSERT DATE 2 YEARS AFTER EFFECTIVE DATE OF THE FINAL RULE*].

Signed: January 29, 2010.

John J. Manfreda,

Administrator.

[FR Doc. 2010–4570 Filed 3–3–10; 8:45 am]

BILLING CODE 4810–31–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2006–0601; FRL–9122–6]

Approval and Disapproval and Promulgation of Air Quality Implementation Plans; Montana; Revisions to the Administrative Rules of Montana—Air Quality, Subchapter 7 and Other Subchapters

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to partially approve and partially disapprove State Implementation Plan revisions submitted by the State of Montana on August 26, 1999, May 28, 2003, March 9, 2004, October 25, 2005, and October 16, 2006. The revisions contain new, amended, and repealed rules in Subchapter 7 (Permit, Construction, and Operation of Air Contaminant Sources) that pertain to the issuance of Montana air quality permits, in addition to other minor administrative changes to other subchapters of the Administrative Rules of Montana. The intended effect of this action is to propose to approve those

portions of the rules that are approvable and to propose to disapprove those portions of the rules that are inconsistent with the Clean Air Act. This action is being taken under section 110 of the Clean Air Act.

DATES: Comments must be received on or before April 5, 2010.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R08–OAR–2006–0601, by one of the following methods:

- *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *E-mail: videtich.callie@epa.gov* and *leone.kevin@epa.gov.*
- *Fax:* (303) 312–6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** if you are faxing comments).
- *Mail:* Callie A. Videtich, Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129.
- *Hand Delivery:* Callie A. Videtich, Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129. Such deliveries are only accepted Monday through Friday, 8 a.m. to 4:30 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R08–OAR–2006–0601. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA, without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.* For additional instructions on submitting comments, go to Section I. General Information of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly-available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Kevin Leone, Air Program, Mailcode 8P–AR, Environmental Protection Agency, Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129, (303) 312–6227, or *leone.kevin@epa.gov.*

SUPPLEMENTARY INFORMATION:

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Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

(i) The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.

(ii) The words *EPA, we, us* or *our* mean or refer to the United States Environmental Protection Agency.

(iii) The initials *SIP* mean or refer to State Implementation Plan.

(iv) The words *State* or *Montana* mean the State of Montana, unless the context indicates otherwise.

I. General Information

A. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *http://www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

a. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

b. 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.

c. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

d. Describe any assumptions and provide any technical information and/or data that you used.

e. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

f. Provide specific examples to illustrate your concerns, and suggest alternatives.

g. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

h. Make sure to submit your comments by the comment period deadline identified.

II. Summary of SIP Revisions

A. August 26, 1999 Submittal

On August 26, 1999, the Governor of Montana submitted a State Implementation Plan (SIP) revision request. The revision contains amended and repealed rules to various subchapters in the Administrative Rules of Montana (ARM) that were adopted by

the Montana Board of Environmental Review (Board) on May 14, 1999. Specific to Subchapter 7 (Permit, Construction, and Operation of Air Contaminant Sources), the submittal revised ARM 17.8.705 and 17.8.733 and repealed ARM 17.8.708. However, as indicated below, a May 28, 2003 submittal rescinded the August 26, 1999 revisions to ARM 17.8.705 and 17.8.733.

B. May 28, 2003 Submittal

On May 28, 2003, the Governor of Montana submitted a SIP revision request. The revision contains new, amended, and repealed rules adopted by the Board on December 6, 2002. The new and repealed rules pertain to the issuance of Montana air quality permits and are in Subchapter 7 of the ARM. The amended rules contain references to the new and repealed rules.

The new rules include: ARM 17.8.740, 17.8.743, 17.8.744, 17.8.745, 17.8.748, 17.8.749, 17.8.752, 17.8.755, 17.8.756, 17.8.759, 17.8.760, 17.8.762, 17.8.763, 17.8.764, 17.8.765, 17.8.767, and 17.8.770.

The repealed SIP-approved rules include: ARM 17.8.701, 17.8.702, 17.8.704, 17.8.705, 17.8.706, 17.8.707, 17.8.710, 17.8.715, 17.8.716, 17.8.717, 17.8.720, 17.8.730, 17.8.731, 17.8.732, 17.8.733, and 17.8.734.

The amended SIP-approved rules include: ARM 17.8.101, 17.8.110, 17.8.309, 17.8.310, 17.8.316, 17.8.818, 17.8.825, 17.8.826, 17.8.901, 17.8.904, 17.8.905, 17.8.906, 17.8.1004, 17.8.1005, 17.8.1106, and 17.8.1109.

The May 28, 2003 submittal also rescinded outstanding SIP submissions for rules that amended the following: ARM 17.8.702, adopted July 20, 2001 and submitted on December 20, 2001; [1] ARM 17.8.705 and 17.8.733, adopted on May 14, 1999 and submitted on August 26, 1999.

EPA provided written comments to the State during the rulemaking process for the revisions submitted to EPA on May 28, 2003. To review these comments please *see* the October 9, 2002 letter from Richard R. Long, EPA, to the Board included in the docket for this action. All future references in this notice to EPA's comments during the State rulemaking process refer to this letter. In addition, the State provided a response to all comments received during their rulemaking. To review these responses please *see Public Hearing Notice and Final Notices on amendments of air quality rules* letter dated December 26, 2002 included as part of the May 28, 2003 submittal. All future references in this notice to the State's response to EPA's comments refer to this letter.

C. March 9, 2004 Submittal

On March 9, 2004, the Governor of Montana submitted a SIP revision request. The revision contains amended rules adopted by the Board on September 26, 2003. The amended rules pertain to the issuance of Montana air quality permits. The following rules were amended: ARM 17.8.749, 17.8.759, 17.8.763, and 17.8.764.

D. October 25, 2005 Submittal

On October 25, 2005, the Governor of Montana submitted a SIP revision request. The revision contains amended rules adopted by the Board on June 3, 2005. EPA approved all of the October 25, 2005 submittal on July 19, 2006 (71 FR 40922), except for ARM 17.8.767. We are addressing ARM 17.8.767 in this document.

E. October 16, 2006 Submittal

On October 16, 2006, the Governor of Montana submitted a SIP revision request. The revision contains an amended rule for ARM 17.8.743(1) and new rules codified as ARM 17.8.1601, 17.8.1602, 17.8.1603, 17.8.1604, 17.8.1605, and 17.8.1606, and ARM 17.8.759 adopted by the Board on December 2, 2005. The submittal also requested to withdraw ARM 17.8.743(1)(c) from being incorporated into the SIP. We are addressing ARM 17.8.759 in this document. The revision to ARM 17.8.743(1) and the new rules pertain to the regulation of oil and gas well facilities, and we will address this revision request in a separate action.

III. EPA Review and Proposed Action on SIP Revisions

A. Repealed Rules

The State has completely rewritten its permitting rules in Subchapter 7 of the ARM. The State has repealed the existing SIP-approved rules and adopted new rules. We are proposing to approve the State's May 28, 2003 request to repeal the following rules from the SIP: ARM 17.8.701, 17.8.702, 17.8.704, 17.8.705, 17.8.706, 17.8.707, 17.8.710, 17.8.715, 17.8.716, 17.8.717, 17.8.720, 17.8.730, 17.8.731, 17.8.732, 17.8.733, and 17.8.734. Our review and proposed action on the new rules submitted on May 28, 2003, with revisions submitted on March 9, 2004 and October 25, 2005, are discussed below.

The August 26, 1999 SIP revision requested that ARM 17.8.708 be repealed from the SIP. On September 19, 1997, the Governor of Montana submitted a SIP revision that completely recodified the State's air quality rules. ARM 17.8.708 was one of the rules recodified. In our August 13, 2001 final notice (66 FR 42427) on the recodification, we indicated that we would act on several provisions, including ARM 17.8.708, at a later date. Therefore, ARM 17.8.708 was never approved into the SIP. (*See* page 42434 of the August 13, 2001 notice). At this point there is no ARM 17.8.708 to repeal as requested by the August 26, 1999 submittal letter.

B. New Subchapter 7 Rules

1. ARM 17.8.740 Definitions

On May 28, 2003, the State submitted new section ARM 17.8.740. ARM 17.8.740 contains the definitions applicable to Subchapter 7. Previously the definitions were in ARM 17.8.701, which was repealed with the May 2003 submittal. ARM 17.8.740 contains definitions for some terms not contained in ARM 7.8.701, as well as makes minor modifications to some of the definitions that were contained in ARM 17.8.701. Also, two terms in ARM 17.8.701, "lowest achievable emission rate" and "major emitting facility," are not contained in ARM 17.8.740.

It is acceptable that the ARM 17.8.740 does not contain definitions for "lowest achievable emission rate" and "major emitting facility." "Lowest achievable emission rate" is defined at ARM 17.8.901(10) and the State's rules also contain a definition of "major stationary source" at ARM 17.8.801(22) and 17.8.901(12).

Definitions for the following terms are being added to ARM 17.8.740, which were not previously in ARM 17.8.701: day; emitting unit; facility; install or installation; modify, Montana air quality permit; and routine maintenance, repair, or replacement.

We are proposing to approve the definitions in section ARM 17.8.740, with the exception of the definitions of "routine maintenance, repair, or replacement" (RMRR), "modify," "negligible risk to the public health, safety, and welfare and to the environment" and "construct or construction." We are proposing to disapprove the definition of "routine maintenance, repair, or replacement" and "negligible risk to the public health, safety, and welfare and to the environment," and portions of the

[1] Note that the May 28, 2003 submittal requested rescinding revisions to ARM 17.8.702, adopted on July 20, 2001 and submitted on December 20, 2001. EPA had already approved the revisions to ARM 17.8.702 (*see* 67 FR 55125, 8/28/02, and 40 CFR 52.1370(c)(55)) by the time we had received the May 28, 2003 letter. However, the May 28, 2003 submittal also requests that all of ARM 17.8.702 be repealed. We are proposing to remove ARM 17.8.702 from the federally-approved SIP.

definition of "construct or construction" and we are not taking action on portions of the definition of "modify" for the following reasons.

a. "RMRR" EPA has determined that the definition for RMRR at ARM 17.8.740(14) would be applicable to major sources, since this definition does not explicitly limit its application to true minor sources. The term RMRR is used in Montana's Prevention of Significant Deterioration (PSD) and non-attainment New Source Review (NSR) regulations (ARM 17.8.801(20)(b)(i) and 17.8.901(11)(b)(i)), but RMRR is not defined in these subchapters. During the State's rulemaking process we provided comments that expressed our concerns with the definition of RMRR.[2] In response to our comments, the State indicated that the definitions section (that includes the RMRR definition) in Subchapter 7 (Permit, Construction and Operation of Air Contaminant Sources) explicitly states that the definitions contained in that rule are "for the purposes of this subchapter," and therefore, the definition of "routine maintenance, repair, or replacement" would not apply to Subchapters 8, 9, and 10.[3] However, EPA interprets ARM 17.8.743 (Montana Air Quality Permits—When Required) as requiring all Montana sources (both major and minor) to comply with the requirements in Subchapter 7, and that major sources would also comply with the requirements in Subchapters 8, 9, or 10 as applicable. Therefore, major sources and the public may believe the definition of RMRR in Subchapter 7 is applicable to the major sources since there is nothing in subchapters 8, 9, or 10 prohibiting a major source from using this definition.

Montana's definition of RMRR allows associated fixed capital costs less than 50% of the fixed capital cost necessary to construct a comparable new emitting unit to be considered RMRR. Montana's definition of RMRR is inconsistent with EPA's current policy concerning RMRR at PSD sources. EPA's position is that a determination of routine maintenance, repair, or replacement is a case specific process that cannot be generally defined, and takes into consideration the nature, extent, purpose, frequency and cost of the work, as well as any other relevant factors.[4] Furthermore, the State's rule is less stringent than EPA's vacated Routine Equipment Replacement Provision rule for PSD sources (68 FR 61248), which had specified that the capital cost threshold for routine equipment replacement shall not exceed 20 percent of the replacement value of the process (rule vacated by the Court of Appeals for the D.C. Circuit, *New York* v. *EPA,* 443 F.3d 880 (*D.C.Cir.2006*).) Based on the above analysis, we have determined that Montana's definition for RMRR at ARM 17.8.740(14) is inconsistent with the Clean Air Act (CAA) and is not approvable.

b. "Modify." We are not taking action on part of the definition of "modify." The new definition for "modify" at ARM 17.8.740(8) refers to the "Exclusion of De Minimis Changes" provision codified at ARM 17.8.745, which EPA is not taking action on (*see* discussion regarding ARM 17.8.745 below). Since we are not taking action on ARM 17.8.745, we are proposing to approve ARM 17.8.740(8) with the exception of the following phrases: (1) "Except when a permit is not required under ARM 17.8.745" in ARM 17.8.740(8)(a); and (2) "except as provided in ARM 17.8.745" in ARM 17.8.740(8)(c).

c. "Negligible risk to the public health, safety, and welfare and to the environment." We are proposing to disapprove the definition of "negligible risk to the public health, safety, and welfare and to the environment" in ARM 17.8.740(10) because, in a March 30, 2006 letter to EPA, the State rescinded its May 28, 2003 request for provision ARM 17.8.770 (Additional Requirements for Incinerators) to be included in the federally-approved SIP. ARM 17.8.770 is the only provision in Subchapter 7 that utilizes this definition; and therefore, it is not necessary for it to be incorporated into the SIP.

Finally, during the State's rulemaking process we expressed concerns with the definition of "construct or construction" in ARM 17.8.740(2). We were concerned because this definition includes the phrase "reasonable period of time for startup and shakedown." Subchapters 8, 9 and 10 contain their own definitions addressing construction in ARM 17.8.801(5) and (10) and ARM 17.8.901(3) and (6) for major source permitting; however, the addition of the phrase "reasonable period of time for startup and shakedown" makes the definition of "construct or construction" in ARM 17.8.740(2) inconsistent with the same term used in major source permitting. Since this phrase also reduces the stringency of the current SIP approved regulations, an analysis should be provided by the State showing that this new rule will not interfere with compliance with the National Ambient Air Quality Standards (NAAQS) or PSD increments. Section 110(l) of the CAA states that EPA cannot approve a SIP revision that would interfere with any applicable requirement concerning attainment or reasonable further progress, as defined in Section 171 of the CAA, or any other applicable requirement of the CAA. Montana did not provide any analysis or demonstration that the definition of "construct or construction" in ARM 17.8.740(2) meets these criteria. Therefore, we are proposing to approve the definition of "construct or construction" in ARM 17.8.740(2) with the exception of the phrase "reasonable period of time for startup and shakedown."

2. ARM 17.8.743 Montana Air Quality Permits—When Required

On May 28, 2003, the State submitted new section ARM 17.8.743. ARM 17.8.743(1) describes those sources that are required to obtain a Montana air quality permit and ARM 17.8.743(2)—(5) adds new provisions pertaining to seasonal construction activities that can occur prior to receiving a Montana air quality permit.

ARM 17.8.743(1) provides that any new or modified facility or emitting unit that has the potential to emit more than 25 tons per year of any airborne pollutant, except lead,[5] must obtain a Montana air quality permit except as provided in ARM 17.8.744 and ARM 17.8.745 before constructing, installing, modifying or operating. ARM 17.8.431(1)(b) also requires asphalt concrete plants, mineral crushers, and mineral screens that have the potential to emit more than 15 tons per year of any airborne pollutant, other than lead, to obtain a Montana air quality permit. Sources excluded from the above requirements are those that are

[2] *See* October 9, 2002 letter from Richard R. Long, EPA, to the Montana Board of Environmental Review—all future references in this notice to EPA's comments during the State rulemaking process refer to this letter.

[3] *See Public Hearing Notice and Final Notices on amendments of air quality rules* letter dated December 26, 2002 included as part of the May 28, 2003 submittal—all future references in this notice to the State's response to EPA's comments refer to this letter.

[4] *See* September 9, 1988 Memorandum from Don R. Clay, Acting Assistant Administrator for Air and Radiation, to David A. Kee, Director, Air and Radiation Division, Region V, titled "Applicability of Prevention of Significant Deterioration (PSD) and New Source Performance Standards (NSPS) Requirements to the Wisconsin Power Company (WEPCO) Port Washington Life Extension Project."

[5] Facilities or emitting units that emit airborne lead must obtain a Montana air quality permit if they are new and emit greater than five tons per year of airborne lead, or if they are an existing facility or emitting unit and a modification results in an increase of airborne lead by an amount greater than 0.6 tons per year.

identified in ARM 17.8.744 and ARM 17.8.745.

ARM 17.8.743(l) is similar to what was previously required in sections ARM 17.8.705(1)(l), (m), (n), and (o). ARM 17.8.705, which was repealed with the May 28, 2003 submittal, identified those sources that were not required to obtain a permit. ARM 17.8.705(1) listed those sources that were not required to obtain a permit and included: (l) Sources and stacks which do not have the potential to emit more than 25 tons per years, other than lead; (m) a new stack or source of airborne lead whose potential to emit is less than 5 tons per year; (n) an alteration or modification of an already constructed stack or other source of lead contamination which results in an increase in maximum potential of the source or stack to emit airborne lead by an amount less than 0.6 tons per year; and (o) asphalt concrete plants and mineral crushers which do not have the potential to emit more than 5 tons per year of any pollutant, other than lead.

For the most part, the provisions that were in ARM 17.8.705(1)(l), (m), (n) and (o) are contained in the ARM 17.8.743(1), except that the permitting threshold for asphalt concrete plants and mineral crushers has been changed from 5 tons per year to 15 tons per year. During the State's rulemaking process we expressed concerns with the new permit threshold for asphalt concrete plants and mineral crushers. In its response to our comments, the State indicated that it was making the permit level for this source category consistent with other permitting thresholds in the subchapter. Also, the State indicated that for mineral screen operations the rule was more stringent since previously only mineral screens greater than 25 tons per year had to get permits.

Since for asphalt concrete plants and mineral crushers this revision (ARM 17.8.743(1)(b)) reduces the stringency of the current SIP approved regulations, an analysis should be provided by the State showing that this new rule will not interfere with compliance with the NAAQS or PSD increments. Section 110(l) of the CAA states that EPA cannot approve a SIP revision that would interfere with any applicable requirement concerning attainment or reasonable further progress, as defined in Section 171 of the CAA, or any other applicable requirement of the CAA. Montana did not provide any analysis or demonstration that the increased permit threshold, from 5 tons per year to 15 tons per year, for asphalt concrete plants and mineral crushers meets these criteria. Montana plans on providing a 110(l) analysis at a later date. At the request of the State, we are taking no action on the phrase "asphalt concrete plants, mineral crushers" from ARM 17.8.743(1)(b). We are proposing to approve the remainder of ARM 17.8.743(1)(b), which is "mineral screens that have the potential to emit more than 15 tons per year of any airborne pollutant, other than lead, that is regulated under this chapter."

ARM 17.8.743(1) also refers to ARM 17.8.745. As indicated below, we are taking no action on ARM 17.8.745. Consequently, we are taking no action on the phrase "and 17.8.745" that is contained in ARM 17.8.743(1).

As part of the October 16, 2006 submittal, Montana requested to withdraw the request to include ARM 17.8.743(1)(c) into the SIP as part of the May 28, 2003 submission. This provision requires any incinerator to obtain a Montana air quality permit. This incinerator specific provision is not in the currently approved SIP. The approved SIP treats incinerator sources under the provision for "all other sources and stacks not specifically excluded, which do not have the potential to emit more than 25 tons per year of any pollutant, other than lead" (codified at ARM 17.8.743(e)). We also note that any incinerators in Montana that are not permitted must meet the SIP approved provisions in ARM 17.8.316. Therefore, we are taking no action on ARM 17.8.743(1)(c) and this section will not be incorporated into Montana's SIP. In addition, the October 16, 2006 submittal requested a revision to ARM 17.8.743(1) to add a reference to a new rule codified at ARM 17.8.1602. This revision and the new rule pertain to the regulation of oil and gas well facilities, and we will address this revision request in a separate action.

With the exceptions noted above, we are proposing to approve the remaining language in ARM 17.8.743(1).

During the State's rulemaking process we expressed concerns with the provisions in ARM 17.8.743(2)–(5). However, after further analysis and for the reasons stated below, we are proposing to approve ARM 17.8.743(2)–(5). These provisions allow only limited site preparation and construction, can be stopped by the State at any time, require a permit application completeness determination from the State before this type of work can occur, and exclude sources subject to Federal requirements (i.e., PSD and synthetic minors). EPA's regulations at 40 CFR 51.160 do not require the issuance of a permit for the construction or modification of minor sources, but only that the SIP include a procedure to prevent the construction of a source or modification that would violate the SIP control strategy or interfere with attainment or maintenance of the NAAQS. Provision (2) of the State's regulation limits site work prior to permit issuance to only installing concrete foundation work, below-ground plumbing, installing ductwork, and other infrastructure and/or excavation work involving the same. No construction or installation of emission units will be allowed under this provision. Provision (3) indicates that "Notwithstanding the ability to undertake the construction activities described above, the department may issue a letter instructing the owner or operator to immediately cease such activities pending a final determination on an application if it finds that the proposed project would result in a violation of the State Implementation Plan or would interfere with the attainment or maintenance of any Federal or State ambient air quality standard." Provision (4) indicates that the State is not obligated to issue an air quality permit and that an "owner or operator who has received a completeness determination and who elects to engage in initial construction activities accepts the regulatory risks of engaging in such activities." Provision (5) indicates that "the provisions of (2) do not supersede any other local, state, or federal requirements." The State has interpreted ARM 17.8.743(5), in its formal response to EPA's comments, to mean that ARM 17.8.743(2) "does not allow pre-permit construction if some other permit or rule prohibits such activities. For example, if a source needs a Prevention of Significant Deterioration (PSD) permit, both federalFederal and stateState regulations require that the applicant secure the permit before undertaking any construction." The State's formal response to comments on this provision also stated that "nothing in this rule would supersede these existing restrictions in other rules. The applicant would only be able to undertake limited pre-permit construction if it did not need a PSD permit as well."

EPA approved minor NSR programs in several States do not require permits prior to construction, but instead require sources to submit a notice and authorization for sources to begin construction after a specified time if the permitting authority does not issue an order preventing construction. However, all minor NSR projects above the permitting thresholds (25 tons per year for new sources and 15 tons per year for modifications (not approved into the SIP)) in Montana will receive a permit.

These projects go through the required air quality impact analysis before the project is approved. Additionally, all minor NSR permits go through a public notice and comment period before being issued.

EPA had commented to the State that we had concerns that ARM 17.8.743(2) does not require some type of administrative approval from the State prior to allowing pre-permit construction activities. EPA did not initially take into account the permit application completeness determination from the Montana Department of Environment Quality (DEQ). After reviewing the procedure for permit application completeness determination, EPA has concluded that it is an administrative approval which must be issued by the State prior to the start of pre-permit construction activities, ensuring that sources that are subject to Federal requirements (i.e., PSD and synthetic minors) do not begin any construction prior to permit issuance. Also, the State clarified in its response to EPA's comments that this pre-permit construction provision is limited to true minor sources. A true minor source is not subject to PSD requirements and is not subject to other Federal requirements.

As part of our analysis of Montana's pre-permit construction provision we also reviewed recent EPA actions approving pre-permit construction rules into other State SIPs. EPA's July 10, 2006 (71 FR 38773) approval of Mississippi's minor source permit regulations included a new provision entitled "Optional Pre-Permit Construction," which allows construction to commence on certain non-major sources and non-major modifications prior to receiving a final permit to construct, provided certain conditions are met. EPA also approved pre-permit construction rules for the State of Idaho's permit to construct regulations, which were approved into the Idaho SIP on January 16, 2003 (68 FR 2217). Both of these State provisions allow complete construction of the source, including the emission units, prior to issuance of the permit. However, these provisions preclude any actual operation of the new or modified source before issuance of the final construction permit. EPA has approved these provisions because they require the prior written approval of the State and have safeguards to ensure that new major stationary sources and major modifications do not commence construction prior to permit issuance. Montana's pre-permit construction provision differs from these other States' rules in that it allows only limited site preparation and construction, which does not include the emission units, and does not require the prior written approval of the State.

As discussed above, Montana's ARM 17.8.743(2)–(5) is consistent with the requirements of section 110(a)(2)(C) of the CAA and Federal regulations found at 40 CFR 51.160 through 51.164, including 40 CFR 51.160(b), which requires States to have legally enforceable procedures to prevent construction or modification of a source if it would violate any SIP control strategies or interfere with attainment or maintenance of the NAAQS. Furthermore, Montana's rule is consistent with 40 CFR 51.160(e), which requires States to identify the basis for determining which facilities will be subject to review. Sources in Montana subject to ARM 17.8.743 must have an air quality permit prior to construction or modification of the emission units and prior to operation. Only limited site preparation and construction, which does not include the emission units, would be allowed at minor sources prior to issuance of an air quality permit. A permit application completeness determination from the Montana Department of Environmental Quality (Department) must be made before this type of work can occur. Additionally, the Department can require the owner or operator to immediately cease any pre-permit construction activities if it finds that the proposed project would result in a violation of the SIP or would interfere with the attainment or maintenance of any Federal or State ambient air quality standard. Finally, this proposal is consistent with prior EPA statements.[6] Therefore, we are proposing approval for ARM 17.8.743(2)–(5).

3. ARM 17.8.744 Montana Air Quality Permits—General Exclusions

On May 28, 2003, the State submitted new section ARM 17.8.744. This section describes those sources that are not required to obtain a Montana air quality permit. This section is similar to what previously existed in ARM 17.8.705(1), except that: (a) Several of the provisions that were in ARM 17.8.705(1) were deleted or incorporated into ARM 17.8.743(1), and (b) two provisions were added (ARM 17.8.744(1)(f) and (k)).

During the State's rulemaking process we expressed concerns with the provisions in ARM 17.8.744(1)(f). However, after further review, we are proposing to approve all of ARM 17.8.744 including ARM 17.8.744(1)(f). ARM 17.8.744(1)(f) is acceptable since this exclusion is limited to emergency equipment used only to alleviate adverse effects on public health or facility safety. In addition, this exclusion is limited to only minor sources, since ARM 17.8.818(1) states that "a major stationary source or major modification exempted from the requirements of Subchapter 7 under ARM 17.8.744 or 17.8.745 shall, if applicable, still be required to obtain a Montana air quality permit and comply with all applicable requirements of this subchapter." Likewise, ARM 17.8.904(1) and 17.8.1004(1) both indicate "a major stationary source or major modification exempted from the requirements of Subchapter 7 under ARM 17.8.744 or 17.8.745 * * *, shall, prior to construction, still be required to obtain a Montana air quality permit* * *"

4. ARM 17.8.745 Montana Air Quality Permits—Exclusion for De Minimis Changes

On May 28, 2003, the State submitted new section ARM 17.8.745. This section describes those situations where a source is not required to obtain a Montana air quality permit under ARM 17.8.743 for de minimis changes. With this provision, Montana has adopted a 15 tons per year potential to emit increase as a de minimis limit for any pollutant below which no permit is required for changes.

During the State's rulemaking process we expressed concerns with the de minimis level specified in this provision. Since this new section (ARM 17.8.745) reduces the stringency of the current SIP approved regulations, an analysis should be provided by the State showing that this new rule will not interfere with compliance with the NAAQS or PSD increments. Section 110(l) of the CAA states that EPA cannot approve a SIP revision that would interfere with any applicable requirement concerning attainment or reasonable further progress, as defined in Section 171 of the CAA, or any other applicable requirement of the CAA. Montana did not provide any analysis or demonstration that the new section (ARM 17.8.745) meets these criteria. Montana plans on providing a 110(l) analysis at a later date, as well as a revision to its 15 tons per year de minimus limit. At the request of the State, we are taking no action on

[6] NEPA's October 10, 1978, memorandum from Edward E. Reich, Director Division of Stationary Source Enforcement, to Thomas W. Devine, Chief Air Branch, Region 1, titled "Source Construction Prior to Issuance of PSD Permit," discusses preconstruction activities allowed at a site with both PSD and non-PSD sources. This memo states that construction may begin on PSD-exempt projects before the permit is issued.

Montana's de minimis provision in ARM 17.8.745.

5. ARM 17.8.748 New or Modified Emitting Units—Permit Application Requirements

On May 28, 2003, the State submitted new section ARM 17.8.748. This section describes the permit application requirements and for the most part is the same as what previously existed in ARM 17.8.706 with some minor changes. The last sentence contained in ARM 17.8.748(1) was originally contained in ARM 17.8.707(1)(b) and ARM 17.8.748(7) was originally contained in ARM 17.8.720(2)(a).

We are proposing to approve all of ARM 17.8.748.

6. ARM 17.8.749 Conditions for Issuance or Denial of Permit

On May 28, 2003, the State submitted new section ARM 17.8.749. This section describes the conditions for issuance or denial of a Montana air quality permit. The provisions in ARM 17.8.749(1), (3), (4), and (7) are similar to what previously existed in ARM 17.8.710(1), (2), (4), and ARM 17.7.730. The provisions in ARM 17.8.749(2), (5) and (6) are new provisions.

On March 9, 2004, the State submitted revisions to ARM 17.8.749(7) pertaining to how the Department notifies an applicant when it denies a permit and advises the applicant of the right to appeal. The revisions allow the Department to provide such notice through the mail.

During the State's rulemaking process, we expressed concerns with provisions ARM 17.8.749(2)—that allow the department to extend the deadlines specified in a permit and ARM 17.8.749(5)—that requires "state-only" conditions be identified in the permit, and specifies these conditions "are not intended by the department to be enforceable under federal law." For ARM 17.8.749(2) we were concerned that extended deadlines may conflict with requirements for sources subject to PSD. In response to our concerns, the State indicated that the provisions of their PSD rules (ARM 17.8.819) meet the requirements of 40 CFR 52.21(r) and 51.166(j)(4). After further analysis we are have determined that ARM 17.8.749(2) allows a director's discretion, in that it states that "the department may extend a deadline specified in the schedule" for permit conditions to become effective. Based on this director's discretion we are proposing to disapprove ARM 17.8.749(2).

For ARM 17.8.749(5) we asked for a justification as to why certain permit provisions would not warrant Federal (and citizen) review and enforceability. In response to our concerns, the State noted that they "have adopted certain requirements that are more stringent than Federal requirements," "these rules are not intended to be part of the SIP," and "during the permitting process, EPA and other concerned persons will have the opportunity to ensure that the Department correctly applies the state-only designation." After further analysis we have determined that ARM 17.8.749(5) will be used to identify State-only provisions in permits that are more stringent than Federal requirements. Therefore, we are proposing to approve ARM 17.8.749(5).

We are proposing to approve ARM 17.8.749(1), (3), (4), (5), (6) and (8) submitted on May 28, 2003; and ARM 17.8.749(7) submitted on March 9, 2004.

7. ARM 17.8.752 Emission Control Requirements

On May 28, 2003, the State submitted new section ARM 17.8.752. This section describes the emission control requirements for a new or modified facility or emission unit. The provisions in ARM 17.8.752 are similar to what previously existed in ARM 17.8.715, except that the provisions in ARM 17.8.752(1)(a)(i) are new. This new provision states that Montana's minor source Best Available Control Technology (BACT) requirement is only triggered for the modified unit at an existing source (not the entire source). Federal NSR regulations do not require BACT for minor sources. Therefore, we are proposing to approve all of ARM 17.8.752.

8. ARM 17.8.755 Inspection of Permit

On May 28, 2003, the State submitted new section ARM 17.8.755. This section indicates that the current Montana air quality permit must be made available at the facility or emitting unit unless the permittee and Department agree on a different location. This section is similar to what previously existed in ARM 17.8.716, except that a new phrase was added indicating that a different location may be acceptable if mutually agreeable between the permittee and department.

We are proposing to approve ARM 17.8.755.

9. ARM 17.8.756 Compliance With Other Requirements

On May 28, 2003, the State submitted new section ARM 17.8.756. This section describes the permittee responsibilities in complying with other requirements. ARM 17.8.756(1) is similar to what previously existed in ARM 17.8.717, and ARM 17.8.756(2) and (3) is similar to what previously existed in ARM 17.8.710(6) and (3), respectively.

We are proposing to approve ARM 17.8.756.

10. ARM 17.8.759 Review of Permit Applications

On May 28, 2003, the State submitted new section ARM 17.8.759. This section describes the Department's responsibilities for determining completeness of the permit application, for issuing a preliminary completeness determination, for public notification and providing the opportunity for comment, and for issuing a final decision. Most of this new section is similar to what previously existed in ARM 17.8.720(2) and (3).

During the State's rulemaking process we expressed concerns with the timeframe allowed for the public and EPA to comment on preliminary permit determinations. On March 9, 2004, the State submitted revisions to ARM 17.8.759(4). The revisions extend the date by which comments can be submitted on the preliminary determination for certain permit actions and the timeline for the department to notify the applicant of approval or denial of the application. On October 16, 2006, the State submitted additional revisions to ARM 17.8.759(4), added a new 17.8.759(5), and renumbered the existing paragraph 17.8.759(5) to (6). The new 17.8.759(5) specifies, in part, that "the department may, on its own action, or at the request of the applicant or member of the public, extend by 15 days the period within which public comments may be submitted as described in (4)(b)(ii) and the date for issuing a final decision on a permit application." After further analysis, we no longer have concerns with this provision because the Department now has an opportunity to extend by 15 days the period in which public comments may be submitted either on its own, or at the request of an external party. This would minimize the time crunch for reviewing draft permits.

We are proposing to approve ARM 17.8.759(1) through (3), submitted on May 28, 2003; and ARM 17.8.759(4), (5), and (6) submitted on October 16, 2006.

11. ARM 17.8.760 Additional Review of Permit Applications

On May 28, 2003, the State submitted new section ARM 17.8.760. This section describes additional review requirements for applications subject to the Montana Environmental Policy Act and the Major Facility Siting Act. This section is similar to what previously existed in ARM 17.8.720(1) and (4).

We are proposing to approve ARM 17.8.760.

12. ARM 17.8.762 Duration of Permit

On May 28, 2003, that State submitted new section ARM 17.8.762. This section describes the conditions that affect the duration of a permit. This section is similar to what previously existed in ARM 17.8.731. Provision ARM 17.8.762(2) specifies that a permit will expire unless construction or installation is commenced within the time specified in the permit, which may not be less than one year or more than three years after the permit is issued. The current SIP-approved provision in ARM 17.8.731 does not specify a maximum time period for permit expiration.

During the State's rulemaking process, we expressed concerns with the permit expiration timelines in ARM 17.8.762(2). We were concerned that extended deadlines may conflict with requirements for sources subject to PSD. In response to our concerns, the State indicated that a provision in their PSD rules (ARM 17.8.819) met the requirements of 40 CFR 52.21(r)(2) and 51.166(j)(4). The State further indicated that this rule "will not replace the PSD requirements for PSD sources *(i.e.,* the 18-month limit applies to PSD sources, but not to non-PSD sources)." Despite the State's assertion, we note that ARM 17.8.819 does not meet the Federal PSD requirements of 40 CFR 52.21(r)(2), which specifies that "approval to construct shall become invalid if construction is not commenced within 18 months after receipt of such approval." 40 CFR 52.21 specifies the PSD requirements for areas that are not covered by a federally approved PSD SIP.

However, the PSD requirements for SIP-approved States, such as Montana, contained in 40 CFR 51.166 do not have an "18-month" provision analogous to 40 CFR 52.21(r)(2). ARM 17.8.819 is consistent with the "18-month phased construction project" provision in 51.166(j)(4). Therefore, ARM 17.8.762(2) is consistent with the Federal PSD rules for SIP-approved States. We are proposing to approve ARM 17.8.762.

13. ARM 17.8.763 Revocation of Permit

On May 28, 2003, the State submitted new section ARM 17.8.763. This section describes the reasons why the Department may revoke a Montana air quality permit, the process the Department must follow when revoking a permit, and the ability of the permittee to request a hearing before the Board. This section is similar to what previously existed in ARM 17.8.732.

During the State's rulemaking process, we expressed concerns with the provisions in ARM 17.8.763(1) in that applicable provisions or the permit (*e.g.,* major source requirements) may be inadvertently revoked at the request of the permittee. In response to our concerns, the State indicated that while some portions of a permit may be revoked, the permit as a whole must still meet any underlying applicable regulations. After further analysis, we no longer have concerns with these provisions because the State does not intend to revoke any applicable regulations, only minor administrative changes.

On March 9, 2004, the State submitted revisions to ARM 17.8.763(2) and (3) pertaining to how the Department notifies an applicant when it revokes a permit or a portion of a permit. The revisions allow the Department to provide such notice through the mail.

We are proposing to approve ARM 17.8.763 (1) and (4), submitted on May 28, 2003; and ARM 17.8.763(2) and (3), submitted on March 9, 2004.

14. ARM 17.8.764 Administrative Amendment to Permit

On May 28, 2003, the State submitted new section AMR 17.8.764. This section describes how the Department may make administrative amendments to a Montana air quality permit, the process the Department must follow when making administrative amendments to a permit, and the ability of the permittee to request a hearing before the Board of. This section is similar to what previously existed in ARM 17.8.733, except that ARM 17.8.764(1)(c) is a new provision.

On March 9, 2004, the State submitted revisions to ARM 17.8.764(2) and (3) pertaining to how the Department notifies an applicant when it proposes administrative amendments to a permit. The revisions allow the Department to provide such notice through the mail.

During the State's rulemaking process we raised concerns that some administrative amendments should receive public review even though there might not be an increase in emissions. In response to our concerns, the State indicated that the current SIP-approved rule contains the same provision. After further analysis, we have determined that new section ARM 17.8.764 is consistent with the existing SIP-approved ARM 17.8.733.

We are proposing to approve ARM 17.8.764(1) (except as noted below) and (4), submitted on May 28, 2003; and ARM 17.8.764(2) and (3) submitted on March 9, 2004. As indicated earlier, we are taking no action on ARM 17.8.745. Consequently, we are taking no action on the phrase "the emission increase meets the criteria in ARM 17.8.745 for a de minimis change not requiring a permit," that is contained in ARM 17.8.764(1)(b).

15. ARM 17.8.765 Transfer of Permit

On May 28, 2003, the State submitted new section ARM 17.8.765. This section describes the requirements for transferring a Montana air quality permit from one location to another, and from one owner or operator to another. This section is similar to what previously existed in ARM 17.8.734, except that ARM 17.8.765(3) revises what was in ARM 17.8.734(3). The main difference is that the prior rule required action by the Department to approve or disapprove the permit transfer and the new rule indicates that the transfer is deemed approved if the Department does not act within 30 days of receipt of the notice.

During the State's rulemaking process we expressed concerns with the provisions in ARM 17.8.765(3) in that a source may inappropriately locate in an area and jeopardize attainment of the NAAQS and the permit transfer would be deemed approved if the Department does not act within 30 days. In its response to our concerns, the State indicated that permits for portable sources are written in such a manner as to comply with applicable requirements regardless of location of the source. Consequently, we are proposing to approve all of ARM 17.8.765.

16. ARM 17.8.767 Incorporation by Reference

On May 28, 2003, the State submitted new section ARM 17.8.767. This section adopts and incorporates by reference various documents and indicates where these documents are available. This section is similar to what previously existed in ARM 17.8.702.

On October 25, 2005, the State submitted revisions to ARM 17.8.767. This revision deletes the incorporation by reference (IBR) of 40 CFR 52.21 (Prevention of significant deterioration of air quality) in ARM 17.8.767(1)(d) and modifies the addresses where various documents can be obtained in ARM 17.8.767(2), (3) and (4). 40 CFR 52.21 specifies the PSD requirements for areas that are not covered by a federally approved PSD SIP. Since Subchapter 7 contains the requirements for the permitting, construction, and operation of all air contaminant sources and not just PSD sources, this IBR of 40 CFR 52.21 is not necessary. Subchapter 8

contains Montana's SIP approved PSD rules.

We are proposing to approve ARM 17.8.767(1)(a) through (c), submitted on May 28, 2003; and ARM 17.8.767(1)(d) through (g) and 17.8.767(2), (3) and (4) submitted on October 25, 2005.

17. ARM 17.8.770 Additional Requirements for Incinerators

On May 28, 2003, the State submitted new section ARM 17.8.770. This section discusses additional requirements an incineration facility must meet for a Montana air quality permit. In the prior codification of Subchapter 7, this section had not been incorporated into the SIP. On March 30, 2006, the Department requested to withdraw the request to include ARM 17.8.770 into the SIP as part of the May 28, 2003 submission. Consequently, we are taking no action on ARM 17.8.770, and this section will not be incorporated into Montana's SIP.

C. Revisions to Other Subchapters

On May 28, 2003, the State submitted revisions to other subchapters of the ARM. Because the State repealed, in Subchapter 7, various rules and added new rules in their place, the cross-references in other subchapters are being revised. In addition, the previous Subchapter 7 referred to "air quality preconstruction permits" whereas the new Subchapter 7 refers to "Montana air quality permits." In other subchapters, the phrase "air quality preconstruction permits" is being replaced with "Montana air quality permits." Finally, new rules are being added and minor administrative changes are occurring in other subchapters.

EPA is proposing to approve revisions to the following sections submitted on May 28, 2003: ARM 17.8.101(4); 7.8.110(7), (8), and (9); 17.8.818(1); 17.8.825(3); 17.8.826(1) and (2); 17.8.904(1) and (2); 17.8.905(1) and (4); 17.8.906; 17.8.1004; 17.8.1005(1), (2), and (5); 17.8.1106; and 17.8.1109.

On May 28, 2003, the State submitted revisions to ARM 17.8.309(5)(b) and 17.8.310(3)(e). We previously disapproved the provisions in ARM 17.8.309(5)(b) and 17.8.310(3)(e) on January 24, 2006 (*see* 40 CFR 52.1384(a)). Therefore, we are proposing to not act on the revisions to these same sections submitted on May 28, 2003.

On May 28, 2003, the State submitted revisions to ARM 17.8.316(6). This rule pertains to the regulation of incinerators and we will address this revision in a separate action with other revisions to ARM 17.8.316 submitted previously.

We have previously approved changes to ARM 17.8.901(14) that incorporate the changes to ARM 17.8.901(14)(e)(iii) submitted on May 28, 2003 (*see* January 24, 2006 (71 FR 3776) action). Since we have already approved these revisions into the SIP we are not taking action on them in this document.

On October 16, 2006, the State submitted a revision to ARM 17.8.743(1) and new rules codified at ARM 17.8.1601, 17.8.1602, 17.8.1603, 17.8.1604, 17.8.1605, and 17.8.1606. These rules pertain to the regulation of oil and gas well facilities, and we will address this revision request in a separate action.

IV. Summary of EPA's Proposed SIP Action

We are proposing to approve the removal of the following provisions from the federally- approved SIP: ARM 17.8.701, 17.8.702, 17.8.704, 17.8.705, 17.8.706, 17.8.707, 17.8.710, 17.8.715, 17.8.716, 17.8.717, 17.8.720, 17.8.730, 17.8.731, 17.8.732, 17.8.733, and 17.8.734.

We are proposing to approve the following new Subchapter 7 provisions into the federally-approved SIP: ARM 17.8.740 (except 17.8.740(10) and (14) and the following phrases in 17.8.740(8)(a) and (c), respectively, (1) "except when a permit is not required under ARM 17.8.745;" and (2) "except as provided in ARM 17.8.745" and the phrase "reasonable period of time for startup and shutdown" in ARM 17.8.740(2)), submitted on May 28, 2003; 17.8.743 (except the phrases "asphalt concrete plants, mineral crushers" in 17.8.743(1)(b) "and 17.8.745" in 17.8.743(1), and 17.8.743(1)(c)), submitted on May 28, 2003; 17.8.744 and 17.8.748, submitted on May 28, 2003; 17.8.749(1), (3), (4), (5), (6), and (8), submitted on May 28, 2003; 17.8.749(7), submitted on March 9, 2004; 17.8.752, 17.8.755, and 17.8.756, submitted on May 28, 2003; 17.8.759(1) through (3), submitted on May 28, 2003; 17.8.759(4) through (6), submitted on October 16, 2006; 17.8.760 and 17.8.762, submitted on May 28, 2003; 17.8.763(1) and (4), submitted on May 28, 2003; 17.8.763(2) and (3), submitted on March 9, 2004; 17.8.764(1) (except the phrase "the emission increase meets the criteria in ARM 17.8.745 for a de minimis change not requiring a permit" in 17.8.764(1)(b)) and (4), submitted on May 28, 2003; 17.8.764(2) and (3), submitted on March 9, 2004; 17.8.765, submitted on May 28, 2003; 17.8.767(1)(a) through (c), submitted on May 28, 2003; and 17.8.767(1)(d) through (g), (2), (3), and (4), submitted on October 25, 2005.

We are proposing to disapprove the following new Subchapter 7 provisions: ARM 17.8.749(2), ARM 17.8.740(10), 17.8.740(14); and portions of 17.8.740(2).

We are proposing to approve revisions to the following sections of other subchapters submitted on May 28, 2003: ARM 17.8.101(4); 17.8.110(7), (8), and (9); 17.8.818(1); 17.8.825(3); 17.8.826(1) and (2); 17.8.904(1) and (2); 17.8.905(1) and (4); 17.8.906; 17.8.1004; 17.8.1005(1), (2), and (5); 17.8.1106; and 17.8.1109.

We are not acting, at the request of the State, on the following provisions in Subchapter 7: ARM 17.8.743(1)(c) and ARM 17.8.770, the phrase "asphalt concrete plants, mineral crushers" in ARM 17.8.743(1)(b) and ARM 17.8.745 submitted on May 28, 2003.

We are not acting on the following provisions of other subchapters: The following phrases in 17.8.740(8)(a) and (c), respectively, (1) "except when a permit is not required under ARM 17.8.745" and (2) "except as provided in ARM 17.8.745," submitted on May 28, 2003; ARM 17.8.309(5)(b), 17.8.310(3)(e), 17.8.316(6), and 17.8.901(14)(3)(iii), submitted on May 28, 2003; the phrase "and 17.8.745" in ARM 17.8.743(1), submitted on May 28, 2003; ARM 17.8.749(2) submitted on May 28, 2003; and the phrase "the emission increase meets the criteria in ARM 17.8.745 for a de minimis change not requiring a permit," in ARM 17.8.764(1)(b), submitted on May 28, 2003; and ARM 17.8.743(1), 17.8.1601, 17.8.1602, 17.8.1603, 17.8.1604, 17.8.1605, and 17.8.1606, submitted on October 16, 2006.

V. Statutory and Executive Order Reviews

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

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

• Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

• Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L.104–4);

• Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds, Incorporation by reference.

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

Dated: February 3, 2010.

Carol Rushin,

Acting Regional Administrator, Region 8.

[FR Doc. 2010–4559 Filed 3–3–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–2010–0068, EPA–HQ–SFUND–2010–0069, EPA–HQ–SFUND–2010–0070, EPA–HQ–SFUND–2010–0072, EPA–HQ–SFUND–2010–0073, EPA–HQ–SFUND–2010–0074, EPA–HQ–SFUND–2010–0075, EPA–HQ–SFUND–2010–0076; FRL–9120–6]

RIN 2050–AD75

National Priorities List, Proposed Rule No. 52

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "the Act"), as amended, requires that the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP") include a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States. The National Priorities List ("NPL") constitutes this list. The NPL is intended primarily to guide the Environmental Protection Agency ("EPA" or "the Agency") in determining which sites warrant further investigation. These further investigations will allow EPA to assess the nature and extent of public health and environmental risks associated with the site and to determine what CERCLA-financed remedial action(s), if any, may be appropriate. This rule proposes to add eight sites to the General Superfund section of the NPL.

DATES: Comments regarding any of these proposed listings must be submitted (postmarked) on or before May 3, 2010.

ADDRESSES: Identify the appropriate Docket Number from the table below.

DOCKET IDENTIFICATION NUMBERS BY SITE

Site name	City/County, State	Docket ID No.
Sanford Dry Cleaners	Sanford, FL	EPA–HQ–SFUND–2010–0068.
St. Clair Shores Drain	St. Clair Shores, MI	EPA–HQ–SFUND–2010–0069.
Vienna Wells	Vienna, MO	EPA–HQ–SFUND–2010–0070.
ACM Smelter and Refinery	Cascade County, MT	EPA–HQ–SFUND–2010–0072.
Wright Chemical Corporation	Riegelwood, NC	EPA–HQ–SFUND–2010–0073.
Black River PCBs	Jefferson County, NY	EPA–HQ–SFUND–2010–0074.
Dewey Loeffel Landfill	Nassau, NY	EPA–HQ–SFUND–2010–0075.
Smokey Mountain Smelters	Knox County, TN	EPA–HQ–SFUND–2010–0076.

Submit your comments, identified by the appropriate Docket number, by one of the following methods:

• *http://www.regulations.gov:* Follow the online instructions for submitting comments.

• *E-mail: superfund.docket@epa.gov.*

• *Mail:* Mail comments (no facsimiles or tapes) to Docket Coordinator, Headquarters; U.S. Environmental Protection Agency; CERCLA Docket Office; (Mail Code 5305T); 1200 Pennsylvania Avenue, NW.; Washington, DC 20460

• *Hand Delivery or Express Mail:* Send comments (no facsimiles or tapes) to Docket Coordinator, Headquarters; U.S. Environmental Protection Agency; CERCLA Docket Office; 1301 Constitution Avenue, NW.; EPA West, Room 3334, Washington, DC 20004. Such deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays).

Instructions: Direct your comments to the appropriate Docket number (see table above). EPA's policy is that all comments received will be included in the public Docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system; that

means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public Docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional Docket addresses and further details on their contents, see section II, "Public Review/Public Comment," of the **SUPPLEMENTARY INFORMATION** portion of this preamble.

FOR FURTHER INFORMATION CONTACT: Terry Jeng, phone: (703) 603–8852, e-mail: *jeng.terry@epa.gov,* Site Assessment and Remedy Decisions Branch, Assessment and Remediation Division, Office of Superfund Remediation and Technology Innovation (Mail Code 5204P), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; or the Superfund Hotline, phone (800) 424–9346 or (703) 412–9810 in the Washington, DC, metropolitan area.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

A. What Are CERCLA and SARA?

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601–9675 ("CERCLA" or "the Act"), in response to the dangers of uncontrolled releases or threatened releases of hazardous substances, and releases or substantial threats of releases into the environment of any pollutant or contaminant that may present an imminent or substantial danger to the public health or welfare. CERCLA was amended on October 17, 1986, by the Superfund Amendments and Reauthorization Act ("SARA"), Public Law 99–499, 100 Stat. 1613 *et seq.*

B. What Is the NCP?

To implement CERCLA, EPA promulgated the revised National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 40 CFR part 300, on July 16, 1982 (47 FR 31180), pursuant to CERCLA section 105 and Executive Order 12316 (46 FR 42237, August 20, 1981). The NCP sets guidelines and procedures for responding to releases and threatened releases of hazardous substances, or releases or substantial threats of releases into the environment of any pollutant or contaminant that may present an imminent or substantial danger to the public health or welfare. EPA has revised the NCP on several occasions. The most recent comprehensive revision was on March 8, 1990 (55 FR 8666).

As required under section 105(a)(8)(A) of CERCLA, the NCP also includes "criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable taking into account the potential urgency of such action, for the purpose of taking removal action." "Removal" actions are defined broadly and include a wide range of actions taken to study, clean up, prevent or otherwise address releases and threatened releases of hazardous substances, pollutants or contaminants (42 U.S.C. 9601(23)).

C. What Is the National Priorities List (NPL)?

The NPL is a list of national priorities among the known or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States. The list, which is appendix B of the NCP (40 CFR part 300), was required under section 105(a)(8)(B) of CERCLA, as amended. Section 105(a)(8)(B) defines the NPL as a list of "releases" and the highest priority "facilities" and requires that the NPL be revised at least annually. The NPL is intended primarily to guide EPA in determining which sites warrant further investigation to assess the nature and extent of public health and environmental risks associated with a release of hazardous substances, pollutants or contaminants. The NPL is

only of limited significance, however, as it does not assign liability to any party or to the owner of any specific property. Also, placing a site on the NPL does not mean that any remedial or removal action necessarily need be taken.

For purposes of listing, the NPL includes two sections, one of sites that are generally evaluated and cleaned up by EPA (the "General Superfund Section"), and one of sites that are owned or operated by other Federal agencies (the "Federal Facilities Section"). With respect to sites in the Federal Facilities Section, these sites are generally being addressed by other Federal agencies. Under Executive Order 12580 (52 FR 2923, January 29, 1987) and CERCLA section 120, each Federal agency is responsible for carrying out most response actions at facilities under its own jurisdiction, custody, or control, although EPA is responsible for preparing a Hazard Ranking System ("HRS") score and determining whether the facility is placed on the NPL.

D. How Are Sites Listed on the NPL?

There are three mechanisms for placing sites on the NPL for possible remedial action (*see* 40 CFR 300.425(c) of the NCP): (1) A site may be included on the NPL if it scores sufficiently high on the HRS, which EPA promulgated as appendix A of the NCP (40 CFR part 300). The HRS serves as a screening tool to evaluate the relative potential of uncontrolled hazardous substances, pollutants or contaminants to pose a threat to human health or the environment. On December 14, 1990 (55 FR 51532), EPA promulgated revisions to the HRS partly in response to CERCLA section 105(c), added by SARA. The revised HRS evaluates four pathways: Ground water, surface water, soil exposure, and air. As a matter of Agency policy, those sites that score 28.50 or greater on the HRS are eligible for the NPL. (2) Pursuant to 42 U.S.C. 9605(a)(8)(B), each State may designate a single site as its top priority to be listed on the NPL, without any HRS score. This provision of CERCLA requires that, to the extent practicable, the NPL include one facility designated by each State as the greatest danger to public health, welfare, or the environment among known facilities in the State. This mechanism for listing is set out in the NCP at 40 CFR 300.425(c)(2). (3) The third mechanism for listing, included in the NCP at 40 CFR 300.425(c)(3), allows certain sites to be listed without any HRS score, if all of the following conditions are met:

- The Agency for Toxic Substances and Disease Registry (ATSDR) of the U.S. Public Health Service has issued a health advisory that recommends dissociation of individuals from the release.
- EPA determines that the release poses a significant threat to public health.
- EPA anticipates that it will be more cost-effective to use its remedial authority than to use its removal authority to respond to the release.

EPA promulgated an original NPL of 406 sites on September 8, 1983 (48 FR 40658) and generally has updated it at least annually.

E. What Happens to Sites on the NPL?

A site may undergo remedial action financed by the Trust Fund established under CERCLA (commonly referred to as the "Superfund") only after it is placed on the NPL, as provided in the NCP at 40 CFR 300.425(b)(1). ("Remedial actions" are those "consistent with permanent remedy, taken instead of or in addition to removal actions. * * *" 42 U.S.C. 9601(24).) However, under 40 CFR 300.425(b)(2) placing a site on the NPL "does not imply that monies will be expended." EPA may pursue other appropriate authorities to respond to the releases, including enforcement action under CERCLA and other laws.

F. Does the NPL Define the Boundaries of Sites?

The NPL does not describe releases in precise geographical terms; it would be neither feasible nor consistent with the limited purpose of the NPL (to identify releases that are priorities for further evaluation), for it to do so. Indeed, the precise nature and extent of the site are typically not known at the time of listing.

Although a CERCLA "facility" is broadly defined to include any area where a hazardous substance has "come to be located" (CERCLA section 101(9)), the listing process itself is not intended to define or reflect the boundaries of such facilities or releases. Of course, HRS data (if the HRS is used to list a site) upon which the NPL placement was based will, to some extent, describe the release(s) at issue. That is, the NPL site would include all releases evaluated as part of that HRS analysis.

When a site is listed, the approach generally used to describe the relevant release(s) is to delineate a geographical area (usually the area within an installation or plant boundaries) and identify the site by reference to that area. However, the NPL site is not necessarily coextensive with the boundaries of the installation or plant, and the boundaries of the installation or plant are not necessarily the "boundaries" of the site. Rather, the site consists of all contaminated areas within the area used to identify the site, as well as any other location where that contamination has come to be located, or from where that contamination came.

In other words, while geographic terms are often used to designate the site (e.g., the "Jones Co. plant site") in terms of the property owned by a particular party, the site, properly understood, is not limited to that property (*e.g.,* it may extend beyond the property due to contaminant migration), and conversely may not occupy the full extent of the property (*e.g.,* where there are uncontaminated parts of the identified property, they may not be, strictly speaking, part of the "site"). The "site" is thus neither equal to, nor confined by, the boundaries of any specific property that may give the site its name, and the name itself should not be read to imply that this site is coextensive with the entire area within the property boundary of the installation or plant. In addition, the site name is merely used to help identify the geographic location of the contamination and is not meant to constitute any determination of liability at a site. For example, the name "Jones Co. plant site," does not imply that the Jones company is responsible for the contamination located on the plant site.

EPA regulations provide that the Remedial Investigation ("RI") "is a process undertaken * * * to determine the nature and extent of the problem presented by the release" as more information is developed on site contamination, and which is generally performed in an interactive fashion with the Feasibility Study ("FS") (40 CFR 300.5). During the RI/FS process, the release may be found to be larger or smaller than was originally thought, as more is learned about the source(s) and the migration of the contamination. However, the HRS inquiry focuses on an evaluation of the threat posed and therefore the boundaries of the release need not be exactly defined. Moreover, it generally is impossible to discover the full extent of where the contamination "has come to be located" before all necessary studies and remedial work are completed at a site. Indeed, the known boundaries of the contamination can be expected to change over time. Thus, in most cases, it may be impossible to describe the boundaries of a release with absolute certainty.

Further, as noted above, NPL listing does not assign liability to any party or to the owner of any specific property. Thus, if a party does not believe it is liable for releases on discrete parcels of

property, it can submit supporting information to the Agency at any time after it receives notice it is a potentially responsible party.

For these reasons, the NPL need not be amended as further research reveals more information about the location of the contamination or release.

G. How Are Sites Removed From the NPL?

EPA may delete sites from the NPL where no further response is appropriate under Superfund, as explained in the NCP at 40 CFR 300.425(e). This section also provides that EPA shall consult with states on proposed deletions and shall consider whether any of the following criteria have been met:

(i) Responsible parties or other persons have implemented all appropriate response actions required;

(ii) All appropriate Superfund-financed response has been implemented and no further response action is required; or

(iii) The remedial investigation has shown the release poses no significant threat to public health or the environment, and taking of remedial measures is not appropriate.

H. May EPA Delete Portions of Sites From the NPL as They Are Cleaned Up?

In November 1995, EPA initiated a policy to delete portions of NPL sites where cleanup is complete (60 FR 55465, November 1, 1995). Total site cleanup may take many years, while portions of the site may have been cleaned up and made available for productive use.

I. What Is the Construction Completion List (CCL)?

EPA also has developed an NPL construction completion list ("CCL") to simplify its system of categorizing sites and to better communicate the successful completion of cleanup activities (58 FR 12142, March 2, 1993). Inclusion of a site on the CCL has no legal significance.

Sites qualify for the CCL when: (1) Any necessary physical construction is complete, whether or not final cleanup levels or other requirements have been achieved; (2) EPA has determined that the response action should be limited to measures that do not involve construction (*e.g.,* institutional controls); or (3) the site qualifies for deletion from the NPL. For the most up-to-date information on the CCL, see EPA's Internet site at *http://www.epa.gov/superfund/cleanup/ccl.htm.*

J. What Is the Sitewide Ready for Anticipated Use Measure?

The Sitewide Ready for Anticipated Use measure (formerly called Sitewide Ready-for-Reuse) represents important Superfund accomplishments and the measure reflects the high priority EPA places on considering anticipated future land use as part of our remedy selection process. See Guidance for Implementing the Sitewide Ready-for-Reuse Measure, May 24, 2006, OSWER 9365.0–36. This measure applies to final and deleted sites where construction is complete, all cleanup goals have been achieved, and all institutional or other controls are in place. EPA has been successful on many occasions in carrying out remedial actions that ensure protectiveness of human health and the environment, including current and future land users, in a manner that allows contaminated properties to be restored to environmental and economic vitality. For further information, please go to *http://www.epa.gov/superfund/programs/recycle/tools/index.html.*

II. Public Review/Public Comment

A. May I Review the Documents Relevant to This Proposed Rule?

Yes, documents that form the basis for EPA's evaluation and scoring of the sites in this proposed rule are contained in public Dockets located both at EPA Headquarters in Washington, DC, and in the Regional offices. These documents are also available by electronic access at *http://www.regulations.gov* (*see* instructions in the **ADDRESSES** section above).

B. How Do I Access the Documents?

You may view the documents, by appointment only, in the Headquarters or the Regional Dockets after the publication of this proposed rule. The hours of operation for the Headquarters Docket are from 8:30 a.m. to 4:30 p.m., Monday through Friday excluding Federal holidays. Please contact the Regional Dockets for hours.

The following is the contact information for the EPA Headquarters Docket: Docket Coordinator, Headquarters; U.S. Environmental Protection Agency; CERCLA Docket Office; 1301 Constitution Avenue, NW.; EPA West, Room 3334, Washington, DC 20004; 202/566–0276. (Please note this is a visiting address only. Mail comments to EPA Headquarters as detailed at the beginning of this preamble.)

The contact information for the Regional Dockets is as follows:

Joan Berggren, Region 1 (CT, ME, MA, NH, RI, VT), U.S. EPA, Superfund Records and Information Center, Mailcode HSC, 5 Post Office Square, Suite 100, Boston, MA 02109–3912; 617/918–1417.

Ildefonso Acosta, Region 2 (NJ, NY, PR, VI), U.S. EPA, 290 Broadway, New York, NY 10007–1866; 212/637–4344.

Dawn Shellenberger (ASRC), Region 3 (DE, DC, MD, PA, VA, WV), U.S. EPA, Library, 1650 Arch Street, Mailcode 3PM52, Philadelphia, PA 19103; 215/814–5364.

Debbie Jourdan, Region 4 (AL, FL, GA, KY, MS, NC, SC, TN), U.S. EPA, 61 Forsyth Street, SW, Mail code 9T25, Atlanta, GA 30303; 404/562–8862.

Janet Pfundheller, Region 5 (IL, IN, MI, MN, OH, WI), U.S. EPA, Records Center, Superfund Division SMR–7J, Metcalfe Federal Building, 77 West Jackson Boulevard, Chicago, IL 60604; 312/353–5821.

Brenda Cook, Region 6 (AR, LA, NM, OK, TX), U.S. EPA, 1445 Ross Avenue, Suite 1200, Mailcode 6SFTS, Dallas, TX 75202–2733; 214/665–7436.

Michelle Quick, Region 7 (IA, KS, MO, NE), U.S. EPA, 901 North 5th Street, Mailcode SUPRERNB, Kansas City, KS 66101; 913/551–7335.

Margaret Williams, Region 8 (CO, MT, ND, SD, UT, WY), U.S. EPA, 1595 Wynkoop Street, Mailcode 8EPR–B, Denver, CO 80202–1129; 303/312–6943.

Karen Jurist, Region 9 (AZ, CA, HI, NV, AS, GU, MP), U.S. EPA, 75 Hawthorne Street, Mailcode SFD–9–1, San Francisco, CA 94105; 415/972–3219.

Ken Marcy, Region 10 (AK, ID, OR, WA), U.S. EPA, 1200 6th Avenue, Mailcode ECL–112, Seattle, WA 98101; 206/463–1349.

You may also request copies from EPA Headquarters or the Regional Dockets. An informal request, rather than a formal written request under the Freedom of Information Act, should be the ordinary procedure for obtaining copies of any of these documents. Please note that due to the difficulty of reproducing oversized maps, oversized maps may be viewed only in-person; since EPA dockets are not equipped to either copy and mail out such maps or scan them and send them out electronically.

You may use the Docket at *http://www.regulations.gov* to access documents in the Headquarters Docket (see instructions included in the **ADDRESSES** section above). Please note that there are differences between the Headquarters Docket and the Regional Dockets and those differences are outlined below.

C. What Documents Are Available for Public Review at the Headquarters Docket?

The Headquarters Docket for this proposed rule contains the following for the sites proposed in this rule: HRS score sheets; Documentation Records describing the information used to compute the score; information for any sites affected by particular statutory requirements or EPA listing policies; and a list of documents referenced in the Documentation Record.

D. What Documents Are Available for Public Review at the Regional Dockets?

The Regional Dockets for this proposed rule contain all of the information in the Headquarters Docket plus the actual reference documents containing the data principally relied upon and cited by EPA in calculating or evaluating the HRS score for the sites. These reference documents are available only in the Regional Dockets.

E. How Do I Submit My Comments?

Comments must be submitted to EPA Headquarters as detailed at the beginning of this preamble in the **ADDRESSES** section. Please note that the mailing addresses differ according to method of delivery. There are two different addresses that depend on whether comments are sent by express mail or by postal mail.

F. What Happens to My Comments?

EPA considers all comments received during the comment period. Significant comments are typically addressed in a support document that EPA will publish concurrently with the **Federal Register** document if, and when, the site is listed on the NPL.

G. What Should I Consider When Preparing My Comments?

Comments that include complex or voluminous reports, or materials prepared for purposes other than HRS scoring, should point out the specific information that EPA should consider and how it affects individual HRS factor values or other listing criteria (*Northside Sanitary Landfill* v. *Thomas,* 849 F.2d 1516 (D.C. Cir. 1988)). EPA will not address voluminous comments that are not referenced to the HRS or other listing criteria. EPA will not address comments unless they indicate which component of the HRS documentation record or what particular point in EPA's stated eligibility criteria is at issue.

H. May I Submit Comments After the Public Comment Period Is Over?

Generally, EPA will not respond to late comments. EPA can only guarantee that it will consider those comments postmarked by the close of the formal comment period. EPA has a policy of generally not delaying a final listing decision solely to accommodate consideration of late comments.

I. May I View Public Comments Submitted by Others?

During the comment period, comments are placed in the Headquarters Docket and are available to the public on an "as received" basis. A complete set of comments will be available for viewing in the Regional Dockets approximately one week after the formal comment period closes.

All public comments, whether submitted electronically or in paper, will be made available for public viewing in the electronic public Docket at *http://www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose disclosure is restricted by statute. Once in the public Dockets system, select "search," then key in the appropriate Docket ID number.

J. May I Submit Comments Regarding Sites Not Currently Proposed to the NPL?

In certain instances, interested parties have written to EPA concerning sites that were not at that time proposed to the NPL. If those sites are later proposed to the NPL, parties should review their earlier concerns and, if still appropriate, resubmit those concerns for consideration during the formal comment period. Site-specific correspondence received prior to the period of formal proposal and comment will not generally be included in the Docket.

III. Contents of This Proposed Rule

A. Proposed Additions to the NPL

In today's proposed rule, EPA is proposing to add eight sites to the General Superfund section of the NPL. All of the sites in this proposed rulemaking are being proposed based on HRS scores of 28.50 or above. The sites are presented in the table below.

State	Site name	City/County
FL	Sanford Dry Cleaners	Sanford
MI	St. Clair Shores Drain	St. Clair Shores
MO	Vienna Wells	Vienna
MT	ACM Smelter and Refinery	Cascade County
NC	Wright Chemical Corporation	Riegelwood
NY	Black River PCBs	Jefferson County
NY	Dewey Loeffel Landfill	Nassau
TN	Smokey Mountain Smelters	Knox County

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

1. What Is Executive Order 12866?

Under Executive Order 12866 (58 FR 51735 (October 4, 1993)), the Agency must determine whether a regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

2. Is This Proposed Rule Subject to Executive Order 12866 Review?

No. The listing of sites on the NPL does not impose any obligations on any entities. The listing does not set standards or a regulatory regime and imposes no liability or costs. Any liability under CERCLA exists irrespective of whether a site is listed. It has been determined that this action is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

B. Paperwork Reduction Act

1. What Is the 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, after initial display in the preamble of the final rules, are listed in 40 CFR part 9.

2. Does the Paperwork Reduction Act Apply to This Proposed Rule?

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* EPA has determined that the PRA does not apply because this rule does not contain any information collection requirements that require approval of the OMB.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

1. What Is the Regulatory Flexibility Act?

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996) whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

2. How Has EPA Complied With the Regulatory Flexibility Act?

This proposed rule listing sites on the NPL, if promulgated, would not impose any obligations on any group, including small entities. This proposed rule, if promulgated, also would establish no standards or requirements that any small entity must meet, and would impose no direct costs on any small entity. Whether an entity, small or otherwise, is liable for response costs for a release of hazardous substances depends on whether that entity is liable under CERCLA 107(a). Any such liability exists regardless of whether the site is listed on the NPL through this rulemaking. Thus, this proposed rule, if promulgated, would not impose any requirements on any small entities. For the foregoing reasons, I certify that this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act

1. What Is the Unfunded Mandates Reform Act (UMRA)?

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. Before EPA promulgates a rule where a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small-government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

2. Does UMRA Apply to This Proposed Rule?

This proposed rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Proposing a site on the NPL does not itself impose any costs. Proposal does not mean that EPA necessarily will undertake remedial action. Nor does proposal require any action by a private party or determine liability for response costs. Costs that arise out of site responses result from site-specific decisions regarding what actions to take, not directly from the act of proposing a site to be placed on the NPL. Thus, this rule is not subject to the requirements of section 202 and 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. As is mentioned above, site proposal does not impose any costs and would not require any action of a small government.

E. Executive Order 13132: Federalism

1. What Is Executive Order 13132?

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), 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."

2. Does Executive Order 13132 Apply to This Proposed Rule?

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it does not contain any requirements applicable to States or other levels of government. Thus, the requirements of the Executive Order do not apply to this proposed rule.

EPA believes, however, that this proposed rule may be of significant interest to State governments. In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA therefore consulted with State officials and/or representatives of State governments early in the process of developing the rule to permit them to have meaningful and timely input into its development. All sites included in this proposed rule were referred to EPA by States for listing. For all sites in this rule, EPA received letters of support either from the Governor or a State official who was delegated the authority by the Governor to speak on their behalf regarding NPL listing decisions.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

1. What Is Executive Order 13175?

Executive Order 13175, entitled "Consultation and Coordination With Indian Tribal Governments" (65 FR 67249, November 6, 2000), 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."

2. Does Executive Order 13175 Apply to This Proposed Rule?

This action does not have tribal implications, as specified in Executive Order 13175. Proposing a site to the NPL does not impose any costs on a tribe or require a tribe to take remedial action. Thus, Executive Order 13175 does not apply to this proposed rule.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

1. What Is Executive Order 13045?

Executive Order 13045: "Protection of Children From Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

2. Does Executive Order 13045 Apply to This Proposed Rule?

This proposed rule is not subject to Executive Order 13045 because it is not an economically significant rule as defined by Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this proposed rule present a disproportionate risk to children.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Usage

1. What Is Executive Order 13211?

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," (66 FR 28355 (May 22, 2001)) requires federal agencies to prepare a "Statement of Energy Effects" when undertaking certain regulatory actions. A Statement of Energy Effects describes the adverse effects of a "significant energy action" on energy supply, distribution and use, reasonable alternatives to the action, and the expected effects of the alternatives on energy supply, distribution and use.

2. Does Executive Order 13211 Apply to This Proposed Rule?

This action is not a "significant energy action" as defined in Executive Order 13211, because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, we have concluded that this rule is not likely to have any adverse energy impacts because proposing a site to the NPL does not require an entity to conduct any action that would require energy use, let alone that which would significantly affect energy supply, distribution, or usage. Thus, Executive Order 13175 does not apply to this action.

I. National Technology Transfer and Advancement Act

1. What Is the National Technology Transfer and Advancement Act?

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note), directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

2. Does the National Technology Transfer and Advancement Act Apply to This Proposed Rule?

No. This proposed rulemaking does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

1. What Is Executive Order 12898?

Executive Order (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent

practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

2. Does Executive Order 12898 Apply to This Rule?

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. As this rule does not impose any enforceable duty upon State, tribal or local governments, this rule will neither increase nor decrease environmental protection.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Natural resources, Oil pollution, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

Dated: February 24, 2010.

Mathy Stanislaus,

Assistant Administrator, Office of Solid Waste and Emergency Response.

[FR Doc. 2010–4328 Filed 3–3–10; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 15

[ET Docket Nos. 10–23; 07–96; 06–216; FCC 10–14]

Tank Level Probing Radars in the Frequency Band 77–81 GHz

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document the Commission proposes to modify its rules to allow tank level probing radar (TLPR) devices to operate in the 77–81 GHz frequency band on an unlicensed basis under the provisions of part 15 of the Commission's rules. Specifically, the Commission proposes to modify § 15.205 of the rules to remove the prohibition on intentional emissions in the 77–81 GHz band for TLPR devices used in closed storage tanks and vessels made of metal, concrete, or material with similar attenuating characteristics, at fixed locations at petroleum and chemical production and storage facilities, and similar commercial and industrial sites. The Commission believes that its proposals will enable the development and deployment of high frequency technology that operates more effectively and reliably than existing tank level measuring radar technology in certain applications where precision measurements are needed, and in certain tanks which cannot now accommodate existing technology. The Commission believes that, with appropriate restrictions, such high frequency TLPR devices can operate on an unlicensed basis without causing harmful interference to authorized services in the 77–81 GHz band.

DATES: Comments must be filed on or before June 2, 2010, and reply comments must be filed on or before July 2, 2010.

ADDRESSES: You may submit comments, identified by ET Docket Nos. 10–23; 07–96 and 06–216, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Federal Communications Commission's Web Site: http://www.fcc.gov/cgb/ecfs/.* Follow the instructions for submitting comments.
- *E-mail:* [Optional: Include the E-mail address only if you plan to accept comments from the general public]. Include the docket number(s) in the subject line of the message.
- *Mail:* [Optional: Include the mailing address for paper, disk or CD–ROM submissions needed/requested by your Bureau or Office. Do not include the Office of the Secretary's mailing address here.]
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: *FCC504@fcc.gov* or *phone:* 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, *see* the **SUPPLEMENTARY INFORMATION** of this document.

FOR FURTHER INFORMATION CONTACT: Anh Wride, Office of Engineering and Technology, (202) 418–0577, *e-mail: Anh.Wride@fcc.gov,* TTY (202) 418–2989.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Notice of Proposed Rule Making and Order,* ET Docket Nos. 10–23; 07–96; and 06–216, FCC 10–14, adopted January 14, 2010, and released January 19, 2010. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY–A257), 445 12th Street, SW., Washington, DC 20554. The complete text of this document also may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room, CY–B402, Washington, DC 20554. The full text may also be downloaded at: *http://www.fcc.gov.*

Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998).

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/* or the Federal eRulemaking Portal: *http://www.regulations.gov.*
- *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW., Room TW–A325, Washington, DC 20554. The filing hours are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300

East Hampton Drive, Capitol Heights, MD 20743.

• U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW., Washington, DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

Summary of Notice of Proposed Rulemaking

In the *Notice of Proposed Rule Making* (NPRM), the Commission proposes to modify its rules to allow the 77–81 GHz frequency band to be used for the operation of TLPR equipment installed inside closed storage tanks made of metal, concrete or other material with similar attenuating characteristics. The Commission proposes a limit of +43 dBm on the transmitter's peak equivalent isotropically radiated power (EIRP) and +23 dBm on the transmitter's average EIRP levels for fundamental emissions when measured in a laboratory setting, *i.e.*, not installed in a tank. The Commission proposes to limit the radiated emissions from a TLPR device, when installed in representative tanks of each material type, to the general radiated emission limits for intentional radiators in § 15.209(a) of our rules when measured outside of the TLPR tank enclosure in any direction and at any frequency below 200 GHz. The Commission proposes that installation of TLPR devices be limited to commercial usage in fixed locations. It further proposes that in order to receive certification, the device be subjected to a compliance test procedure that includes (a) testing of the transmitter's characteristics (fundamental emissions and emissions at band edges, etc.); and (b) radiated emission testing of the radar installed inside representative storage tanks for each type of tank material. The Commission believes that these proposals have the potential to foster the development of a variety of tank level radar measuring products that will benefit industry by providing better accuracy and reliability in target resolution to identify critical levels of materials such as fuel, water, sewer treated waste and high risk substances, thereby reducing storage tank overflow and spilling while minimizing exposure of maintenance personnel to high risk materials. These proposals would promote greater utility for the 77–81 GHz band without increasing the interference risk to authorized services in the band.

Additionally, the Commission is waiving § 15.205(a) of our rules, subject to certain conditions, to allow Siemens Milltronics Process Instruments Inc. (Siemens), Ohmart/VEGA Corp. (Ohmart/VEGA), and any other responsible party marketing equipment that complies with these conditions (*e.g.,* Endress+Hauser GmbH+Co. KG (Endress+Hauser)) to manufacture, certify, and market TLPR devices in the 77–81 GHz band for a period of two years or until 180 days following the adoption of a Report and Order in this proceeding, whichever is longer. This action will allow the new TLPR technology to be utilized in the near term while the Commission considers modifying the general part 15 rules.

Siemens filed a Petition for Rulemaking requesting that the Commission amend its rules to allow TLPR devices to operate in the restricted 77–81 GHz frequency band. The Commission issued a Public Notice soliciting comments on Siemens's request on December 6, 2006. Ohmart/VEGA and Krohne America, Inc. (Krohne) filed comments that generally supported Siemens petition. Krohne suggests that the Commission should consider allowing TLPR devices to operate in a larger portion of the spectrum, *i.e.,* 75–85 GHz band, to harmonize with European rules for such devices.

Concurrent with its rulemaking petition, Siemens filed a request for waiver of § 15.209(a) to allow TLPR operation in the 78–79 GHz frequency band, subject to certain conditions. Ohmart/VEGA and Krohne filed in support of the Siemens' request. Subsequently, Ohmart/VEGA also filed a request for waiver of § 15.209(a) to allow TLPR operation in the 77–81 GHz band, subject to certain conditions. Endress+Hauser filed in support of the Ohmart/VEGA waiver request and asked that it be granted the same relief. The National Radio Astronomy Observatory (NRAO) states that it would not object to the Ohmart/VEGA waiver if it

Frequency Band of Operation. Authorized operations in the 77–81 GHz band currently include radio astronomy (Federal and non-Federal at 76–85 GHz), radiolocation (Federal and non-Federal at 76–77.5 GHz and 78–81 GHz), space research (Federal and non-Federal at 74–84 GHz), amateur (non-Federal at 76–81 GHz), and amateur satellite (non-Federal at 77–81 GHz). These services typically employ highly directional antennas because propagation loss is significant over short distances at these frequencies.

The Commission believes that the proposed TLPR operation will not cause harmful interference to incumbent services in the 77–81 GHz band, based on several factors. First, the general emission limits are 39.6 dB below the emission levels that the Commission previously determined is sufficient to prevent harmful interference in this frequency range. Second, emissions in this band should attenuate more rapidly than the rate predicted by free space propagation due to the greater attenuating effects on radio waves from oxygen, water and any intervening objects at these frequencies; thus, the risk for harmful interference is minimal. Third, TLPR devices would be installed inside tanks which attenuate the radiated emissions so that they would not exceed our general emission limits outside of the tank. Further, because TLPR antennas would be pointing down toward the material inside closed storage tanks, side beam leakage should be minimal given the tank enclosure's attenuation coefficient and the absorption characteristics of the material to be measured (liquid or solid); thus, reflected signals should be contained within the tank. Finally, the Commission is proposing certain operational conditions (regarding emission limits, tank materials, and site locations) that would further reduce the likelihood of harmful interference to authorized services. Accordingly, the Commission believes that TLPR devices would be able to share spectrum with authorized services in the 77–81 GHz band, and it seeks comment on what impact, if any, our proposal to allow TLPR operations in this band would have on authorized services.

Regarding radio astronomy, the Commission observes that NRAO submitted comments in response to the Ohmart/VEGA petition to request special considerations to protect radio astronomy services, such as a mandatory 2 kilometer distance separation, between any permanent TLPR installation and radio astronomy site. Although radio astronomy has a primary allocation in the entire 77–81 GHz band proposed for TLPR operations, the Commission notes that, the part 15 rules currently allow spurious emissions approximately 39.6 dB higher than the radiated emission limit allowed in § 15.209 which the Commission proposes to apply to TLPR devices. In addition, vehicle radars, which are subject to the higher emission limits, are more likely to be operating in the vicinity of radio astronomy sites than TLPR devices in tanks at fixed locations. The Commission already

determined that the higher spurious emissions would not result in harmful interference, even without requiring a minimum separation distance from radio astronomy sites; operation at a level 39.6 dB lower also should not be a source of harmful interference. Furthermore, radio astronomy stations manage the RF systems used on their properties, and thus they may choose to exclude TLPR devices on their properties. The Commission further notes that TLPR devices currently operate under the general non-interference requirements of § 15.5 of our rules as would those proposed in this NPRM. Under these rules, the operator of a TLPR device is responsible for eliminating any harmful interference that may occur or must cease operation upon notification by a Commission representative that the device is causing harmful interference. Thus, the Commission believes that radio astronomy sites would be sufficiently protected. Accordingly, it tentatively concludes that it is not necessary to require any separation distance between a TLPR installation and a radio astronomy site. The Commission seeks comment on this tentative conclusion.

The 75–85 GHz frequency band encompasses many more incumbent licensed operations than the 77–81 GHz band requested by Siemens. In addition to those services authorized in the 77–81 GHz band identified, the authorized services in the 75–85 GHz band include fixed/mobile/fixed satellite (Federal and non-Federal at 74–76 GHz and 81–85 GHz), mobile satellite (Federal and non-Federal at 81–84 GHz), and broadcast and broadcast satellite (non-Federal at 74–76 GHz). In addition, unlicensed vehicle radars are allowed to operate in the 76–77 GHz band. Krohne notes that these regions of the spectrum are similarly allocated in Europe and in the U.S., and ETSI studies have shown that there is little risk of interference from devices which emit at or below the general emission limits for unlicensed radiators. Moreover, Krohne states that TLPR antennas, by design, are directed downward and operate only inside of tank structures which further reduce any risk of harmful interference to other spectrum users. Accordingly, Krohne believes that there is little reason for the Commission not to consider adopting the same spectrum policies for TLPR devices as those that are being followed in Europe. The Commission seeks comment on whether it should allow TLPR devices to operate in the 75–85 GHz band, including what impact, if any, such operations would have on authorized users in the band. The Commission invites commenters to submit into the record any technical studies on the feasibility of allowing TLPR devices to operate in the 75–85 GHz frequency band.

Radiated emission limits. Siemens requests that the Commission establish a peak EIRP level of +43 dBm for fundamental emissions for TLPR devices at 77–81 MHz, with 10 dB attenuation requirement at band edges and 20 dB attenuation requirement for peak spurious emissions. Siemens proposes that when a TLPR device is installed in a storage tank, the radiated emissions outside the TLPR tank enclosure at any frequency in the range of 40 to 250 GHz be limited to a level of −41.3 dBm/MHz, which is an equivalent isotropically radiated power ("EIRP") level that approximates the general radiated emission limits for intentional radiators under § 15.209(a) of the rules. Siemens states that protection of co-channel users as well as other spectrum users in the harmonically related bands is assured by compliance of the TLPR device with the part 15 requirement for intentional radiators (i.e., attenuated to an EIRP level of −41.3 dBm/MHz), as measured *in-situ* outside the tank, and by attenuation of emissions at band edges and spurious emissions, as measured on tests on the radar transmitter by itself.

As requested by Siemens, the Commission proposes to allow TLPR devices to operate in the 77–81 GHz band at a maximum peak EIRP of +43 dBm. It is also proposing a maximum average EIRP of +23 dBm. This is consistent with the existing provision in our rules which specifies a limit on peak power that is 20 dB greater than the average limit. The Commission also proposes to require that when the radar is installed inside a storage tank, the device shall comply with the general radiated emission limits in § 15.209(a), in any direction outside the tank enclosure. The Commission proposes to apply the field strength emission limits in § 15.209(a), rather than the limit on EIRP requested by the petitioners to regulate emissions radiated from the enclosure. The specification of a limit based on EIRP is appropriate when discussing the level of emissions from a transmitter. However, the Commission believes that the levels of emissions radiated from an enclosure are more accurately characterized by a field strength specification. The Commission seeks comment on the proposals.

Siemens suggests limits on radiated emissions outside the TLPR tank enclosure at any frequency in the range 40 GHz to 250 GHz. The Commission notes that its current part 15 rules require measurements of a transmitter from the lowest fundamental frequency up to the fifth harmonic or 200 GHz, whichever is lesser. Measuring above 200 GHz, as Siemens proposes, could require additional specialized measurement instrumentation which may not be readily available. The Commission seeks comments on potential problems that might be encountered in measuring emissions above 200 GHz. It further notes that if a radar transmitter generates any radio frequency signals below 40 GHz, *e.g.,* if it contains digital circuitry such as a microprocessor, our rules require that measurements be made at frequencies lower than Siemens' proposed 40 GHz lower limit. Similar requirements would apply to digital circuitry associated with the radar's receiver. As such, the Commission believes that the part 15 rules concerning emissions above and below 40 GHz are adequate for TLPR devices and do not think that it is necessary to extend the upper measurement frequency to 250 GHz from 200 GHz. The Commission seeks comments on this tentative conclusion.

Radar Technique. The Commission observes that currently TLPR devices typically use either pulsed radar waves or frequency-modulated continuous waves (FMCW). In pulsed radars, short duration pulses are transmitted toward the target and the target distance is calculated using the transit time. In FMCW radars, a continuous frequency-modulated signal is transmitted, and the frequency difference caused by the time delay between transmission and reception indicates the target distance. The Commission believes that there should be no restriction to the type of radar technique used by the device, because the radar technique used does not appear to affect the interference potential of the device, as long as the device is compliant with the emission limits. The Commission notes that ETSI does not differentiate between radar equipment using FMCW or pulse in its standard. The Commission therefore proposes to make available the 77–81 GHz frequency band for use by TLPR devices incorporating any radar technique, subject to the operational restrictions discussed in the NPRM. The Commission seeks comment on this proposal.

Operational Restrictions. The Commission proposes to require that TLPR devices in the 77–81 GHz band be installed in tanks made of metal, concrete or material of similar characteristics that attenuate radiated emissions to the levels we proposed. It also proposes to require that a TLPR device be operated only when the tank

is closed. The Commission notes that in allowing the emission levels for the transmitter, the ETSI standard specifically states that the TLPR device must be installed in closed metallic tanks or reinforced concrete tanks, or similar enclosure structures made of material with comparable attenuating characteristics. In closed tanks made of metal or concrete material, the main emissions outside the tank typically result only from the leakage of the escaping radar signal through the transmitter enclosure or through the mounting flange of the TLPR devices. However, if the tank is open when the radar is operating, the radar signal can escape through any such opening. The Commission also observes that there is a large difference in attenuation coefficient between metal/concrete and plastic or fiberglass material. The Commission is therefore concerned that an open tank or a tank made of material other than metal and/or concrete may allow higher leakage of the radar signals through any opening and through the tank walls, which could potentially cause harmful interference to other radio services. The Commission seeks comment on these proposals to restrict the types of tanks these devices can be installed in.

While the Commission is proposing to restrict the types of tank materials to metal and concrete, it is also requesting comment on Siemens' request that the Commission allow the tank enclosure to be of any material type (*e.g.,* plastic, fiberglass, etc.) The Commission notes that at the proposed +23 dBm EIRP average transmitted level, the TLPR signal must be attenuated by at least 64.3 dB in order to meet the equivalent −41.3 dBm EIRP of § 15.209 radiated emission limit of 500 μV/m at 3 meters. The Commission therefore seeks comment on whether it should also allow installation of TLPR devices in tanks made of other types of material of lesser attenuation coefficient, including open-air installations, and if so, what additional measures it should adopt to ensure that TLPR devices installed in such enclosures comply with the limit for radiated emissions outside the tank. Comments should address what additional limitations the Commission should place on such use and any supplemental parameters and measurement procedures it should consider. For example when other tank materials are employed, should a more stringent EIRP limit be imposed on the radar transmitter, and how can it be demonstrated that the material employed provides sufficient attenuation to ensure that the emissions do not exceed the limits in § 15.209?

The Commission also proposes to limit installations of TLPR devices to fixed locations in commercial or industrial environments to minimize proximity to authorized services operating in the same frequency band. It seeks comment on this proposal.

Compliance Testing. Siemens suggests a 2-tiered testing approach to ensure compliance of TLPR devices. It proposes that we require the transmitter's output power to be tested to show compliance with the emission limits both in-band and at band edges and with unwanted emission limits. It further proposes that we require that the tank assembly be tested with the transmitter installed inside a representative storage tank at three representative customer's sites for *in-situ* testing. Ohmart/VEGA suggests that testing for compliance with the limits when the TLPR is installed inside the tank could be performed at an open area test site (OATS) as well, rather than *in-situ* at customers' sites. The Commission observes that testing the tank assembly at a test site raises a question of the types of tanks that can be provided by the testing organization, and whether they would be representative enclosures of comparable dimensions. It notes that ETSI allows the use of a metallic test tank at a test site. On the other hand, *in-situ* testing would require compliance tests to be performed on a representative tank made of each material type at three representative sites (*e.g.,* a representative metallic tank at three representative sites, a representative concrete tank at three representative sites, etc.), which could prove burdensome to the applicant depending on the various enclosure types that are intended to be used with the radar.

The Commission proposes to require that TLPR devices be subjected to a compliance test procedure that includes (a) testing of the transmitter's characteristics (fundamental emissions and emissions at band edges, etc.); and (b) radiated emission testing of the radar installed inside representative storage tanks for each type of tank material. The Commission seeks comment on this proposal. It also seeks comment on whether testing should be performed *in-situ* with the radar installed inside representative storage tanks at three installations for each type of tank material or if the *in-situ* testing could be replaced by measuring the attenuation characteristics of the type of material proposed to be used for the tank; and performing a radiated emission test at an open area test site (OATS) to demonstrate that the emissions that emanate from any part of the transmitter which is external to the tank, *i.e.,* the portion of the transmitter that is not shielded by the tank material, comply with the § 15.209 emission limits in all directions. This alternative procedure would substitute for *in-situ* measurements, reducing the burden for the applicant, while ensuring that the system complies with the applicable emission limits.

The Commission also proposes to require that TLPR devices designed to operate in the 77–81 GHz band be approved under the Commission's certification procedures and that certification be performed by the Commission rather than by Telecommunications Certification Bodies (TCB). Because a standard test procedure for TLPR devices has not yet been devised, this will enable the Commission to develop appropriate measurement guidelines for devices operating in this frequency band. After the Commission has developed measurement guidelines and gained experience with these devices, it may allow certification by the TCBs. The Commission seeks comment on this proposal.

The Commission is also granting waivers of the restriction on spurious emissions in the 77–81 GHz band set forth in § 15.205(a) to Siemens, Ohmart/VEGA, and any other responsible party (*e.g.,* Endress+Hauser) that meets the waiver conditions specified in this NPRM. The Commission finds that a waiver of the spurious emissions restriction of § 15.205(a) as requested by these petitioners will serve the public interest because it will allow deployment of TLPR devices with improved accuracy and reliability and will reduce risks caused by overfilling and accidental spillage of storage tanks, while the Commission considers modifying our general part 15 rules in the rulemaking proceeding that it is initiating. The Commission concludes that, with appropriate operational and technical restrictions, a waiver of the restriction on intentional emissions in § 15.205(a) can be granted for a limited time pending the conclusion of our rule making without increasing the potential for harmful interference, and is therefore in the public interest. These findings apply equally to the requests of Siemens and Ohmart/VEGA.

The Commission exempts TLPR devices from the restriction on intentional emissions in the 77–81 GHz band, it is requiring them to comply with our existing average radiated emissions limit for devices operating above 960 MHz, *i.e.,* 500 μV/m or the equivalent of −41.3 dBm/MHz EIRP, as

measured at 3 meters. Further, the Commission requires that TLPR devices mandated and operated under the waiver meet all part 15 requirements, except for § 15.205(a), including the 20 dB peak-to-average requirement of § 15.35(b) which is also a controlling factor on peak emissions.

Accordingly, with the exception of § 15.205(a), the Commission will require TLPR devices operating under this waiver to comply with all applicable standards of part 15. The Commission further finds that allowing controlled deployments of TLPR devices operating under the waiver at fixed locations at industrial sites in metal or reinforced concrete storage tanks will serve the public interest by providing a reliable means of protecting the environment and the safety of employees in industrial processes from the risks of accidental spillage and exposure to high risk materials. These areas would include those that are critical to the country's infrastructure, such as petrochemical and nuclear plants. Deployment of TLPR devices will enhance the security procedures of these areas, thereby facilitating homeland security efforts. The Commission will limit TLPR devices operating under this waiver to closed tanks made of metal or concrete only, for the reasons elaborated in conjunction with our proposed rule changes.

In addition, the storage tanks in which the TLPR devices are to be mounted will be at fixed locations, thus increasing the likelihood that they will be located away from and thus not likely to interfere with authorized users in the band. Further, since TLPR installations will be limited to commercial/industrial applications, the Commission believes that such installations will be maintained by trained professionals, as noted by Siemens. Finally, the Commission finds that our compliance test procedure will provide assurance that not only the TLPR device's design itself meets the fundamental emissions and spurious emissions requirements in our rules, but that the installation (TLPR device and storage tank) also comply with the rules. The Commission therefore concludes that the operational restrictions constitute good controlling factors on the scope and scale of use of TLPR devices operating under this waiver, thus minimizing their impact on authorized radio users in the band.

The Commission has already determined that spurious emissions at 39.6 dB higher than the limit in § 15.209 would not result in harmful interference, even without separation requirements from radio astronomy sites. Further, NRAO states that it does not expect that TLPR devices will cause harmful interference to radio astronomy. The Commission believes that any concerns that NRAO has in this regard are adequately addressed with the other operational restrictions it is imposing (e.g., fixed location, commercial/industrial applications) and if harmful interference does occur despite our expectation to the contrary, the TLPR device will be required to be shut down.

With respect to Ohmart/VEGA's offer to maintain a database of TLPR installations, we note that Siemens did not make a similar offer. The Commission recognizes that TLPR devices operating under this waiver will be fixed installations at commercial or industrial locations, where there likely would be few, if any, radio astronomy sites. Although the Commission believes that interference to radio astronomy is very unlikely under these conditions, it nonetheless will require that, for the duration of the waiver, Siemens and Ohmart/VEGA maintain lists of TLPR installations that will be available to the Commission in the event that an interference complaint is raised by an authorized user. Because customer information is competitively sensitive, the Commission will not require that the lists be publicly available.

The Commission will not limit the number of TLPR installations during the waiver period, as Ohmart/VEGA offers. It is imposing a number of conditions on TLPR operation that reduces the likelihood of interference, *e.g.,* fixed location, closed tank operation, metal or reinforced concrete storage tanks, and commercial/industrial locations.

The Commission will allow other responsible parties, such as Endress+Hauser, to request certification of TLPR devices in the 77–81 GHz band, provided they meet the conditions described in the Order for operation in these bands. The certification application shall state that the party is seeking approval under the terms and conditions of the Order, and approved devices will be subject to these terms and conditions. If a responsible party cannot attest that its TLPR device meets the terms and conditions of this Order, the Commission will not consider its certification application unless that party has requested a waiver of applicable rules.

Accordingly, for a period of two years or for a period of 180 days following the adoption of a Report and Order in this proceeding, whichever is longer, the Commission is waiving the intentional emissions restriction of § 15.205(a) to allow any TLPR manufacturer to obtain FCC certification for its TLPR devices to operate in the 77–81 GHz band subject to compliance with the following provisions:

(1) The TLPR device shall comply with all the technical specifications applicable to operation under part 15 of 47 CFR with the exception of § 15.205(a), and shall be certified by the Commission.

(2) The TLPR device shall be subjected to compliance testing to demonstrate that:

i. The TLPR device's fundamental emissions shall comply with a peak radiated EIRP limit of +43 dBm and an average EIRP limit of +23 dBm in the 77–81 GHz band.

ii. Emissions from the device appearing outside of the 77–81 GHz band shall be attenuated to at least 20 dB below the highest level of the fundamental emission. The −20 dB bandwidth of the device must be contained within the 77–81 GHz band, under all conditions of operation including the effects from pulsing or other modulation techniques that may be employed as well as the frequency stability of the transmitter over the temperature range −20 to +50 degrees Celsius and an input voltage variation of 85% to 115% of rated input voltage.

iii. When installed in a storage tank, emissions radiated in any direction from the TLPR shall not exceed the general limits in § 15.209 of the rules. Testing in a storage tank shall be performed on each type of representative tank.

(3) The TLPR device shall be installed in storage tanks made of metal, concrete or material with similar attenuating characteristics only. The tank shall be closed when the radar device is operating. Care shall be taken to ensure that gaskets, flanges, and other openings are sealed to eliminate signal leakage outside of the structure.

(4) The TLPR device shall be installed only at fixed locations.

(5) The applicant shall maintain a record of installations of the devices it operates or sells under this waiver, including the identity of the customer and the address or geographical coordinates of each installation, for the duration of the waiver. This record shall be made available to the Commission upon request.

Ordering Clauses

Pursuant to §§ 1, 4(i), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 303(g), and 303(r), the *Notice of Proposed Rule Making is adopted* and the Petition for Rule Making by Siemens Milltronics Process Instruments, Inc.

filed on November 3, 2006, is hereby *granted* to the extent described herein.

Pursuant to authority in § 1.3 of the Commission's rules, 47 CFR 1.3, and §§ 4(i), 302, and 303(e), of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 302, and 303(e), the Request for Waiver filed by Siemens Milltronics Process Instruments, Inc. filed on November 3, 2006, *is granted,* consistent with the terms of this Order. This action is effective upon release of the Order.

Pursuant to authority in § 1.3 of the Commission's rules, 47 CFR 1.3, and §§ 4(i), 302, and 303(e), of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 302, and 303(e), the Request for Waiver filed by Ohmart/VEGA Corp. filed on April 30, 2007, *is granted* in part and *denied* in part consistent with the terms of the Order. This action is effective upon release of the Order.

Pursuant to authority delegated in § 0.241 of the Commission's rules, 47 CFR 0.241, the Office of Engineering and Technology may approve equipment certification applications consistent with the terms and conditions of the waivers granted by the Order for any responsible party that attests and demonstrates in its application that it seeks approval under and satisfies the terms and conditions of the Order.

The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of the *Notice of Proposed Rule Making and Order,* including the Initial Regulatory Flexibility Analysis to the Chief Counsel for Advocacy of the Small Business Administration.

Initial Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the NPRM. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).

A. Need for, and Objectives of, the Proposed Rules

The rule making proposal was initiated to obtain comments regarding proposed changes to the regulations for radio frequency devices that do not require a license to operate. The Commission seeks to determine if the standards should be amended to permit intentional emissions in the 77–81 GHz by tank level probing radars (TLPR) to provide better accuracy and reliability in target resolution to identify critical levels of materials such as fuel, water and sewer treated waste and high risk substances. Specifically, we propose to allow intentional emissions in the 77–81 GHz restricted band for TLPR devices used in closed storage tanks and vessels made of metal, concrete or comparable material, at petroleum and chemical production and storage facilities and similar industrial sites. The Commission believes that our proposals herein would enable TLPR devices to provide better accuracy and reliability in target resolution to identify critical levels of materials such as fuel, water and sewer treated waste and high risk substances. The proposed amendments to our rules will permit these devices to operate effectively and reliably, reducing storage tank overfill and spilling while minimizing exposure of maintenance personnel to high risk materials, all without increasing the risk of interference to authorized services.

B. Legal Basis

The proposed action is taken pursuant to §§ 4(i), 301, 302, 303(e), 303(f), 303(r), 304 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 301, 302, 303(e), 303(f), 303(r), 304 and 307.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing. The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment." The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is: all such firms having 750 or fewer employees. According to Census Bureau data for 2002, there were a total of 1,041 establishments in this category that operated for the entire year. Of this total, 1,010 had employment of under 500, and an additional 13 had employment of 500 to 999. Thus, under this size standard, the majority of firms can be considered small.

Wireless Service Providers. The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of "Paging" and "Cellular and Other Wireless Telecommunications." Under both categories, the SBA deems a wireless business to be small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 2002 show that there were 807 firms in this category that operated for the entire year. Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more. Thus, under this category and associated small business size standard, the majority of firms can be considered small. For the census category of Cellular and Other Wireless Telecommunications, Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year. Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more. Thus, under this second category and size standard, the majority of firms can, again, be considered small.

The Commission does not expect that the rules proposed in the *NPRM* will have a significant negative economic impact on small businesses.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

Part 15 transmitters already are required to be authorized under the Commission's certification procedure as a prerequisite to marketing and importation. The reporting and recordkeeping requirements associated

with these equipment authorizations would not be changed by the proposals contained in this Notice. The changes to the regulations would permit operation of radar devices used in specific industrial applications in a higher frequency band (77–81 GHz).

E. Federal Rules That May Duplicate, Overlap or Conflict With the Proposed Rules

None.

List of Subjects in 47 CFR Part 15

Communications equipment, Radio, Reporting and recordkeeping requirements.

Federal Communications Commission

Marlene H. Dortch,

Secretary.

Rule Changes

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 15 to read as follows:

PART 15—RADIO FREQUENCY DEVICES

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

Authority: 47 U.S.C. 154, 302(a), 303, 304, 307, 336 and 544a.

2. Section 15.205 is amended by revising paragraph (d)(4) to read as follows:

§ 15.205 Restricted bands of operation.

* * * * *

(d) * * *

(4) Any equipment operated under the provisions of § 15.253, § 15.255, § 15.256 or § 15.257 of this part.

* * * * *

3. Section 15.256 is added to read as follows:

§ 15.256 Operation within the band 77–81 GHz.

(a) Operation within the 77–81 GHz band is limited to tank level probing radars (TLPR) under the provisions of this section.

(1) TLPR transmitters must be operated only while mounted inside storage tanks or similar structures with antennas directed downward. Such storage structures shall be made of metal, concrete or other material with substantially similar attenuating characteristics. The tank shall be closed during the operation of the intentional radiator. Care shall be taken to ensure that gaskets, flanges, and other openings are sealed to eliminate signal leakage outside of the structure.

(2) Storage tanks or structures housing a TLPR device shall be installed only in fixed locations and in commercial or industrial environments.

(b) The emission levels shall not exceed the following:

(1) Within the 77–81 GHz band, the equivalent isotropically radiated power (EIRP) of the TLPR transmitter without the storage tank shall not exceed +43 dBm peak and +23 dBm average.

(2) Emissions appearing outside of the 77–81 GHz band shall be attenuated to at least 20 dB below the highest level of the fundamental emission. The −20 dB bandwidth of the device must be contained within the 77–81 GHz band under all conditions of operation including the effects from pulsing or other modulation techniques that may be employed as well as the frequency stability of the transmitter over the temperature range −20 to +50 degrees Celsius and an input voltage variation of 85% to 115% of rated input voltage.

(3) Emissions radiated in any direction from the TLPR while installed in the storage tank or enclosure shall not exceed the general limits in 15.209 of this part.

(4) Compliance measurements for TLPR devices shall be made in accordance with the measurement guidelines specified by the Commission for TLPR devices operating in the 77–81 GHz band.

[FR Doc. 2010–4562 Filed 3–3–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 09–52; FCC 10–24]

Policies To Promote Rural Radio Service and To Streamline Allotment and Assignment Procedures

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission adopted a Further Notice of Proposed Rulemaking (FNPRM), in which it announced that it was considering, without proposing specific rules, two issues urged by commenters in this proceeding. First, the Commission is considering whether, how, and under what circumstances federally-recognized Native American Tribes and Alaska Native Villages (Tribes) should receive a bidding credit in auctions for new radio stations. Second, the Commission is considering whether and how the Tribal Priority adopted in the First Report and Order (First R&O) in this proceeding might be claimed by Tribes that do not possess defined tribal lands.

DATES: Comments may be filed on or before May 3, 2010 and reply comments may be filed on or before June 2, 2010. Written comments on the Paperwork Reduction Act proposed information collection requirements must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on or before May 3, 2010.

ADDRESSES: You may submit comments, identified by MB Docket No. 09–52, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Federal Communications Commission's Web Site: http://www.fcc.gov/cgb/ecfs/.* Follow the instructions for submitting comments.
- *E-mail: ecfs@fcc.gov.* Include the docket number in the subject line of the message. See the **SUPPLEMENTARY INFORMATION** section of this document for detailed information on how to submit comments by e-mail.
- *Mail:* 445 12th Street, SW., Washington, DC 20554.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432. For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Peter Doyle, Chief, Media Bureau, Audio Division, (202) 418–2700; Thomas Nessinger, Attorney-Advisor, Media Bureau, Audio Division, (202) 418–2700.

For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Cathy Williams at 202–418–2918, or via the Internet at *Cathy.Williams@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Further Notice of Proposed Rulemaking, FCC 10–24, adopted January 28, 2010, and released February 3, 2010.

Initial Paperwork Reduction Act of 1995 Analysis

The FNPRM contains potential information collection requirements subject to the PRA, Public Law 104–13. OMB, the general public, and other Federal agencies are invited to comment on the potential new and modified information collection requirements

contained in this FNPRM. If the information collection requirements are adopted, the Commission will submit the appropriate documents to OMB for review under Section 3507(d) of the PRA and OMB, the general public, and other Federal agencies will again be invited to comment on the new and modified information collection requirements adopted by the Commission.

Public and agency comments on the potential proposed information collection requirements are due May 3, 2010. Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the FCC seeks specific comment on how it might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

In addition to filing comments with the Secretary, a copy of any Paperwork Reduction Act comments on the information collection requirements contained herein should be submitted to Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554, or via the Internet to *Cathy.Williams@fcc.gov,* and to Nicholas A. Fraser, Office of Management and Budget (OMB), via the Internet to *Nicholas_A._Fraser@omb.eop.gov* or by fax to 202–395–5167.

Summary of Further Notice of Proposed Rule Making

Some commenters noted that tribal applicants applying the Tribal Priority at the FM allotment rule making stage might still lose at auction to non-tribal bidders. It was suggested that a remedy for this problem would be to implement a bidding credit for qualified tribal applicants.

Given the paucity of tribal-owned radio stations, it might be expected that the vast majority of tribal applicants for commercial facilities would qualify for new entrant bidding credits, negating the need for a special tribal bidding credit over and above the new entrant bidding credits. Moreover, the Commission has previously rejected the implementation of "finder's" or "pioneer's" bidding credits for applicants that add allotments to the FM Table of Allotments. The Commission nevertheless believes it appropriate to consider various proposals for a special bidding credit for tribal applicants.

While not proposing any one such proposal as a rule at this time, the Commission seeks comment to assist its consideration as to whether to offer such a new bidding credit, either in lieu of or in addition to the existing new entrant bidding credits. One option would be to establish a 35 percent bidding credit for tribal applicants, as long as they own no commercial facilities in the "same area" as the proposed new facility (as defined in 47 CFR 73.5007(b)). Another would be the equivalent of a new entrant credit, rather than the Tribal Priority. The Commission would also consider whether to give tribal applicants the option to claim either the appropriate 25 or 35 percent new entrant bidding credit or, as long as an applicant owns no other commercial stations in the same area, a 25 or 35 percent tribal bidding credit. Still another alternative would be to offer a choice of either the appropriate new entrant bidding credit or a lesser credit, perhaps 15 or 20 percent, to tribal applicants who are not new entrants. In all of the above cases, the Commission would consider whether to limit the tribal bidding credit to allotments added using the Tribal Priority, and further, whether to limit the credit to the Tribe(s) or entity adding the allotment to the Table of Allotments. Should a qualifying bidder be able to employ a tribal bidding credit in addition to a new entrant bidding credit (at least for qualifying tribal allotments) rather than in lieu of the new entrant credit? Additionally, applicants using new entrant bidding credits are subject to the unjust enrichment provisions of our Rules, which require that all or a portion of the bidding credit be reimbursed if the authorization is assigned or transferred within five years of issuance to a party not qualifying for the credit. What impact would a tribal bidding credit have on the unjust enrichment rules, and what adjustments (if any) should the Commission make to those rules to accommodate a tribal bidding credit? The Commission seeks comment on these proposals, or any other proposals forwarded by commenters for a potential tribal bidding credit.

The Tribal Priority as adopted in the First R&O is by its terms limited to Tribes possessing tribal lands that can be served. Commenters to the Rural NPRM pointed out that many Tribes do not have their own reservations or defined tribal lands. It was urged that the Commission seek comment on ways in which "landless" Tribes may nonetheless avail themselves of the Tribal Priority.

The Tribal Priority proposed in the Rural NPRM was principally designed to enable Tribes to aid the development, and perpetuate the language and culture of their members, not merely to give Tribes a blanket priority over other applicants for facilities that may not provide service targeted at Tribal citizens or communities. Two commenters stated that other federal agencies use different concepts, such as "service areas," rather than strict definitions of tribal lands. It was further suggested that provision could be made for tribal applicants to show that the proposed principal community contour serves the functional equivalent of tribal lands, using factors such as Native American population density, cultural links between the community of license and the Tribe or Tribes, or other factors.

The Commission therefore considers, without proposing a specific rule, whether and how Tribes without tribal lands as defined in the First R&O and in the Rural NPRM can qualify for the Tribal Priority. For example, the Commission considers whether a threshold tribal population, or tribal population density, could be taken into account in determining whether a tribal applicant meets the tribal coverage and community of license criteria of the Tribal Priority. Another possibility would be to consider whether historical or contemporary cultural links could be taken into account in making the tribal coverage and community determinations. Should the fact that a currently landless Tribe or Tribes previously occupied the coverage area or proposed community of license be taken into account? Are there other factors that should be considered? The Commission invites comment on these issues, and seek suggestions as to whether and how it might institute such a procedure.

Comments and Reply Comments. Pursuant to §§ 1.415 and 1.419 of the Commission's Rules (47 CFR 1.415, 1.419), interested parties must file comments on or before May 3, 2010, and must file reply comments on or before June 2, 2010. *Comments may be filed using:* (1) The Commission's Electronic Comment Filing System (ECFS); (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.

Comments may be filed electronically using the Internet by accessing the

ECFS: *http://www.fcc.gov/cbg/ecfs,* or the Federal eRulemaking Portal: *http://www.regulations.gov.* Filers should follow the instructions provided on the Web sites for submitting comments. For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to *ecfs@fcc.gov,* and should include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service (although the Commission continues to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554.

Contact the FCC to request materials in accessible formats (Braille, large print, electronic files, audio format, etc.) by e-mail at *FCC504@fcc.gov,* or call the Consumer & Governmental Affairs Bureau at 202–418–0531 (voice), 202–418–7365 (TTY).

The full text of the Further Notice of Proposed Rulemaking is available for inspection and copying during normal business hours in the FCC Reference Information Center, Room CY–A257, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: *http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-30.pdf.* Alternative formats are available to persons with disabilities by contacting Martha Contee at (202) 418–0260 or TTY (202) 418–2555.

Ex Parte Rules. This proceeding will be treated as a "permit-but-disclose" proceeding subject to the "permit-but-disclose" requirements under § 1.1206(b) of the Commission's Rules (47 CFR 1.1206(b)). *Ex parte* presentations are permissible if disclosed in accordance with Commission Rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required. Additional rules pertaining to oral and written presentations are set forth in § 1.1206(b) of the Commission's Rules.

Initial Regulatory Flexibility Analysis. The Regulatory Flexibility Act of 1980, as amended (RFA), requires that a regulatory flexibility analysis be prepared for notice and comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A "small business concern" is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

As required by the RFA (5 U.S.C. 603), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the FNPRM. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the FNPRM provided in paragraph 75 of the FNPRM. The Commission will send a copy of this entire FNPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the FNPRM and the IRFA (or summaries thereof) will be published in the **Federal Register**.

Need For, and Objectives of, the Proposed Rules. This further rulemaking proceeding is initiated to obtain comments concerning commenters' request that the Commission consider providing a bidding credit to Native American Indian Tribes and Alaska Native Villages (Tribes) and entities owned by Tribes, and also to obtain comments concerning a commenter's proposal to provide a Tribal Priority, as adopted in the First R&O in this proceeding, to Tribes that do not possess their own tribal lands. The Commission has put out for consideration several proposals for a potential tribal bidding credit: to grant Tribes the maximum permissible 35 percent bidding credit provided they do not own any other facility in the "same area" as the proposed new facility; to give Tribes the option to claim either the appropriate 25 or 35 percent new entrant bidding credit or, as long as the applicant owns no stations in the same area as the proposed new station, a 25 or 35 percent tribal bidding credit; or to offer Tribes a choice of either the appropriate new entrant bidding credit or a lesser credit, perhaps 15 or 20 percent, to tribal applicants who are not new entrants. In all of the above cases, the Commission also considers whether to limit the tribal bidding credit, in FM auctions, to allotments added using the Tribal Priority, and further, whether to limit the credit to the Tribe(s) or entity adding the allotment to the Table of Allotments. In other words, should the bidding credit be available to otherwise qualifying applicants that did not participate in the Tribal allotment reservation process? The Commission also considers herein whether a tribal bidding credit should be available in addition to a new entrant bidding credit (at least for qualifying tribal FM allotments) or in lieu of the new entrant bidding credit. The Commission believes these proposals, if adopted, will provide opportunities for Tribes and tribal entities proposing new FM allotments better to compete at auction for those allotments.

The Commission is also considering, without proposing a specific rule, whether and how Tribes without tribal lands can qualify for the Tribal Priority. The proposals offered for consideration by commenters are (1) Whether an applicant or proponent is deemed to provide tribal area coverage if it covers a certain threshold tribal population or population density, (2) whether historical or contemporary cultural links between a Tribe and land or population covered should be taken into account in making the tribal coverage and community of license determinations, and (3) whether the fact that a currently landless Tribe or Tribes previously occupied the coverage area or proposed community of license should be taken into account. The Commission considers these proposals, and seeks comment and suggestions as to other ways to extend the benefits of the Tribal Priority to those Tribes that do not have reservations or other tribal lands, allowing such "landless" Tribes to acquire radio stations to achieve the goals of aiding tribal development, and perpetuating tribal language and culture.

Legal Basis. The authority for this proposed rulemaking is contained in Sections 1, 2, 4(i), 303, 307, and 309(j) of the Communications Act of 1934, 47 U.S.C 151, 152, 154(i), 303, 307, and 309(j).

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules. The RFA generally defines the term "small entity" as encompassing the terms "small business," "small organization," and "small governmental entity." In addition, the term "small Business" has the same meaning as the term "small business concern" under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

Radio Stations. The proposed rules and policies potentially will apply to all AM and FM radio broadcasting applicants, and proponents for new FM allotments, who qualify for the Tribal Priority adopted in the First R&O in this proceeding. The "Radio Stations" Economic Census category "comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA has established a small business size standard for this category, which is: such firms having $7 million or less in annual receipts. According to BIA Advisory Services, LLC, MEDIA Access Pro Database on March 17, 2009, 10,884 (95%) of 11,404 commercial radio stations have revenue of $6 million or less. Therefore, the majority of such entities are small entities. We note, however, that in assessing whether a business concern qualifies as small under the above size standard, business affiliations must be included. In addition, to be determined to be a "small business," the entity may not be dominant in its field of operation. We note that it is difficult at times to assess these criteria in the context of media entities, and our estimate of small businesses may therefore be over-inclusive.

Description of Projected Reporting, Recordkeeping and Other Compliance Requirements. The proposed rule and procedural changes may, in some cases, impose different reporting requirements on existing and potential radio licensees and permittees, insofar as they would require or allow certain applicants to file new technical and population coverage information on or after filing the short form application (FCC 175) or in the noncommercial educational long form application (FCC 340). However, the information to be filed is already familiar to broadcasters, and the information requested to claim the Tribal Priority is similar to current Section 307(b) showings, so any additional burdens would be minimal.

To the extent that other applicants would be disadvantaged by Tribes qualifying for the Tribal Priority, the Commission believes that such burdens would be offset by the fact that the Tribal Priority is designed to redress inequities in the number of tribal radio licensees, compared to the population of tribal citizens in the United States and the fact that some of these citizens were deprived of their original tribal lands. The Tribal Priority, then, not only helps the Commission to meet its goals of ownership and program diversity, but also furthers the federal government's obligations toward Tribes to assist them in promulgating tribal languages and cultures, and to support tribal self-government.

Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities. In the FNPRM, the Commission seeks to provide additional opportunities for participation by Tribes in broadcast auctions, especially FM auctions, and to open up the Tribal Priority to those Tribes who do not currently have tribal lands, and who therefore cannot qualify under the Tribal Priority's tribal coverage criterion. The Commission is open to consideration of alternatives to the proposals under consideration, as set forth herein, including but not limited to alternatives that will minimize the burden on broadcasters, most of whom are small businesses. There may be unique circumstances these entities may face, and we will consider appropriate action for small broadcasters when preparing a Report and Order in this matter.

Federal Rules Which Duplicate, Overlap, or Conflict With, the Commission's Proposals. None.

This document is available in alternative formats (computer diskette, large print, audio record, and Braille). Persons with disabilities who need documents in these formats may contact Brian Millin at (202) 418–7426 (voice), (202) 418–7365 (TTY), or via e-mail at *Brian.Millin@fcc.gov.*

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2010–3492 Filed 3–3–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 10–307; MB Docket No. 10–49; RM–11593]

Television Broadcasting Services; Beaumont, TX

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission has before it a petition for rulemaking filed by Freedom Broadcasting of Texas ("Freedom Broadcasting"), the licensee of KFDM(TV), channel 21, Beaumont, Texas. Freedom Broadcasting requests

the substitution of channel 25 for channel 21 at Beaumont.

DATES: Comments must be filed on or before March 19, 2010, and reply comments on or before March 29, 2010.

ADDRESSES: Federal Communications Commission, Office of the Secretary, 445 12th Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for petitioner as follows: John P. Janka, Esq., Latham & Watkins LLP, 555 Eleventh Street, NW., Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Adrienne Y. Denysyk, *adrienne.denysyk@fcc.gov*, Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 10–49, adopted February 23, 2010, and released February 24, 2010. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–478–3160 or via e-mail *http://www.BCPIWEB.com.* To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden "for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts (other than *ex parte* presentations exempt under 47 CFR 1.1204(a)) are prohibited in Commission proceedings, such as this one, which involve channel allotments. *See* 47 CFR 1.1208 for rules governing restricted proceedings.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Television, Television broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.622 [Amended]

2. Section 73.622(i), the Post-Transition Table of DTV Allotments under Texas, is amended by adding channel 25 and removing channel 21 at Beaumont.

Federal Communications Commission.

Clay C. Pendarvis,

Associate Chief, Video Division, Media Bureau.

[FR Doc. 2010–4566 Filed 3–3–10; 8:45 am]

BILLING CODE 6712–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1809, 1827, 1837, and 1852

RIN 4700–AD43

Release, Handling, and Protection of Restricted Information

AGENCY: National Aeronautics and Space Administration.

ACTION: Proposed rule.

SUMMARY: This proposed rule amends the NASA Federal Acquisition Regulation (FAR) Supplement (NFS) to clarify the policy and procedures regarding the release of contractors' restricted information and the handling and protection of restricted information by contractors. This document proposes to change the term "sensitive information" to "restricted information;" clarify what data constitutes restricted information; and revise and move the coverage relative to providing contractors access to restricted information and release of contractors' restricted information to another part. These changes are required to clarify the applicability of clauses addressing contractor handling and protection of restricted information and to clarify what data constitutes restricted information. Additionally, these changes will provide for consistent application of clauses and understanding of what constitutes restricted information. This proposed rule would also update NASA's waiver of the requirements of FAR 9.505–4 to reflect the policy and procedures regarding the release of contractors' restricted information and the handling and protection of restricted information by contractors. This proposed rulemaking would monitor and work to align with recent administration efforts to review the controlled unclassified information (CUI) framework to the extent that it impacts information designation, protection, release, and handling procedures addressed in this proposed rule.

DATES: Comments should be submitted on or before May 3, 2010 to be considered in formulation of the final rule.

ADDRESSES: Interested parties may submit comments, identified by RIN number 2700–AD43, via the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments. Comments may also be submitted to Leigh Pomponio, NASA Headquarters, Office of Procurement, Contract Management Division, Washington, DC 20546. Comments may also be submitted by e-mail to *leigh.pomponio@nasa.gov.*

FOR FURTHER INFORMATION CONTACT: Leigh Pomponio, Office of Procurement, Contract Management Division, (202) 358–0592, e-mail: *leigh.pomponio.@nasa.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

Currently the NFS addresses the release of contractors' sensitive information and access to sensitive information in NFS Part 1837, Service Contracting and NFS Subpart 1837.2, Advisory and Assistance Services, uses the term "sensitive information" to describe data that may be subject to certain restrictions or subject to special handling procedures and protection from inappropriate disclosure. This rule changes the term "sensitive information" to "restricted information" as well as amends and moves from NFS Subpart 1837.2 to NFS Subpart 1827.4, Rights in Data and Copyrights, NASA's policy on release and protection and handling of such information. This action serves to clarify the nature of the information and

better reflect NASA's existing policy and application of the clauses to more than service contracts. NASA's waiver of the requirements of FAR 9.505–4 is updated in this rule to reflect the changes made in 1827.405. This rule also removes clauses 1852.237–72, Access to Sensitive Information, and 1852.237–73, Release of Sensitive Information, and adds clauses 1852.227–73, Handling and Protection of Restricted Information, and 1852.227–74, Release of Restricted Information, respectively, in their place.

To better reflect the nature of the information, the new NFS section, 1827.405–70, more specifically identifies "restricted information" as recorded information, regardless of form or the media on which it may be recorded, the use and dissemination of which is restricted, and includes: (1) Limited rights data, (2) restricted computer software, (3) information incidental to contract administration, such as financial, administrative, cost or pricing, or management information that embody trade secrets or are commercial or financial and confidential or privileged, and (4) information designated by NASA as Sensitive But Unclassified (SBU). This change does not expand the universe of "data" that clauses 1852.237–72 and 1852.237–73 address. The original definition for "sensitive information" contained in 1837.203–70 covered information that a contractor has developed at private expense, or that the Government has generated that qualifies for exception to the Freedom of Information Act, which is not currently in the public domain, and which may embody trade secrets or commercial or financial information, and which may be sensitive or privileged. Commercial or financial information which may be sensitive or privileged is specifically covered in both the original and new clauses. The only other "trade secret" information provided by contractors under existing FAR and NFS clauses is Limited Rights Data and Restricted Computer Software that may be delivered under Alt II and III of FAR clause 52.227–14, Rights in Data-General. These are now specifically listed. Information that the Government has generated that qualifies for an exception to the Freedom of Information Act is now referred to as information designated by NASA as SBU.

The new NFS section 1827.405–70(b) clarifies applicability by removing reference to the term "service provider." If, in performance of NASA contracts, contractors and their subcontractors may require access to restricted information in the Government's possession, which may be entitled to protection from unauthorized use or disclosure, then the clause at 1852.227–73, Handling and Protection of Restricted Information, shall be included in the contract. NFS Clause 1852.227–73 provides restrictions on use and disclosure of restricted information provided by the Government to the contractor if the information is suitably marked with a legend indicating that its use and disclosure is restricted or the information is specifically identified in the contract or in writing by the Contracting Officer as being subject to the clause. Further, this rule clarifies that contractor access to restricted information that comprises third party limited rights data or restricted computer software will be provided to contractors only as authorized by the clause at 52.227–14, Rights in Data—General, Alternates II and III.

NASA's waiver of the requirements of FAR 9.505–4 is updated in this rule to reflect the changes made in 1827.405 as it relates to the acquisition of services to support mission activities and management and administrative functions.

This proposed rule removes clause 1852.237–72, Access to Sensitive Information, and adds a new clause 1852.227–73, Handling and Protection of Restricted Information, in its place. This new clause addresses contractor responsibilities when performance of its contract requires access to restricted information; defines "restricted information;" provides restrictions on use and disclosure of restricted information provided by the Government; identifies exceptions; establishes that this clause is subordinate to all other contract clauses or requirements that specifically address the access, use, handling, protection or disclosure of information; identifies remedies for breach of any conditions of the clause; and requires flow-down of the clause requirements to all subcontractors. The effect of this clause is to create a non-disclosure agreement within the contract, eliminating the need for separate non-disclosure agreements between contractors. Since the clause at 1852.227–73, Handling and Protection of Restricted Information, functions as a contractual non-disclosure agreement, the clause may also be used, in conjunction with other appropriate measures, as part of a plan to mitigate organizational conflicts of interest resulting from unfair access to restricted information. This clause alone does not create an adequate firewall to mitigate OCIs resulting from unfair access to data.

This proposed rule also removes clause 1852.237–73, Release of Sensitive Information, and adds a new clause 1852.227–74, Release of Restricted Information, in its place. Consistent with 1852.227–73, this clause includes the same definition of "restricted information." Through this clause offerors and contractors agree that NASA may release their restricted information to other contractors in accordance with the procedures prescribed in 1827.405–70 and subject to the safeguards and protections delineated in the clause at 1852.227–73, Handling and Protection of Restricted Information. The clause at 1852.227–74 requires offerors and contractors to identify information they claim to be restricted information provided to the Government in the course of submitting proposals for a contract and performing a contract by suitably marking such restricted information with a legend indicating that use and disclosure of the information is restricted.

B. Regulatory Flexibility Act

This rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* because the proposed rule only clarifies existing NFS requirements.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 96–511) does not apply because the changes to the NFS do not impose information collection requirements that require the approval of OMB under 44 U.S.C. 3501, *et seq.*

William P. McNally,

Assistant Administrator for Procurement.

This proposed rule was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

Accordingly, 48 CFR parts 1809, 1827, 1837, and 1852 are proposed to be amended as follows:

1. The authority citation for 48 CFR parts 1809, 1827, 1837, and 1852 continues to read as follows:

Authority: 42 U.S.C. 2473(c)(1).

PART 1809—CONTRACTOR QUALIFICATIONS

2. Revise section 1809.505–4 to read as follows:

1809.505–4 Obtaining access to restricted information.

(b) In accordance with FAR 9.503, the Assistant Administrator for Procurement has determined that it would not be in the Government's

interests for NASA to comply strictly with FAR 9.505–4(b) when acquiring services to support mission activities and management and administrative functions. The Assistant Administrator for Procurement has, therefore, waived the requirement that before gaining access to other companies' restricted information (see 1827.405–70) contractors must enter specific agreements with each of those other companies to protect their information from unauthorized use or disclosure. Accordingly, NASA will not require contractors and subcontractors and their employees in procurements that support NASA mission activities and management and administrative functions to enter into separate, interrelated third party agreements to protect restricted information from unauthorized use or disclosure. As an alternative to numerous, separate third party agreements, 1827.405–70 prescribes detailed policy and procedures to protect contractors from unauthorized use or disclosure of their restricted information. Nothing in this section waives the requirements of FAR 37.204 and 1837.204.

PART 1827—PATENTS, DATA, AND COPYRIGHTS

3. Add sections 1827.405–70, 1827.405–71, and 1827.405–72 to read as follows:

1827.405–70 Providing contractors access to restricted information.

(a)(1) As used in this subpart, "restricted information" means recorded information, regardless of form or the media on which it may be recorded, the use and dissemination of which is restricted, and includes:

(i) Limited rights data;

(ii) Restricted computer software;

(iii) Information incidental to contract administration, such as financial, administrative, cost or pricing, or management information that embody trade secrets or are commercial or financial and confidential or privileged; and

(iv) Information designated by NASA as Sensitive But Unclassified (SBU).

(2) As used in this subpart, "requiring organization" refers to the NASA organizational element or activity that requires specified services or products to be provided under a contract.

(b)(1) In performance of NASA contracts, contractors, and their subcontractors, may require access to restricted information in the Government's possession, which may be entitled to protection from unauthorized use or disclosure. The clause at 1852.227–73, Handling and Protection of Restricted Information, will be used in contracts to ensure that restricted information is properly protected from unauthorized use or disclosure.

(2) Since the clause at 1852.227–73, Handling and Protection of Restricted Information, functions as a contractual non-disclosure agreement, the clause may also be used, as deemed appropriate and in conjunction with other appropriate measures as necessary, to mitigate organizational conflicts of interest resulting from unequal access to restricted information.

(3) After contract award, the requiring organization shall review any contractor's requests for access to restricted information to determine whether the access is necessary to performance of the contract and whether the information requested is considered "restricted" as defined in paragraph (a)(1) of this section, and shall notify the Contracting Officer of such determination. If it is determined that performance will necessitate access to restricted information and the clause at 1852.227–73 is in the contract, the restricted information may be provided to the contractor. If the clause at 1852.227–73 was not initially included in the contract, the contracting officer shall add the clause before restricted information is provided to the contractor.

(4) Access to restricted information that comprises third party limited rights data or restricted computer software will be provided to contractors only as authorized by the clause at 52.227–14, Rights in Data—General, Alternates II and III (see also FAR 27.402(c) and (d), 27.409(b)(3) and (b)(4), and 1827.409(c) and (d) for authorization to revise Limited Rights and Restricted Rights notices to provide the Government greater rights in limited rights data and restricted computer software). All other restricted information will be provided to contractors in compliance with the clause at 1852.227–74, Release of Restricted Information. All restricted information provided to a contractor will be handled by the contractor in compliance with 1852.227–73, Handling and Protection of Restricted Information.

(5)(i) The clause at 1852.227–73 provides restrictions on use and disclosure of restricted information provided by the Government to the contractor if the information is suitably marked with a legend indicating that its use and disclosure is restricted or the information is specifically identified in the contract or in writing by the Contracting Officer as being subject to the clause. This includes information incidental to contract administration, such as financial, administrative, cost or pricing, or management information that embodies trade secrets or are commercial or financial and confidential or privileged, as well as information designated by NASA as Sensitive But Unclassified (SBU).

(ii) Additionally, paragraph (d)(1) of the clause at 52.227–14, Rights in Data—General, permits the Government to restrict a contractor's right to use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the contractor in the performance of a contract provided such restriction is expressly set forth in the contract. Pursuant to this authority, the clause at 1852.227–73 provides restrictions on use and disclosure of third party limited rights data and restricted computer software that may be provided by the Government to its contactors.

(c) When a contractor is given access to restricted information in performance of a contract and such restricted information is either marked with a restrictive legend indicating that use and disclosure of the information is restricted or is specifically identified in the contract or in writing by the Contracting Officer as being subject to restrictions, the contractor, and its subcontractors given access to such restricted information, shall follow the steps outlined in the clause at 1852.227–73, Handling and Protection of Restricted Information, to protect the restricted information from unauthorized use or disclosure.

(d) If the contractor will be operating an information technology system for NASA that contains restricted information, the operating contract shall include the clause at 1852.204–76, Security Requirements for Unclassified Information Technology Resources, which requires the implementation of an Information Technology Security Plan to protect information processed, stored, or transmitted from unauthorized access, alteration, disclosure, or use.

(e) The contracting officer may require the contractor to demonstrate how it is complying with the clause at 1852.227–73, Handling and Protection of Restricted Information, to protect from unauthorized use or disclosure any restricted information provided under the contract that is either marked with a restrictive legend indicating that use and disclosure of the information is restricted or is specifically identified in the contract or in writing by the Contracting Officer as being subject to restrictions.

1827.405–71 Release of contractors' restricted information.

Pursuant to the clause at 1852.227–74, Release of Restricted Information, offerors and contractors agree that NASA may release their restricted information to other contractors in accordance with the procedures prescribed in 1827.405–70 and subject to the safeguards and protections delineated in the clause at 1852.227–73, Handling and Protection of Restricted Information. As required by the clause at 1852.227–74, contractors must identify information they claim to be restricted information submitted in the course of performing a contract by suitably marking such restricted information with a legend indicating that use and disclosure of the information is restricted. The contracting officer shall evaluate all contractor claims regarding such restricted information in deciding how NASA should respond to requests from requiring organizations and contractors for access to restricted information.

1827.405–72 NASA contract clauses.

(a) The contracting officer shall insert the clause at 1852.227–73, Handling and Protection of Restricted Information, in all solicitations, contracts, and basic ordering agreements, unless the contracting officer determines that contract performance will not require access to restricted information.

(b) The contracting officer shall insert the clause at 1852.227–74, Release of Restricted Information, in all solicitations, contracts, and basic ordering agreements.

PART 1837—SERVICE CONTRACTING

1837.203–70, 1837.203–71, and 1837.203–72 [Removed]

4. Remove sections 1837.203–70, 1837.203–71, and 1837.203–72.

PART 1852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Add sections 1852.227–73 and 1852.227–74 to read as follows:

1852.227–73 Handling and Protection of Restricted Information.

As prescribed in 1827.405–72(a), insert the following clause:

HANDLING AND PROTECTION OF RESTRICTED INFORMATION

(XX/XX)

(a) Definition. "Restricted information," as used in this clause, means recorded information, regardless of form or the media on which it may be recorded, the use and dissemination of which is restricted, and includes:

(1) Limited rights data;

(2) Restricted computer software;

(3) Information incidental to contract administration, such as financial, administrative, cost or pricing, or management information that embody trade secrets or are commercial or financial and confidential or privileged; and

(4) Information designated by NASA as Sensitive But Unclassified (SBU).

(b) Restrictions on use and disclosure of restricted information. With regard to any restricted information to which the Contractor is given access in performance of this contract that is either marked with a restrictive legend indicating that use and disclosure of the information is restricted or is specifically identified in this contract or in writing by the Contracting Officer as being subject to this clause, the Contractor agrees to:

(1) Use such restricted information only for the purposes of performing the services specified in this contract, and not appropriate the restricted information to its own or another's use;

(2) Safeguard the restricted information from unauthorized use and disclosure;

(3) Allow access to the restricted information only to those employees and subcontractors that need it to perform services under this contract;

(4) Preclude access and disclosure of the restricted information to persons and entities outside of the Contractor's or its subcontractor's organization(s);

(5) Inform employees who may require access to the restricted information about obligations to use it only to perform the services specified in this contract and to safeguard it from unauthorized use and disclosure;

(6) Require that each employee that has access to restricted information complies with the obligations regarding restricted information included in this clause; and

(7) Return or dispose of the restricted information, as NASA may direct, when the restricted information is no longer needed for performance of work under this contract.

(c) Exceptions.

(1) The obligations and prohibitions of paragraph (b) do not apply to restricted information which the Contractor can demonstrate to the Contracting Officer—

(i) Was publicly available at the time of receipt by the Contractor or thereafter becomes publicly available without breach of this contract;

(ii) Was known to, in the possession of, or developed by or for the Contractor independently of the restricted information received from the Government and such knowledge, possession, or independent development can be shown;

(iii) Was received by the Contractor from a party other than the owner of the restricted information, who has the authority to release the restricted information and did not require the Contractor to hold it in confidence; or

(iv) Is released to or becomes available to a third party on an unrestricted basis from the owner of the restricted information, someone acting under the owner's control, or with the prior written approval of the owner.

(2) Under a valid order of a court or Government agency, the Contractor may release restricted information to which the Contractor is given access in performance of this contract, provided that the Contractor provides prior written notice to the owner of the restricted information of such obligation and the opportunity to oppose such disclosure. The Contractor shall provide a copy of the notice to the Contracting Officer.

(d) In the event that restricted information provided to the Contractor includes a restrictive legend that the Contractor deems to be ambiguous or unauthorized, the Contractor must notify the Contracting Officer of such condition. Notwithstanding such a notification, as long as the restrictive legend provides an indication that a restriction on use or disclosure was intended, the Contractor will treat the restricted information pursuant to the requirements of this clause unless otherwise directed in writing by the Contracting Officer or the owner of the restricted information.

(e) Other contractual restrictions on restricted information. This clause is subordinate to all other contract clauses or requirements that specifically address the access, use, handling, protection or disclosure of information. If any restrictions or authorizations in this clause are inconsistent with a requirement of any other clause of this contract, the requirement of the other clause shall take precedence over the requirement of this clause. Third party limited rights data and restricted computer software will be provided under this contract only as authorized by the clause at 52.227–14, Rights in Data—General, Alternates II and III (as modified by 1852.227–14, if applicable). If the Contractor believes there is a conflict between this clause and another clause in this contract regarding the access, use, handling, protection or disclosure of restricted information, the Contractor must consult with the Contracting Officer before taking subsequent actions under the other clause.

(f) The Contracting Officer may require the Contractor to demonstrate how it is complying with this Handling and Protection of Restricted Information clause.

(g) Remedies. Recognizing that this contract establishes a high standard of accountability and trust, the Contractor's breach of any of the conditions of this clause may provide grounds for the Government to—

(1) Disqualify the Contractor from subsequent related contractual efforts;

(2) Debar the Contractor for serious misconduct affecting present responsibility;

(3) Terminate the Contractor for default; or

(4) Pursue such other remedies as may be permitted by law, regulation, or this contract.

(h) Subcontracts. The Contractor shall insert, or require the insertion of, this clause, including this paragraph (h), suitably modified to reflect the relationship of the parties, in all subcontracts (regardless of tier).

(End of clause)

1852.227–74 Release of restricted information.

As prescribed in 1827.405–72(b), insert the following clause:

RELEASE OF RESTRICTED INFORMATION

(XX/XX)

(a) Definition. "Restricted information," as used in this clause, means recorded information, regardless of form or the media on which it may be recorded, the use and dissemination of which is restricted, and includes:

(1) Limited rights data;

(2) Restricted computer software;

(3) Information incidental to contract administration, such as financial, administrative, cost or pricing, or management information that embody trade secrets or are commercial or financial and confidential or privileged; and

(4) Information designated by NASA as Sensitive But Unclassified (SBU).

(b) In performance of NASA contracts, contractors, as well as their subcontractors and their individual employees, may require access to restricted information in the Government's possession. The Contractor agrees that, where needed for the performance of a NASA contract, NASA may release to its contractors, and their subcontractors, restricted information delivered during the course of this contract. Additionally, offerors agree that restricted information submitted with their proposals may be provided to NASA service contractors that assist NASA with contract closeout. If suitably marked with a legend indicating that use and disclosure of restricted information is restricted, such restricted information will be subject to the enumerated protections mandated by this clause and the clause at 1852.227–73, Handling and Protection of Restricted Information. The Contractor's limited rights data and restricted computer software will be provided to other NASA contractors or subcontractors only as authorized by the clause at 52.227–14, Rights in Data—General, Alternates II and III (as modified by 1852–227–14, if applicable).

(c) For purposes of marking such restricted information, the Contractor may, in addition to any other notice or legend otherwise required (*e.g.,* notices required under the clause at 52.227–14, Rights in Data—General, Alternates II and III), use a notice similar to the following:

Mark the title page with the following legend:

This document was submitted by [insert submitter's name] in performance Contract No. [insert contract no.]. Submitter asserts that this document contains restricted information that embodies trade secrets or is commercial or financial and privileged or confidential. Such information shall not be disclosed outside of NASA except in accordance with the clause at NFS 1852.227–73, Handling and Protection of Restricted Information. This restriction does not limit the Government's right to use this restricted information if it is obtained from another source without restriction. The restricted information subject to this notice is contained in pages [insert page numbers or other identification of pages].

Mark each page containing restricted information the Contractor wishes to restrict with the following legend:

This page contains restricted information and is subject to the restriction on the title page of this document.

(d) The Contracting Officer shall evaluate restricted information marked in accordance with paragraph (c) of this clause. Unless the Contracting Officer decides, with the advice of Center legal counsel, that reasonable grounds exist to challenge the markings, NASA and its contractors and subcontractors, shall comply with all of the safeguards contained in paragraph (e) of this clause and the clause at 1852.227–73, Handling and Protection of Restricted Information.

(e) To receive access to restricted information needed to assist NASA in accomplishing NASA mission activities and management and administrative functions, the Contractor or subcontractor must be operating under a contract that contains the clause at 1852.227–73, Handling and Protection of Restricted Information, which obligates the Contractor or subcontractor, with respect to restricted information marked with a legend indicating that use and disclosure of the information is restricted, to do the following:

(1) Use such restricted information only for the purpose of performing the services specified in its contract, and not appropriate the restricted information to its own or another's use;

(2) Safeguard such restricted information from unauthorized use and disclosure;

(3) Allow access to such restricted information only to those employees and subcontractors that need it to perform services under the contract;

(4) Preclude access and disclosure of such restricted information to persons and entities outside of the contractor's or its subcontractor's organization(s);

(5) Inform employees who may require access to such restricted information about obligations to use it only to perform the services specified in its contract and to safeguard it from unauthorized use and disclosure;

(6) Require that each employee that has access to restricted information complies with the obligations regarding restricted information included in this clause; and

(7) Return or dispose of such restricted information, as NASA may direct, when the restricted information is no longer needed for performance of work under the contract.

(f) Exceptions. The obligations and prohibitions of paragraph (e) of this clause do not apply to restricted information which the receiving contractor can demonstrate to the Contracting Officer—

(1) Was publicly available at the time of receipt by the receiving contractor or thereafter becomes publicly available without breach of the receiving contractor's contract;

(2) Was known to, in the possession of, or developed by or for the receiving contractor independently of the restricted information received from the Government and such knowledge, possession, or independent development can be shown;

(3) Was received by the receiving contractor from a party other than the owner of the restricted information, who has the authority to release the restricted information and did not require the receiving contractor to hold it in confidence;

(4) Is released to or becomes available to a third party on an unrestricted basis from the owner of the restricted information, someone acting under the owner's control, or with the prior written approval of the owner; or

(5) Is required to be released under a valid order of a court or Government agency, provided that the Contractor provides prior written notice to the owner of the restricted information of such obligation and the opportunity to oppose such disclosure.

(g) When a contractor will have primary responsibility for operating an information technology system for NASA that contains restricted information, the contractor's contract shall also include the clause at 1852.204–76, Security Requirements for Unclassified Information Technology Resources. The Security Requirements clause requires the contractor to implement an Information Technology Security Plan to protect information processed, stored, or transmitted from unauthorized access, alteration, disclosure, or use. Contractor personnel requiring privileged access or limited privileged access to these information technology systems are subject to screening using the standard National Agency Check (NAC) forms appropriate to the level of risk for adverse impact to NASA missions. The Contracting Officer may allow the Contractor to conduct its own screening, provided the contractor employs substantially equivalent screening procedures.

(h) This clause does not affect NASA's responsibilities under the Freedom of Information Act.

(i) Subcontracts. The Contractor shall insert, or require the insertion of, this clause, including this paragraph (i), suitably modified to reflect the relationship of the parties, in all subcontracts (regardless of tier).

(End of clause)

1852.237–72 and 1852.237–73 [Removed]

6. Remove sections 1852.237–72 and 1852.237–73.

[FR Doc. 2010–4408 Filed 3–3–10; 8:45 am]

BILLING CODE 7510–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

RIN 0648–AY32

Fisheries of the Caribbean, Gulf of Mexico and South Atlantic; Comprehensive Ecosystem-Based Amendment 1

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

ACTION: Notice of availability (NOA); request for comments.

SUMMARY: The South Atlantic Fishery Management Council (Council) has

submitted CE-BA 1 which includes amendments to the following South Atlantic fishery management plans (FMPs): the FMP for Coral, Coral reefs, and Live/Hard Bottom Habitats of the South Atlantic Region (Coral FMP); the FMP for the Dolphin and Wahoo Fishery off the Atlantic States (Dolphin and Wahoo FMP); the FMP for Golden Crab of the South Atlantic Region (Golden Crab FMP); the FMP for the Shrimp Fishery of the South Atlantic Region (Shrimp FMP); and the FMP for the Snapper-Grouper Fishery of the South Atlantic Region (Snapper-Grouper FMP), as prepared and submitted by the South Atlantic Fishery Management Council (Council); as well as the FMP for Coastal Migratory Pelagic (CMP) Resources (CMP FMP); and the FMP for the Spiny Lobster Fishery of the Gulf of Mexico and South Atlantic (Spiny Lobster FMP), as prepared and submitted by the South Atlantic and Gulf of Mexico Fishery Management Councils.

Management actions proposed in CE-BA 1 include the establishment of deepwater Coral Habitat Areas of Particular Concern (CHAPCs) to protect what is currently thought to be the largest distribution (>23,000 square miles) of pristine deepwater coral ecosystems in the world. Actions in the amendment would prohibit the use of bottom damaging fishing gear and allow for the creation of allowable fishing zones within the CHAPCs in the historical fishing grounds of the golden crab and deepwater shrimp fisheries while extending protection for deepwater coral ecosystems. CE-BA 1 would also amend the Coral, Shrimp, Coastal Migratory Pelagics, Golden Crab, Spiny Lobster, Dolphin-Wahoo, and Snapper-Grouper FMPs to provide spatial information on previously designated essential fish habitat (EFH).

DATES: Comments must be received no later than 5 p.m., eastern time, on May 3, 2010.

ADDRESSES: Comments on CE-BA 1, identified by 0648–AY32, may be submitted by any one of the following methods:

- Electronic submissions: Submit all electronic public comments via the Federal rule-making portal: *www.regulations.gov*
- Mail: Karla Gore, NMFS, Southeast Regional Office, 263 13th Avenue South, St. Petersburg, FL 33701.
- Fax: (727) 824–8308 Attn: Karla Gore.

Instructions: No comments will be posted for public viewing until after the comment period is over. All comments received are a part of the public record and will generally be posted to *www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Copies of CE-BA 1, which includes a final environmental impact statement, a regulatory impact review, a regulatory flexibility analysis, and a fishery impact statement are available from the South Atlantic Fishery Management Council, 4055 Faber Place, Suite 201, North Charleston, SC 29405; telephone 843–571–4366; fax 843–769–4520; e-mail *safmc@safmc.net*.

FOR FURTHER INFORMATION CONTACT: Karla Gore, telephone: 727–824–5305; fax: 727–824–5308; e-mail: *Karla.Gore@noaa.gov*.

SUPPLEMENTARY INFORMATION: The fisheries for coastal migratory pelagics; coral, coral reefs, and live/hard bottom habitats; dolphin and wahoo; golden crab; shrimp; spiny lobster; and snapper-grouper off the southern Atlantic states are managed under their respective FMPs. The FMPs were prepared by the Council and are implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

Background

Management actions proposed in CE-BA 1 include the establishment of CHAPCs in which the use of bottom damaging fishing gear would be prohibited. These CHAPCs would protect what is currently believed to be the largest distribution (>60,000 square kilometers; >23,000 square miles) of deepwater coral ecosystems in the world. Currently, these areas are relatively undisturbed by the impacts of fishing. The underlying need for this action is to protect deepwater coral ecosystems in the Council's jurisdiction, which are currently thought to be in pristine condition, from future activities that could compromise their condition. Failure to establish and protect these deepwater coral habitats may create negative biological impacts on the deepwater coral ecosystem and associated fauna if destructive fishing practices develop and expand into the deepwater coral ecosystems. CE-BA 1 includes alternatives to determine which areas in the South Atlantic to designate as CHAPCs.

Currently, the only commercial fisheries that operate in the areas are the wreckfish, golden crab, and deepwater shrimp fisheries. The amendment includes alternatives that would allow creation of "allowable golden crab fishing areas" and "shrimp fishery access areas" that would allow these fisheries to continue with little or no negative impacts to deepwater coral ecosystems. The wreckfish fishery would not be impacted by the designations of the CHAPCs.

CE-BA 1 would also address the need for spatial representations of previously designated EFH and EFH-HAPCs. Thus, this document proposes to amend the following fishery management plans (FMPs) to include such EFH and EFH-HAPC spatial information: Coral FMP; CMP FMP; Shrimp FMP; Golden Crab FMP; Spiny Lobster FMP; Dolphin-Wahoo FMP; and the Snapper-Grouper FMP.

The amendment contains alternatives for monitoring the golden crab fishery within the proposed CHAPCs. The Council has selected the "no action" alternative as preferred for this action due to concerns with feasibility and enforcement.

The Council has submitted CE-BA 1 for Secretarial review, approval and implementation. NMFS's decision to approve, partially approve or disapprove CE-BA 1 will be based, in part, on consideration of comments, recommendations, and information received during the comment period on this NOA. A proposed rule will be published in the **Federal Register** for public comment. After considering public comment on the NOA, and consistency with the Magnuson-Stevens Act and other applicable laws, NMFS will publish a notice of agency action in the **Federal Register** announcing the Agency's decision to approve, partially approve or disapprove CE-BA 1, and the associated rationale. If approved, the provisions of CE-BA 1 would be specified in a final rule published in the **Federal Register**.

Consideration of Public Comments

Public comments received by 5 p.m. eastern time on May 3, 2010 will be considered by NMFS in the approval/disapproval decision regarding CE-BA 1.

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

Dated: February 26, 2010.

James P. Burgess,

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

[FR Doc. 2010–4623 Filed 3–3–10; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register
Vol. 75, No. 42
Thursday, March 4, 2010

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

Rural Housing Service

Discontinuation of the Notice of Availability of Funding; Multi-Family Housing, Single Family Housing

AGENCY: Rural Housing Service, USDA.

ACTION: Notice; discontinuance of annual publication.

SUMMARY: This Notice is to inform the public that the U.S. Department of Agriculture, Rural Development's Rural Housing Service, hereinafter referred to as Housing and Community Facilities Programs (HCFP) is discontinuing its annual publication in the **Federal Register** the combined notice of funds availability (NOFA) for some of its existing and continuing Multi-Family and Single-Family Housing programs for which it receives annual appropriations. For Fiscal Year 2010 and thereafter, it will provide funding availability information to the public through its Web site, *http://www.rurdev.usda.gov.*

DATES: March 4, 2010.

FOR FURTHER INFORMATION CONTACT: For information and application assistance contact Henry Searcy, Jr., Finance and Loan Analyst, Multi-Family Housing Programs, telephone 202–720–1753 and Myron Wooden, Loan Specialist, Single Family Housing Programs, telephone 202–720–4780 as well as the appropriate state office by visiting the Web site *http://offices.usda.gov.* Interested parties may also contact offices which can be found in local telephone directory blue pages under "Rural Development."

SUPPLEMENTARY INFORMATION: HCFP provides homeownership opportunities to rural Americans, as well as programs for home renovation and repair. HCFP also makes financial assistance available to elderly, disabled, and low-income rural residents of multi-unit housing structures to ensure that they are able to make rental payments. Individual NOFA's will continue to be published for some of its existing and continuing programs. It should be noted that NOFA's may be published for new or demonstration programs as needed.

Non-Discrimination Statement

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, age, disability, and where applicable, sex, marital status, familial status, parental status, religion, sexual orientation, genetic information, political beliefs, reprisal, or because all or part of an individual's income is derived from any public assistance program. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

To file a complaint of discrimination write to USDA, Director, Office of Civil Rights, 1400 Independence Avenue, SW., Washington, DC 20250–9410 or call (800) 795–3272 (voice) or (202) 720–6382 (TDD). USDA is an equal opportunity provider, employer, and lender.

Dated: January 28, 2010

Tammye Treviño,

Administrator, Rural Housing Service.

[FR Doc. 2010–4498 Filed 3–3–10; 8:45 am]

BILLING CODE 3410–XV–P

COMMISSION ON CIVIL RIGHTS

Sunshine Act Notice

AGENCY: United States Commission on Civil Rights.

ACTION: Notice of meeting.

DATE AND TIME: Friday, March 12, 2010; 9:30 a.m. EST.

PLACE: 624 9th St., NW., Room 540, Washington, DC 20425.

Meeting Agenda

This meeting is open to the public, except where noted otherwise.

I. Approval of Agenda
II. State Advisory Committee Issues
- Pennsylvania
- Nevada SAC
- Kansas SAC
- Missouri SAC
- District of Columbia SAC

III. Program Planning
- Approval of Briefing Report on Historically Black Colleges and Universities
- Discussion of Commission Meeting Schedule in April
- Discussion of Timelines for Consideration of Briefing Reports & Scheduling of Briefings
- Update on Status of the 2010 Enforcement Report and Related Hearing (Some of the discussion of this agenda item may be held in closed session.)
- Update on Status of Title IX Project (Some of the discussion of this agenda item may be held in closed session.)
- Update on Attack Against Asian-American Students at South Philadelphia High School

IV. Management and Operations
- Office of General Counsel Presentation Regarding Commissioner Terms

V. Staff Director's Report
VI. Adjourn

CONTACT PERSON FOR FURTHER INFORMATION: Lenore Ostrowsky, Acting Chief, Public Affairs Unit (202) 376–8591. TDD: (202) 376–8116.

Persons with a disability requiring special services, such as an interpreter for the hearing impaired, should contact Pamela Dunston at least seven days prior to the meeting at 202–376–8105. TDD: (202) 376–8116.

Dated: March 2, 2010.

David Blackwood,

General Counsel.

[FR Doc. 2010–4732 Filed 3–2–10; 4:15 pm]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

International Trade Administration

University of Pittsburgh, *et al.*; Notice of Consolidated Decision on Applications for Duty-Free Entry of Electron Microscopes

This is a decision consolidated pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Public Law 106–36; 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 a.m. and 5 p.m. in Room 3720, U.S. Department of Commerce, 14th and

Constitution Avenue., NW. Washington, DC.

Docket Number: 09–069. Applicant: University of Pittsburgh, Pittsburgh, PA 15260. Instrument: Electron Microscope.

Manufacturer: JEOL, Ltd., Japan. Intended Use: See notice at 75 FR 3895, January 25, 2010.

Docket Number: 09–070. Applicant: Haverford College, Haverford, PA 19041. Instrument: JEM–1400 Electron Microscope.

Manufacturer: JEOL Ltd., Japan. Intended Use: See notice at 75 FR 3895, January 25, 2010.

Comments: None received. Decision: Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as these instruments are intended to be used, was being manufactured in the United States at the time the instruments were ordered. Reasons: Each foreign instrument is an electron microscope and is intended for research or scientific educational uses requiring an electron microscope. We know of no electron microscope, or any other instrument suited to these purposes, which was being manufactured in the United States at the time of order of each instrument.

Dated: February 26, 2010.

Christopher Cassel,

Director, Subsidies Enforcement Office, Import Administration.

[FR Doc. 2010–4600 Filed 3–3–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

University of Arkansas; Notice of Decision on Applications for Duty-Free Entry of Scientific Instruments

This is a decision pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Pub. L. 106–36; 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 a.m. and 5 p.m. in Room 3720, U.S. Department of Commerce, 14th and Constitution Ave., NW., Washington, DC.

Comments: None received. *Decision:* Approved. We know of no instruments of equivalent scientific value to the foreign instruments described below, for such purposes as this is intended to be used, that was being manufactured in the United States at the time of its order.

Docket Number: 09–068. *Applicant:* University of Arkansas, Fayetteville, AK 72071. *Instrument:* Fluorescence Lifetime Imaging Microscope. *Manufacturer:* PicoQuant Photonics, Germany. *Intended Use:* See notice at 75 FR 3895, January 25, 2010.

Reasons: The instrument must be able to perform using lasers with both continuous wave (CW) and pulsed mode. The use of picoseconds pulsed lasers is necessary to measure fluorescence lifetime. The use of CW lasers, so that the fluorophores will be continuously excited, is necessary to measure fluorescence intensity. The driver that controls the laser head provides user-selectable pulsed repetition rates. This instrument is unique in that it is capable of pulsed interleaved excitation (PIE)—Fluorescence Resonance Energy Transfer (FRET) and of allowing repetition rates to be continuously varied down to the 200 kHz range. Furthermore, the instrument is compatible with atomic force microscopy by using objective scanning mode rather than sample scanning mode so that the sample-scanning Atomic Force Microscope (AFM) can be added to the microscope in a future upgrade.

We know of no Fluorescence Lifetime Imaging Microscopes being manufactured in the United States at the time of order of this instrument.

Dated: February 26, 2010.

Christopher Cassel,

Director, Subsidies Enforcement Office, Import Administration.

[FR Doc. 2010–4601 Filed 3–3–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XU82

Endangered Species; File No. 14622

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that Allen Foley, Ph.D., Florida Fish and Wildlife Conservation Commission, Fish and Wildlife Research Institute, 370 Zoo Parkway, Jacksonville, FL 32218, has applied in due form for a permit to take green (*Chelonia mydas*), hawksbill (*Eretmochelys imbricata*), Kemp's ridley (*Lepidochelys kempii*), and loggerhead (*Caretta caretta*) sea turtles for purposes of scientific research.

DATES: Written, telefaxed, or e-mail comments must be received on or before April 5, 2010.

ADDRESSES: The application and related documents are available for review by selecting "Records Open for Public Comment" from the Features box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov*, and then selecting File No. 14622 from the list of available applications. These documents are also available for review upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)713–0376; and

Southeast Region, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701; phone (727)824–5312; fax (727)824–5309.

Written comments or requests for a public hearing on this application should be mailed to the Chief, Permits, Conservation and Education Division, F/PR1, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular request would be appropriate.

Comments may also be submitted by facsimile at (301)713–0376, provided the facsimile is confirmed by hard copy submitted by mail and postmarked no later than the closing date of the comment period.

Comments may also be submitted by e-mail. The mailbox address for providing e-mail comments is *NMFS.Pr1Comments@noaa.gov*. Include in the subject line of the e-mail comment the following document identifier: File No. 14622.

FOR FURTHER INFORMATION CONTACT: Amy Hapeman or Kate Swails, (301)713–2289.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

Dr. Foley requests a 5–year scientific research permit to: (1) monitor the abundance of loggerhead and green sea turtles; (2) characterize the aggregations of loggerhead, Kemp's ridley, and hawksbill sea turtles; and (3) determine the movements, behaviors, habitat-use, and reproductive status of loggerhead sea turtles. Research would occur in Florida Bay and the Everglades National Park. Researchers would approach up to 50 green sea turtles annually during

non-linear transect surveys and capture by hand up to 170 loggerhead, 10 Kemp's ridley, and 5 hawksbill sea turtles annually during capture-mark-recapture studies. Captured turtles would be examined, measured, photographed, weighed, flipper tagged, passive integrated transponder tagged, marked with paint, and blood sampled to determine and monitor sex ratios, genetic identities, health and reproductive status, growth, and subsequent movements and behaviors. Skin and carapace samples would be collected from up to 50 of the captured loggerheads annually. Loggerheads greater than 75 cm straight carapace length would be examined by ultrasound. A subset of loggerheads would be transported, examined with laparoscopy or ultrasonography, and held for up to 24 hours annually. Testicular biopsies would be taken from up to 25 adult male loggerheads annually during laparoscopies. A subset of loggerheads also would have a satellite transmitter attached to the carapace before release. All captured turtles would be released at the site of capture.

Dated: February 26, 2010.

Tammy C. Adams,

Acting Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2010–4624 Filed 3–3–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–806]

Silicon Metal From the People's Republic of China: Extension of Time Limit for the Preliminary Results of Antidumping Duty Administrative Review

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

DATES: *Effective Date:* March 4, 2010.

FOR FURTHER INFORMATION CONTACT: Melissa Blackledge or Magd Zalok, AD/CVD Operations, Office 4, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–3518 and (202) 482–4162, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 29, 2009, the Department of Commerce (the "Department") published its notice of initiation of an administrative review of the antidumping duty order on silicon metal from the People's Republic of China ("PRC"). *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Deferral of Administrative Review*, 74 FR 37690 (July 29, 2009). The period of review is June 1, 2008, through May 31, 2009.

As explained in the memorandum from the Deputy Assistant Secretary for Import Administration, the Department has exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from February 5, through February 12, 2010. Thus, all deadlines in this segment of the proceeding have been extended by seven days. The revised deadline for the preliminary results of this review is now March 9, 2010. *See* Memorandum to the Record from Ronald Lorentzen, DAS for Import Administration, regarding "Tolling of Administrative Deadlines As a Result of the Government Closure During the Recent Snowstorm," dated February 12, 2010.

Extension of Time Limit for Preliminary Results

Pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended ("Act"), the Department shall make a preliminary determination in an administrative review of an antidumping order within 245 days after the last day of the anniversary month of the date of publication of the order. Section 751(a)(3)(A) of the Act further provides, however, that the Department may extend the 245-day period to 365 days if it determines it is not practicable to complete the review within the foregoing time period. The Department has determined that it is not practicable to complete the instant administrative review within the original time limits mandated by section 751(a)(3)(A) of the Act because the Department needs additional time to analyze information pertaining to complex issues, including surrogate value information relating to certain raw material inputs. Therefore, in accordance with section 751(a)(3)(A) of the Act, the Department is extending the time period for completing the preliminary results of the instant administrative review until July 7, 2010, which is 372 days after the last day of the anniversary month of the date of publication of the order (365 days plus an additional seven days (*see* the Tolling Memorandum discussed above)). The deadline for the final results of this review continues to be 120 days after the publication of the preliminary results.

This extension notice is issued and published in accordance with sections 751(a)(3)(A) and 777(i) of the Act.

Dated: *February 25, 2010.*

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2010–4599 Filed 3–3–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Administrative Review of the Antidumping Duty Order on Wooden Bedroom Furniture From the People's Republic of China

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

SUMMARY: The Department of Commerce (the Department) has received requests to conduct an administrative review of the antidumping duty order on wooden bedroom furniture from the People's Republic of China (PRC). The anniversary month of this order is January. In accordance with the Department's regulations, we are initiating this administrative review.

DATES: *Effective Date:* March 4, 2010.

FOR FURTHER INFORMATION CONTACT: Jeffrey Pedersen, Rebecca Pandolph, or David Edmiston, AD/CVD Operations, Office 4, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, telephone: (202) 482–2769, (202) 482–3627, or (202) 482–0989 respectively.

SUPPLEMENTARY INFORMATION:

Background

The Department received timely requests, in accordance with 19 CFR 351.213(b), for an administrative review of the antidumping duty order on wooden bedroom furniture from the PRC covering multiple entities. The Department is now initiating an administrative review of the order covering those entities.

Notice of No Sales

Under 19 CFR 351.213(d)(3), the Department may rescind a review where there are no exports, sales, or entries of subject merchandise during the relevant period of review (POR) listed below. If a producer or exporter named in this notice of initiation had no exports, sales, or entries during the POR, it should notify the Department of this fact by the due date for responding to the

Department's Quantity and Value ("Q&V") Questionnaire. *See http://ia.ita.doc.gov/download/prc-wbf/index.html* for a copy of the Q&V questionnaire. The Department will consider rescinding the review only if the producer or exporter, as appropriate, submits a properly filed and timely statement certifying that it had no exports, sales, or entries of subject merchandise during the POR.[1] All submissions must be made in accordance with 19 CFR 351.303 and are subject to verification in accordance with section 782(i) of the Tariff Act of 1930, as amended (the Act). Six copies of the submission should be submitted to the Assistant Secretary for Import Administration, International Trade Administration, Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Further, in accordance with 19 CFR 351.303(f)(1)(i), a copy of each request must be served on every party on the Department's service list.

Respondent Selection

Section 777A(c)(1) of the Act directs the Department to calculate individual dumping margins for each known exporter and producer of the subject merchandise. Where it is not practicable to examine all known producers/exporters of subject merchandise, section 777A(c)(2)(B) of the Act permits the Department to examine exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined. Due to the large number of firms for which an administrative review of wooden bedroom furniture has been requested, and the Department's experience regarding the resulting administrative burden of reviewing each company for which a request has been made, the Department is considering exercising its authority to limit the number of respondents selected for review in accordance with the Act.

In the event that the Department limits the number of respondents for individual examination in the administrative review of wooden bedroom furniture, the Department intends to select respondents based on volume data contained in responses to Q&V questionnaires. Further, the Department intends to limit the number of Q&V questionnaires issued in the review based on U.S. Customs and Border Protection (CBP) data for U.S. imports classified under the Harmonized Tariff Schedule of the United States (HTSUS) headings identified in the scope of the antidumping duty order on wooden bedroom furniture from the PRC. Since the units used to measure import quantities are not consistent for the HTSUS headings identified in the scope of the order on wooden bedroom furniture from the PRC, the Department will limit the number of Q&V questionnaires issued based on the import values in CBP data which will serve as a proxy for import quantities. Parties subject to the review to which the Department does not send a Q&V questionnaire may file a response to the Q&V questionnaire by the applicable deadline if they desire to be included in the pool of companies from which the Department will select mandatory respondents. Parties will be given the opportunity to comment on the CBP data used by the Department to limit the number of Q&V questionnaires issued. We intend to release the CBP data under Administrative Protective Order (APO) to all parties having an APO within five days of publication of this notice in the **Federal Register.** The deadline for commenting on the CBP data will be 10 calendar days after publication of this notice in the **Federal Register.**

In this case, the Department has decided to send Q&V questionnaires to the 20 companies for which reviews were requested with the largest total values of subject merchandise imported into the United States during the POR according to CBP data. The Department will issue the Q&V questionnaire the day after this notice is signed. In addition, the Q&V questionnaire will be available on the Department's Web site at *http://ia.ita.doc.gov/download/prc-wbf/index.html* on the date this notice is signed. The responses to the Q&V questionnaire must be received by the Department by March 23, 2010. Please be advised that due to the time constraints imposed by the statutory and regulatory deadlines for antidumping duty administrative reviews, the Department may not grant any extensions for the submission of responses to the Q&V questionnaire.

Separate Rates

In proceedings involving non-market economy (NME) countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty deposit rate. It is the Department's policy to assign all exporters of merchandise subject to an administrative review in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate.

To establish whether a firm is sufficiently independent from government control of its export activities to be entitled to a separate rate, the Department analyzes each entity exporting the subject merchandise under a test arising from the *Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China,* 56 FR 20588 (May 6, 1991), as amplified by the *Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China,* 59 FR 22585 (May 2, 1994). In accordance with the separate-rates criteria, the Department assigns separate rates to companies in NME cases only if respondents can demonstrate the absence of both *de jure* and *de facto* government control over export activities.

All firms listed below that wish to qualify for separate-rate status in the antidumping duty administrative review of wooden bedroom furniture from the PRC must timely file, as appropriate, either a separate-rate application or certification, as described below. In order to demonstrate separate-rate eligibility, entities for which a review was requested and which were assigned a separate rate in the most recently completed segment of this proceeding in which they participated, must timely file a separate rate certification that they continue to meet the criteria for obtaining a separate rate. The Separate Rate Certification form will be available on the Department's Web site at *http://ia.ita.doc.gov/nme/sep-rate-files/072909/prc-sr-cert-072909.pdf* on the date of publication of this notice in the **Federal Register.** In responding to the certification, please follow the "Instructions for Filing the Certification" in the Separate Rate Certification. Separate Rate Certifications must be received by the Department no later than 30 calendar days after publication of this notice in the **Federal Register.** The deadline and requirement for submitting the Separate Rate Certification applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers who purchase and export subject merchandise to the United States.

Entities that currently do not have a separate rate from a completed segment of this proceeding,[2] must timely file a

[1] Producers or exporters may also fulfill this requirement by submitting a properly filed and timely Q&V questionnaire response that indicates that the entity or entities had no exports, sales, or entries of subject merchandise during the POR.

[2] Such entities include entities that have not participated in the proceeding, entities that were preliminarily granted a separate rate in any

Separate Rate Application to demonstrate eligibility for a separate rate in this proceeding. In addition, companies that received a separate rate in a completed segment of the proceeding that have subsequently made changes, including, but not limited to, changes to corporate structure, acquisitions of new companies or facilities, or changes to their official company name,[3] should timely file a Separate Rate Application to demonstrate eligibility for a separate rate in this proceeding. The Separate Rate Application will be available on the Department's Web site at *http://ia.ita.doc.gov/nme/sep-rate-files/072909/prc-sr-app-072909.pdf* on the date of publication of this notice in the *Federal Register.* In responding to the Separate Rate Application, refer to the instructions contained in the application. Separate Rate Applications must be received by the Department no later than 60 calendar days after publication of this notice in the **Federal Register.** The deadline and requirement for submitting a Separate Rate Application applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers that purchase and export subject merchandise to the United States.

Firms that submit a Separate Rate Application or a Separate Rate Certification that are subsequently selected as mandatory respondents will no longer be eligible for consideration of their separate-rate status unless they respond to all parts of the antidumping duty questionnaire as mandatory respondents.

Notification

This notice constitutes public notification to all firms for which an administrative review of wooden bedroom furniture has been requested and that are seeking separate rate status in that review, that they must submit a timely Separate Rate Application or Certification (as appropriate) as described above, in order to receive consideration for separate-rate status. In addition, firms to which the Department issues a Q&V questionnaire must submit a timely and complete response to the Q&V questionnaire, as well as a timely and complete Separate Rate Application or Certification, as appropriate, in order to receive consideration for separate-rate status. In other words, the Department will not give consideration to any timely Separate Rate Certification or timely Separate Rate Application made by parties to whom the Department issued a Q&V questionnaire but who failed to timely respond to the Q&V questionnaire. However, exporters subject to the review to which the Department does not send a Q&V questionnaire may receive consideration for separate-rate status if they file a timely Separate Rate Application or a timely Separate Rate Certification, as appropriate, without filing a response to the Q&V questionnaire. All information submitted by respondents in this administrative review is subject to verification. Please be advised that due to the time constraints imposed by the statutory and regulatory deadlines for antidumping duty administrative reviews, the Department may not grant any extensions of the deadlines for these submissions. As noted above, the Separate Rate Certification, the Separate Rate Application, and the Q&V questionnaire will be available on the Department's Web site on the date of publication of this notice in the **Federal Register,** at the addresses noted above.

Initiation of Review

In accordance with 19 CFR 351.221(c)(1)(i), we are initiating an administrative review of the antidumping duty order on wooden bedroom furniture from the PRC with respect to the following companies. We intend to issue the final results of this review not later than January 31, 2011.

	Period to be reviewed
Antidumping Duty Proceeding	
The People's Republic of China: Wooden Bedroom Furniture,[4] A–570–890	1/1/09–12/31/09
Alexandre International Corp.,* Southern Art Development Limited,* Alexandre Furniture (Shenzhen) Co., Ltd.,* Southern Art Furniture Factory*	
Art Heritage International, Ltd.,* Super Art Furniture Co., Ltd.,* Artwork Metal and Plastic Co., Ltd.,* Jibson Industries, Ltd.,* Always Loyal International*	
Baigou Crafts Factory of Fengkai*	
Billy Wood Industrial (Dong Guan) Co., Ltd.,* Great Union Industrial (Dongguan) Co., Ltd.,* Time Faith Limited*	
Brother Furniture Manufacture Co., Ltd.*	
C.F. Kent Co., Inc.	
C.F. Kent Hospitality, Inc.	
Changshu HTC Import & Export Co., Ltd.*	
Cheng Meng Furniture (PTE) Ltd.,* Cheng Meng Decoration & Furniture (Suzhou) Co., Ltd.*	
Chuan Fa Furniture Factory*	
Clearwise Company Limited*	
COE, Ltd.*	
Contact Co., Ltd.	
Dalian Huafeng Furniture Co., Ltd.*	
Dalian Huafeng Furniture Group Co., Ltd.	
Decca Furniture Ltd.*	
Denny's Furniture Associates Corp.	
Denny's International Co., Ltd.	
Der Cheng Furniture Co., Ltd.	
Der Cheng Wooden Works	
Dongguan Bon Ten Furniture Co., Ltd.	
Dongguan Cambridge Furniture Co.,* Glory Oceanic Company Limited*	
Dongguan Chunsan Wood Products Co., Ltd.,* Trendex Industries Ltd.*	

currently incomplete segment of the proceeding (*e.g.,* an ongoing administrative review, new shipper review, *etc.*) and entities that lost their separate rate in the most recently completed segment of the proceeding in which they participated.

[3] Only changes to the official company name, rather than trade names, need to be addressed via a Separate Rate Application. Information regarding new trade names may be submitted via a Separate Rate Certification.

[4] If one of the named companies does not qualify for a separate rate, all other exporters of wooden bedroom furniture from the PRC that have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

	Period to be reviewed
Dongguan Creation Furniture Co., Ltd.,* Creation Industries Co., Ltd.*	
Dongguan Golden Fortune Houseware Co., Ltd.*	
Dongguan Great Reputation Furniture Co., Ltd.*	
Dongguan Hero Way Woodwork Co., Ltd.,* Dongguan Da Zhong Woodwork Co., Ltd.,* Hero Way Enterprises Ltd.,* Well Earth International Ltd.*	
Dongguan Hua Ban Furniture Co., Ltd.*	
Dongguan Huangsheng Furniture Co., Ltd.	
Dongguan Hung Sheng Artware Products Co., Ltd.,* Coronal Enterprise Co., Ltd.*	
Dongguan Kin Feng Furniture Co., Ltd.*	
Dongguan Kingstone Furniture Co., Ltd.,* Kingstone Furniture Co., Ltd.*	
Dongguan Landmark Furniture Products, Ltd.*	
Dongguan Liaobushangdun Huada Furniture Factory*, Great Rich (HK) Enterprise Co., Ltd.*	
Dongguan Lung Dong Furniture Co., Ltd.,* Dongguan Dong He Furniture Co., Ltd.*	
Dongguan Mu Si Furniture Co., Ltd.*	
Dongguan Singways Furniture Co., Ltd.*	
DongGuan Sundart Timber Products Co., Ltd.	
Dongguan Sunrise Furniture Co.,* Taicang Sunrise Wood Industry Co., Ltd.,* Shanghai Sunrise Furniture Co., Ltd.,* Fairmont Designs,* Meizhou Sunrise Furniture Co., Ltd.	
Dongguan Sunshine Furniture Co., Ltd.*	
Dongguan Yihaiwei Furniture Limited*	
Dongying Huanghekou Furniture Industry Co., Ltd.*	
Eurosa (Kunshan) Co., Ltd.,* Eurosa Furniture Co., (PTE) Ltd. (Eurosa)*	
Ever Spring Furniture Company Ltd.,* S.Y.C. Family Enterprise Co., Ltd. (Ever Spring)*	
Evershine Enterprise Co.	
Fine Furniture (Shanghai) Ltd.*	
Fleetwood Fine Furniture LP	
Fortune Glory Industrial Ltd. (H.K. Ltd.)*, Tradewinds Furniture Ltd.* (successor-in-interest to Nanhai Jiantai Woodwork Co., Ltd.*)	
Foshan Guanqiu Furniture Co., Ltd.*	
Fujian Putian Jinggong Furniture Co., Ltd.	
Fuzhou Huan Mei Furniture Co., Ltd.*	
Gainwell Industries Limited	
Garri Furniture (Dong Guan) Co., Ltd.,* Molabile International, Inc.* Weei Geo Enterprise Co., Ltd.*	
Golden Well International (HK), Ltd.*	
Green River Wood (Dongguan) Ltd.*	
Guangdong Gainwell Industrial Furniture Co., Ltd.	
Guangdong Yihua Timber Industry Co., Ltd.*	
Guangzhou Maria Yee Furnishings Ltd.,* Pyla HK, Ltd.,* Maria Yee, Inc.*	
Hainan Jong Bao Lumber Co., Ltd.,* Jibbon Enterprise Co., Ltd.*	
Hang Hai Woodcraft's Art Factory*	
Hong Kong Da Zhi Furniture Co., Ltd.,* Dongguan Grand Style Furniture Co., Ltd.*	
Hong Kong Jingbi Group	
Hualing Furniture (China) Co., Ltd.,* Tony House Manufacture (China) Co., Ltd.,* Buysell Investments Ltd.,* Tony House Industries Co., Ltd.*	
Jardine Enterprise, Ltd.*	
Jiangmen Kinwai Furniture Decoration Co., Ltd.*	
Jiangmen Kinwai International Furniture Co., Ltd.*	
Jiangsu Dare Furniture Co., Ltd.*	
Jiangsu Weifu Group Fullhouse Furniture Mfg. Corp.*	
Jiangsu Xiangsheng Bedtime Furniture Co., Ltd.*	
Jiangsu Yuexing Furniture Group Co., Ltd.*	
Jiant Furniture Co., Ltd.	
Jiedong Lehouse Furniture Co., Ltd.*	
King's Way Furniture Industries Co., Ltd.,* Kingsyear Ltd.*	
Kuan Lin Furniture (Dong Guan) Co., Ltd.,* Kuan Lin Furniture Factory,* Kuan Lin Furniture Co., Ltd.*	
Kunshan Lee Wood Product Co., Ltd.*	
Kunshan Summit Furniture Co., Ltd.*	
Langfang Tiancheng Furniture Co., Ltd.*	
Leefu Wood (Dongguan) Co., Ltd.,* King Rich International, Ltd.*	
Link Silver Ltd. (V.I.B.),* Forward Win Enterprises Company Limited,* Dongguan Haoshun Furniture Ltd.*	
Locke Furniture Factory,* Kai Chan Furniture Co., Ltd.,* Kai Chan (Hong Kong) Enterprise Limited.,* Taiwan Kai Chan Co., Ltd.*	
Longkou Huangshan Furniture Factory	
Longrange Furniture Co., Ltd.*	
Meikangchi (Nantong) Furniture Company Ltd.*	
MoonArt Furniture Group	
MoonArt International Inc.	
Nanhai Baiyi Woodwork Co., Ltd.*	
Nanjing Jardine Enterprise Ltd.	
Nanjing Nanmu Furniture Co., Ltd.*	
Nantong Dongfang Orient Furniture Co., Ltd.*	
Nantong Wangzhuang Furniture Co., Ltd	
Nantong Yangzi Furniture Co., Ltd.*	

	Period to be reviewed
Nantong Yushi Furniture Co., Ltd.*	
Nathan International Ltd.,* Nathan Rattan Factory*	
Ningbo Fubang Furniture Industries Limited	
Ningbo Furniture Industries Company Limited a.k.a. Ningbo Furniture Industries Limited a.k.a. Ningbo Hengrun Furniture Co., Ltd.	
Ningbo Techniwood Furniture Industries Limited	
Northeast Lumber Co., Ltd.	
Passwell Corporation,* Pleasant Wave Limited*	
Perfect Line Furniture Co., Ltd.*	
Prime Wood International Co., Ltd.*, Prime Best International Co., Ltd.,* Prime Best Factory*, Liang Huang (Jiaxing) Enterprise Co., Limited*	
Putian Jinggong Furniture Co., Ltd.*	
Qingdao Liangmu Co., Ltd.*	
Restonic (Dongguan) Furniture Ltd.* Restonic Far East (Samoa) Ltd.*	
Rizhao Sanmu Woodworking Co., Ltd.*	
Rui Feng Woodwork Co. Ltd.*, Rui Feng Lumber Development Co., Ltd.*, Dorbest Ltd.*, Rui Feng Woodwork (Dongguan) Co., Ltd.*, Rui Feng Lumber Development (Shenzhen) Co., Ltd.*	
Season Furniture Manufacturing Co.,* Season Industrial Development Co.*	
Sen Yeong International Co., Ltd.* Sheh Hau International Trading Ltd.*	
Senyuan Furniture Group	
Shanghai Aosen Furniture Co., Ltd.*	
Shanghai Fangjia Industry Co., Ltd.*	
Shanghai Hospitality Product Mfg., Co., Ltd.	
Shanghai Jian Pu Export & Import Co., Ltd.*	
Shanghai Kent Furniture Co., Ltd.	
Shanghai Maoji Imp And Exp Co., Ltd.*	
Shanghai Season Industry & Commerce Co., Ltd.	
Shanghai Zhiyi (Jiashun) Furniture Co., Ltd.	
Shanghai Zhiyi Furniture and Decoration Co., Ltd.	
Shaoxing Mengxing Furniture Co., Ltd	
Sheng Jing Wood Products (Beijing) Co., Ltd.* Telstar Enterprises Ltd.*	
Shenyang Shining Dongxing Furniture Co., Ltd.*	
Shenzhen Forest Furniture Co., Ltd.*	
Shenzhen Jiafa High Grade Furniture Co., Ltd.,* Golden Lion International Trading Ltd.*	
Shenzhen New Fudu Furniture Co., Ltd.*	
Shenzhen Shen Long Hang Industry Co., Ltd.*	
Shenzhen Wonderful Furniture Co., Ltd.*	
Shenzhen Xiande Furniture Factory*	
Shing Mark Enterprises Co., Ltd.,* Carven Industries Limited (BVI),* Carven Industries Limited (HK),* Dongguan Zhenxin Furniture Co., Ltd.,* Dongguan Yongpeng Furniture Co., Ltd.*	
Shun Feng Furniture Co., Ltd.*	
Songgang Jasonwood Furniture Factory,* Jasonwood Industrial Co., Ltd. S.A.*	
Starwood Furniture Manufacturing Co., Ltd.*	
Starwood Industries, Ltd.*	
Strongson Furniture (Shenzhen) Co., Ltd.,* Strongson Furniture Co., Ltd.,* Strongson (HK) Co.*	
Sundart International, Ltd.	
Sunforce Furniture (Hui-Yang) Co., Ltd.,* Sun Fung Wooden Factory,* Sun Fung Company,* Shin Feng Furniture Co., Ltd.,* Stupendous International Co., Ltd., (Sunforce)*	
Superwood Co., Ltd.,* LianJian Zongyu Art Products Co., Ltd.*	
Tarzan Furniture Industries, Ltd.,* Samso Industries Ltd.*	
Techniwood (Macao Commercial Offshore) Limited	
Techniwood Industries Ltd.*, Ningbo Furniture Industries Limited*, Ningbo Hengrun Furniture Company Limited*	
Tianjin Fortune Furniture Co., Ltd.*	
Tianjin Master Home Furniture*	
Tianjin Phu Shing Woodwork Enterprise Co., Ltd.*	
Tradewinds International Enterprise Ltd.	
Transworld (Zhangzhou) Furniture Co., Ltd.*	
Tube-Smith Enterprise (Zhangzhou) Co., Ltd.,* Tube-Smith Enterprise (Haimen) Co., Ltd.,* Billionworth Enterprises Ltd.*	
U–Rich Furniture (Zhangzhou) Co., Ltd.,* U–Rich Furniture Ltd.*	
Wan Bao Chen Group Hong Kong Co., Ltd.*	
Wanhengtong Nueevder (Furniture) Manufacture Co., Ltd.,* Dongguan Wanengtong Industry Co., Ltd.*	
Winny Overseas, Ltd.*	
Winny Universal, Ltd.*, Zhongshan Winny Furniture Ltd.*, Winny Overseas, Ltd.*	
Woodworth Wooden Industries (Dong Guan) Co., Ltd.*	
World Design International Co., Ltd.	
Xiamen Yongquan Sci-Tech Development Co., Ltd.*	
Xilinmen Furniture Co., Ltd.	
Xingli Arts & Crafts Factory of Yangchun*	
Yeh Brothers World Trade Inc.*	
Yuexing Group Co., Ltd.	
Zhang Zhou Sanlong Wood Product Co., Ltd.*	
Zhangjiagang Daye Hotel Furniture Co., Ltd.*	

	Period to be reviewed
Zhangjiagang Zheng Yan Decoration Co., Ltd.*	
Zhangjiang Sunwin Arts & Crafts Co., Ltd.*	
Zhangzhou Guohui Industrial & Trade Co., Ltd.*	
Zhejiang Shaoxing Huaweimei Furniture Co., Ltd.	
Zhejiang Tianyi Scientific & Educational Equipment Co., Ltd.	
Zhong Shan Fullwin Furniture Co., Ltd.*	
Zhong Shan Heng Fu Furniture Co.	
Zhongshan Fengheng Furniture Co., Ltd.	
Zhongshan Fookyik Furniture Co., Ltd.*	
Zhongshan Gainwell Furniture Co., Ltd.*	
Zhongshan Golden King Furniture Industrial Co., Ltd.*	
Zhongshan Yiming Furniture Co., Ltd.	
Zhoushan For-Strong Wood Co., Ltd.*	

* These companies received a separate rate in the most recent segment of this proceeding in which they participated.

During any administrative review covering all or part of a period falling between the first and second or third and fourth anniversary of the publication of an antidumping duty order under 19 CFR 351.211 or a determination under 19 CFR 351.218(f)(4) to continue an order or suspended investigation (after sunset review), the Secretary, if requested by a domestic interested party within 30 days of the date of publication of the notice of initiation of the review, will determine, consistent with *FAG Italia* v. *United States,* 291 F.3d 806 (Fed. Cir. 2002), as appropriate, whether antidumping duties have been absorbed by an exporter or producer subject to the review if the subject merchandise is sold in the United States through an importer that is affiliated with such exporter or producer. The request must include the name(s) of the exporter or producer for which the inquiry is requested.

Interested parties must submit applications for disclosure under administrative protective orders in accordance with 19 CFR 351.305. On January 22, 2008, the Department published in the **Federal Register** the following document: *Antidumping and Countervailing Duty Proceedings: Documents Submission Procedures; APO Procedures,* 73 FR 3634 (January 22, 2008). Those procedures apply to the antidumping duty administrative review of wooden bedroom furniture from the PRC being initiated through this notice. Parties that wish to participate in the antidumping duty administrative review of wooden bedroom furniture from the PRC should ensure that they meet the requirements in these procedures (*e.g.* the filing of separate letters of appearance as discussed in 19 CFR 351.103 (d)).

This initiation and notice are in accordance with section 751(a) of the Act (19 U.S.C. 1675(a)), and 19 CFR 351.221(c)(1)(i). Pursuant to 19 CFR 351.221(c)(1)(i), the Department will publish the notice of initiation of an administrative review no later than the last day of the month following the anniversary month of the order. As explained in the memorandum from the Deputy Assistant Secretary for Import Administration, the Department has exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from February 5 through February 12, 2010. Thus, the deadline for publishing this notice of initiation has been extended by seven days. The revised deadline for publishing this notice is now March 8, 2010, which is the first business day after the extended deadline. *See* Memorandum to the Record from Ronald Lorentzen, DAS for Import Administration, regarding "Tolling of Administrative Deadlines As a Result of the Government Closure During the Recent Snowstorm," dated February 12, 2010.

Dated: February 26, 2010.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2010–4598 Filed 3–3–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Antidumping Duty Administrative Review

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

SUMMARY: The Department of Commerce ("the Department") has received requests to conduct administrative reviews of various antidumping duty orders and findings with January anniversary dates. In accordance with the Department's regulations, we are initiating those administrative reviews.

DATES: *Effective Date:* March 4, 2010.

FOR FURTHER INFORMATION CONTACT: Sheila E. Forbes, Office of AD/CVD Operations, Customs Unit, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, telephone: (202) 482–4697.

SUPPLEMENTARY INFORMATION:

Background

The Department has received timely requests, in accordance with 19 CFR 351.213(b), for administrative reviews of various antidumping duty orders and findings with January anniversary dates. With respect to the antidumping duty order on Wooden Bedroom Furniture from the People's Republic of China, the initiation of the antidumping duty administrative review for that case is being published in a separate initiation notice.

Notice of No Sales

Under 19 CFR 351.213(d)(3), the Department may rescind a review where there are no exports, sales, or entries of subject merchandise during the respective period of review ("POR") listed below. If a producer or exporter named in this notice of initiation had no exports, sales, or entries during the POR, it should notify the Department within 30 days of publication of this notice in the **Federal Register.** The Department will consider rescinding the review only if the producer or exporter, as appropriate, submits a properly filed and timely statement certifying that it had no exports, sales, or entries of subject merchandise during the POR. All submissions must be made in accordance with 19 CFR 351.303 and are subject to verification in accordance with section 782(i) of the Tariff Act of 1930, as amended ("the Act"). Six copies

of the submission should be submitted to the Assistant Secretary for Import Administration, International Trade Administration, Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Further, in accordance with 19 CFR 351.303(f)(1)(i), a copy of each request must be served on every party on the Department's service list.

Respondent Selection

In the event the Department limits the number of respondents for individual examination for administrative reviews, the Department intends to select respondents based on U.S. Customs and Border Protection ("CBP") data for U.S. imports during the POR. We intend to release the CBP data under Administrative Protective Order ("APO") to all parties having an APO within five days of publication of this initiation notice and to make our decision regarding respondent selection within 20 days of publication of this **Federal Register** notice. The Department invites comments regarding the CBP data and respondent selection within 10 calendar days of publication of this **Federal Register** notice.

Separate Rates

In proceedings involving non-market economy ("NME") countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty deposit rate. It is the Department's policy to assign all exporters of merchandise subject to an administrative review in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate.

To establish whether a firm is sufficiently independent from government control of its export activities to be entitled to a separate rate, the Department analyzes each entity exporting the subject merchandise under a test arising from the *Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China,* 56 FR 20588 (May 6, 1991), as amplified by *Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China,* 59 FR 22585 (May 2,1994). In accordance with the separate-rates criteria, the Department assigns separate rates to companies in NME cases only if respondents can demonstrate the absence of both *de jure* and *de facto* government control over export activities.

All firms listed below that wish to qualify for separate-rate status in the administrative reviews involving NME countries must complete, as appropriate, either a separate-rate application or certification, as described below. For these administrative reviews, in order to demonstrate separate-rate eligibility, the Department requires entities for whom a review was requested, that were assigned a separate rate in the most recent segment of this proceeding in which they participated, to certify that they continue to meet the criteria for obtaining a separate rate. The Separate Rate Certification form will be available on the Department's Web site at *http://www.trade.gov/ia* on the date of publication of this **Federal Register** notice. In responding to the certification, please follow the "Instructions for Filing the Certification" in the Separate Rate Certification. Separate Rate Certifications are due to the Department no later than 30 calendar days after publication of this **Federal Register** notice. The deadline and requirement for submitting a Certification applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers who purchase and export subject merchandise to the United States.

Entities that currently do not have a separate rate from a completed segment of the proceeding [1] should timely file a Separate Rate Application to demonstrate eligibility for a separate rate in this proceeding. In addition, companies that received a separate rate in a completed segment of the proceeding that have subsequently made changes, including, but not limited to, changes to corporate structure, acquisitions of new companies or facilities, or changes to their official company name,[2] should timely file a Separate Rate Application to demonstrate eligibility for a separate rate in this proceeding. The Separate Rate Application will be available on the Department's Web site at *http://www.trade.gov/ia* on the date of publication of this **Federal Register** notice. In responding to the Separate Rate Status Application, refer to the instructions contained in the application. Separate Rate Status Applications are due to the Department no later than 60 calendar days of publication of this **Federal Register** notice. The deadline and requirement for submitting a Separate Rate Status Application applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers that purchase and export subject merchandise to the United States.

For exporters and producers who submit a separate-rate status application or certification and subsequently are selected as mandatory respondents, these exporters and producers will no longer be eligible for separate-rate status unless they respond to all parts of the questionnaire as mandatory respondents.

Initiation of Review

In accordance with 19 CFR 351.221(c)(1)(i), we are initiating an administrative review of the following antidumping duty order. We intend to issue the final results of this review not later than January 31, 2011.

	Period to be Reviewed
Antidumping Duty Proceedings	
Mexico: Prestressed Concrete Steel Wire Strand, A–201–831	1/1/09–12/31/09
Aceros Camesa S.A. de C.V.	
Deacero S.A. de C.V.	
Countervailing Duty Proceedings	
None.	

[1] Such entities include entities that have not participated in the proceeding, entities that were preliminarily granted a separate rate in any currently incomplete segment of the proceedings (*e.g.,* an ongoing administrative review, new shipper review, *etc.*) and entities that lost their separate rate in the most recently complete segment of the proceeding in which they participated.

[2] Only changes to the official company name, rather than trade names, need to be addressed via a Separate Rate Application. Information regarding new trade names may be submitted via a Separate Rate Application.

Suspension Agreements

None.

During any administrative review covering all or part of a period falling between the first and second or third and fourth anniversary of the publication of an antidumping duty order under 19 CFR 351.211 or a determination under 19 CFR 351.218(f)(4) to continue an order or suspended investigation (after sunset review), the Secretary, if requested by a domestic interested party within 30 days of the date of publication of the notice of initiation of the review, will determine, consistent with *FAG Italia* v. *United States,* 291 F.3d 806 (Fed. Cir. 2002), as appropriate, whether antidumping duties have been absorbed by an exporter or producer subject to the review if the subject merchandise is sold in the United States through an importer that is affiliated with such exporter or producer. The request must include the name(s) of the exporter or producer for which the inquiry is requested.

For the first administrative review of any order, there will be no assessment of antidumping or countervailing duties on entries of subject merchandise entered, or withdrawn from warehouse, for consumption during the relevant provisional-measures "gap" period, of the order, if such a gap period is applicable to the POR.

Interested parties must submit applications for disclosure under administrative protective orders in accordance with 19 CFR 351.305. On January 22, 2008, the Department published *Antidumping and Countervailing Duty Proceedings: Documents Submission Procedures; APO Procedures,* 73 FR 3634 (January 22, 2008). Those procedures apply to administrative reviews included in this notice of initiation. Parties wishing to participate in any of these administrative reviews should ensure that they meet the requirements of these procedures (*e.g.,* the filing of separate letters of appearance as discussed in 19 CFR 351.101(d)).

This initiations and this notice are in accordance with section 751(a) of the Tariff Act of 1930, as amended (19 U.S.C. 1675(a)), and 19 CFR 351.221(c)(1)(i).

Dated: February 26, 2010.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2010–4582 Filed 3–3–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XU58

Western Pacific Fishery Management Council; Public Meetings

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

ACTION: Amendment to notice of public meetings and hearings published in **Federal Register**, February 25, 2010.

SUMMARY: The Western Pacific Fishery Management Council (Council) has included an additional action item to be considered at its 147th meeting.

DATES: The 147th Council meeting to be held March 21–26, 2010. For specific times and agendas, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The 147th Council meeting will be held at the Fiesta Resort and Spa on Saipan and at the Guam Hilton on Guam.

FOR FURTHER INFORMATION CONTACT: Kitty M. Simonds, Executive Director; telephone: (808) 522–8220.

SUPPLEMENTARY INFORMATION: In addition to the agenda item listed here, the Council will hear recommendations from Council advisory groups. Public comment period will be provided. The order in which agenda items are addressed may change. The meetings will run as late as necessary to complete scheduled business. The schedule for additional agenda item to be considered is listed here. All other information listed in the original document published at 75 FR 8674, February 25, 2010, has not been modified.

147th Council Meeting, Guam Hilton, Guam

Thursday, March 25, 2010 9 a.m.–5 p.m.

14. Pelagic & International Fisheries

A. Action Items

4. Highly Migratory Species Memorandum of Understanding

Non-Emergency issues not contained in this agenda may come before the Council for discussion and formal Council action during its 147th meeting. However, Council action on regulatory issues will be restricted to those issues specifically listed in this document and any regulatory issue arising after publication of this document that requires emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kitty M. Simonds, (808)522–8220 (voice) or (808)522–8226 (fax), at least five days prior to the meeting date.

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

Dated: March 1, 2010.

Tracey L. Thompson,

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

[FR Doc. 2010–4500 Filed 3–3–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Science Advisory Board; Notice of Open Meeting

AGENCY: Office of Oceanic and Atmospheric Research (OAR), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice of open meeting.

SUMMARY: The Science Advisory Board (SAB) was established by a Decision Memorandum dated September 25, 1997, and is the only Federal Advisory Committee with responsibility to advise the Under Secretary of Commerce for Oceans and Atmosphere on strategies for research, education, and application of science to operations and information services. SAB activities and advice provide necessary input to ensure that National Oceanic and Atmospheric Administration (NOAA) science programs are of the highest quality and provide optimal support to resource management.

Time and Date: The meeting will be held Tuesday March 23, 2010, from 8:30 a.m. to 5:30 p.m. and Wednesday, March 24, 2010, from 8:45 a.m. to 3 p.m.. These times and the agenda topics described below are subject to change. Please refer to the web page *http://www.sab.noaa.gov/Meetings/meetings.html* for the most up-to-date meeting agenda.

Place: The meeting will be held both days at the Dupont Hotel, 1500 New Hampshire Avenue, Washington, DC 20036. Telephone: 202–483–6000. Please check the SAB Web site *http://www.sab.noaa.gov* for confirmation of the venue and for directions.

Status: The meeting will be open to public participation with a 30-minute

public comment period on March 23 at 5 p.m. (check website to confirm time). The SAB expects that public statements presented at its meetings will not be repetitive of previously submitted verbal or written statements. In general, each individual or group making a verbal presentation will be limited to a total time of five (5) minutes. Written comments should be received in the SAB Executive Director's Office by March 16, 2010 to provide sufficient time for SAB review. Written comments received by the SAB Executive Director after March 16, 2010, will be distributed to the SAB, but may not be reviewed prior to the meeting date. Seats will be available on a first-come, first-served basis.

Matters to be Considered: The meeting will include the following topics: (1) Final Report from the Oceans and Health Working Group; (2) Recommendations from the Ecosystem Sciences and Management Working Group; (3) NOAA Response to the SAB Report on Social Sciences in NOAA; (4) NOAA Response to the SAB Report on Stakeholder Engagement; (5) NOAA Response to the SAB Recommendations on Ocean Acidification; (6) NOAA Integrated Weather Radar Plan and 2025 Vision; (7) An Update on the NOAA Hurricane Forecast Improvement Project; (8) Draft U.S. Integrated Ocean Observing System Road Map: Executive Overview; (9) NOAA Response to the SAB Climate Service Options Report and (10) NOAA Next Generation Strategic Plan.

FOR FURTHER INFORMATION CONTACT: Dr. Cynthia Decker, Executive Director, Science Advisory Board, NOAA, Rm. 11230, 1315 East-West Highway, Silver Spring, Maryland 20910. (Phone: 301–734–1156, Fax: 301–713–1459, E-mail: Cynthia.Decker@noaa.gov; or visit the NOAA SAB Website at *http://www.sab.noaa.gov.*

Dated: February 26, 2010.

Mark E. Brown,

Chief Financial Officer, Office of Oceanic and Atmospheric Research, National Oceanic and Atmospheric Administration.

[FR Doc. 2010–4522 Filed 3–3–10; 8:45 am]

BILLING CODE 3510–KD–P

DEPARTMENT OF COMMERCE

Economic Development Administration

Notice of Petitions by Firms for Determination of Eligibility To Apply for Trade Adjustment Assistance

AGENCY: Economic Development Administration, Department of Commerce.

ACTION: Notice and opportunity for public comment.

Pursuant to section 251 of the Trade Act of 1974 (19 U.S.C. 2341 *et seq.*), the Economic Development Administration (EDA) has received petitions for certification of eligibility to apply for Trade Adjustment Assistance from the firms listed below. EDA has initiated separate investigations to determine whether increased imports into the United States of articles like or directly competitive with those produced by each firm contributed importantly to the total or partial separation of the firm's workers, or threat thereof, and to a decrease in sales or production of each petitioning firm.

LIST OF PETITIONS RECEIVED BY EDA FOR CERTIFICATION OF ELIGIBILITY TO APPLY FOR TRADE ADJUSTMENT 2/23/2010 THROUGH 2/26/2010

Firm	Address	Date accepted for filing	Products
Benchmark Sales Agency, Inc. d/b/a Custom Windows.	2727 South Santa Fe Drive, Englewood, CO 80110.	2/23/2010	The company designs and manufactures custom aluminum extruded windows.
Quality Mould, Inc.	110 Dill Lane, Latrobe, PA 15650.	2/23/2010	Moulds for the glass industry and machines metal parts for the defense, energy and mining industries.
A Forbes Company, Inc.	1035 Harper Avenue, SW., Lenoir, NC 28645.	2/24/2010	The firm produces commercial lithographic printing. Materials include ink and paper.
Midland Marble & Granite, LLC	2077 NE Rice Road, Lee's Summit, MO 64064.	2/25/2010	Marble and granite countertops, ceramic tile floors and walls. Carpet, vinyl and wood.
R.E. Hansen Industries, Inc.	22 Research Way, East Setauket, NY 11733.	2/25/2010	Thru-wall air conditioners and accessories.
The Flinchbaugh Company, Inc.	245 Beshore School Road, Manchester, PA 17345.	2/25/2010	Quality machined parts such as off-road heavy duty equipment and truck parts, and performs job shop services to the U.S. military and many leading private manufacturers.
Ascension Industries, Inc.	1254 Erie Avenue, North, NY 14120.	2/26/2010	Ascension's industrial filtration product line consists of 3 primary products, filter presses, tube filters and pressure leaf filters.
Colorado Case, Inc.	1713 E Lincoln Ave., Fort Collins, CO 80524.	2/26/2010	The company manufactures cases, case covers, and straps for musical instruments.

Any party having a substantial interest in these proceedings may request a public hearing on the matter. A written request for a hearing must be submitted to the Trade Adjustment Assistance for Firms Division, Room 7106, Economic Development Administration, U.S. Department of Commerce, Washington, DC 20230, no later than ten (10) calendar days following publication of this notice.

Please follow the procedures set forth in section 315.9 of EDA's final rule (71 FR 56704) for procedures for requesting a public hearing. The Catalog of Federal Domestic Assistance official program number and title of the program under which these petitions are submitted is 11.313, Trade Adjustment Assistance.

Dated: February 26, 2010.

Bryan Borlik,

Program Director.

[FR Doc. 2010–4507 Filed 3–3–10; 8:45 am]

BILLING CODE 3510–24–P

COMMODITY FUTURES TRADING COMMISSION

Public Information Collection Requirement Submitted to Office of Management and Budget (OMB) for Review

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of Submission of Information Collection #3038–0017, Market Surveys.

SUMMARY: The Commodity Futures Trading Commission has submitted information collection 3038–0017, Market Surveys, to OMB for review and clearance under the Paperwork Reduction Act of 1995 (Pub. L. 104–13). The information collected pursuant to these rules is in the public interest and is necessary for market surveillance.

DATES: Comments must be received on or before April 5, 2010.

ADDRESSES: Persons wishing to comment on this information collection should contact Gary J. Martinaitis, Division of Market Oversight, U.S. Commodity Futures Trading Commission, 1155 21st Street, NW., Washington, DC 20581; Fax (202) 418–5527; or E-mail: *gmartinaitis@cftc.gov.*

SUPPLEMENTARY INFORMATION: An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the CFTC's regulations were published on December 30, 1981. See 46 FR 63035 (Dec. 30, 1981). The **Federal Register** notice with a 60-day comment period soliciting comments on this collection of information was published on December 30, 2009 (74 FR 69076).

Title: Market Surveys.

Control Number: 3038–0017.

Action: This is a request for extension of a currently approved information collection.

Respondents: Businesses (excluding small businesses).

Estimated Annual Burden: 700 total hours.

Respondents	Businesses
Regulation (17 CFR)	21.02
Estimated number of respondents	400
Reports annually by each respondent	1
Total annual responses	400
Estimated number of hours per response	1.75

Dated: February 26, 2010.

David A. Stawick,

Secretary to the Commission.

[FR Doc. 2010–4535 Filed 3–3–10; 8:45 am]

BILLING CODE P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meetings

TIME AND DATE: Wednesday, March 10, 2010, 9 a.m.–12 Noon.

PLACE: Hearing Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Commission Meeting—Open to the Public.

MATTERS TO BE CONSIDERED:

1. Pending Decisional Matter: Civil Penalty Factors—Final Rule.

2. Toddler Beds—Notice of Public Rulemaking (NPR).

A live webcast of the Meeting can be viewed at *http://www.cpsc.gov/webcast/index.html.*

For a recorded message containing the latest agenda information, call (301) 504–7948.

CONTACT PERSON FOR MORE INFORMATION: Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814 (301) 504–7923.

Dated: March 1, 2010.

Todd A. Stevenson,

Secretary.

[FR Doc. 2010–4696 Filed 3–2–10; 4:15 pm]

BILLING CODE 6355–01–P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meetings

TIME AND DATE: Wednesday, March 10, 2010; 2 p.m.

PLACE: Hearing Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Closed to the Public.

MATTERS TO BE CONSIDERED:

Compliance Weekly Report—Commission Briefing

The staff will brief the Commission on the status of various compliance matters.

For a recorded message containing the latest agenda information, call (301) 504–7948.

CONTACT PERSON FOR MORE INFORMATION: Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; (301) 504–7923.

Dated: March 1, 2010.

Todd A. Stevenson,

Secretary.

[FR Doc. 2010–4697 Filed 3–2–10; 4:15 pm]

BILLING CODE 6355–01–P

COUNCIL ON ENVIRONMENTAL QUALITY

Draft Principles and Standards Sections of the "Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies"; Initiation of Revision and Request for Comments

AGENCY: Council on Environmental Quality.

ACTION: Notice of the extension of comment period.

SUMMARY: This notice extends the comment period on a notice published in the **Federal Register** on December 9, 2009 (74 FR 65102). The original date that the comment period would end was March 5, 2010. That date will now be extended until April 5, 2010.

Section 2031 of the Water Resources Development Act of 2007 (Pub. L. 110–114) directs the Secretary of the Army to revise the "Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies," (P&G) dated March 10, 1983, consistent with a number of considerations enumerated in the statute. The Administration has initiated the development of uniform planning standards for the development of water resources that would apply to water resources development programs and activities government-wide, to agencies in addition to the traditional water resources development agencies covered under the current Principles and Guidelines: the Army Corps of Engineers, Bureau of Reclamation (Interior), Natural Resources Conservation Service (USDA), and Tennessee Valley Authority. Therefore, the Council on Environmental Quality (CEQ), in coordination with the Office of Management and Budget, has implemented a two phase interagency process revising the planning guidance. The first phase focused on facilitating interagency revisions to the "Principles and Standards" (Chapter I of the existing P&G) of Principles and Guidelines for planning water resources projects. The second phase will address revisions to the Procedures (Chapters II through IV of the 1983 P&G).

Upon approval of the revised "Principles and Standards" and the future revision of the Procedures, the entire revision will apply to Federal water resources implementation studies including project reevaluations and modifications except those commenced prior to the issuance of the revised guidance. The purpose of this notice is

to provide an opportunity for interested individuals and organizations to submit comments on the revised "Principles and Standards". Using these comments and those from the National Academy of Sciences, CEQ will lead an interagency effort to finalize the Principles and Standards and draft the Procedures sections of the Principles and Guidelines.

Draft Document For Review: The draft "Principles and Standards" for review can be accessed on the Internet at *http://www.whitehouse.gov/administration/eop/ceq/initiatives/PandG/* or, upon request, will be provided by mail or e-mail.

DATES: CEQ is extending the written comments period, they will be accepted through April 5, 2010.

ADDRESSES: Comments may be submitted in writing to the Council on Environmental Quality, Attn: Terry Breyman, 722 Jackson Place, NW., Washington, DC 20503, via e-mail to *P&G@ceq.eop.gov,* FAX 202–456–6546, or submitted via the CEQ Web page at *http://www.whitehouse.gov/administration/eop/ceq/initiatives/PandG/.*

FOR FURTHER INFORMATION CONTACT: Terry Breyman, Deputy Associate Director for Natural Resources, at 202–456–9721.

SUPPLEMENTARY INFORMATION: The Council on Environmental Quality in conjunction with the Office of Management and Budget is seeking comments on the revised draft of the "Principles and Standards" (Chapter I of the 1983 P&G) which is the first phase. Revision of Chapters II through IV of the Procedures will be initiated at a later date. Written comments should be submitted to Terry Breyman, 722 Jackson Place, NW., Washington, DC 20503 or via e-mail to *P&G@ceq.eop.gov* or FAX 202–456–6546. Comments may also be submitted directly to the Council of Environmental Quality Web page at *http://www.whitehouse.gov/administration/eop/ceq/initiatives/PandG/.* To help understand the changes, the following background documents will be made available by mail or e-mail or they may be accessed at the Internet addresses indicated: "Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies dated March 10, 1983 (*http://www.usace.army.mil/CECW/PlanningCOP/Documents/library/Principles_Guidelines.pdf*) Water Resources Development Act of 2007 (Pub. L. 110–114) at *http://www.usace.army.mil/CECW/PlanningCOP/Documents/library/hr1495_pl110–114.pdf.*

Dated: February 26, 2010.

Nancy H. Sutley,

Chair, Council on Environmental Quality.

[FR Doc. 2010–4501 Filed 3–3–10; 8:45 am]

BILLING CODE 3125–W0–P

DEPARTMENT OF EDUCATION

Office of Innovation and Improvement; Overview Information Magnet Schools Assistance Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2010

Catalog of Federal Domestic Assistance (CFDA) Number: 84.165A.

Dates:

Applications Available: March 8, 2010.

Deadline for Notice of Intent to Apply: April 5, 2010.

Date of Pre-Application Meeting: March 26, 2010.

Deadline for Transmittal of Applications: May 3, 2010.

Deadline for Intergovernmental Review: July 2, 2010.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The Magnet Schools Assistance Program (MSAP) provides grants to eligible local educational agencies (LEAs) and consortia of LEAs to support magnet schools that are part of an approved desegregation plan. Through the implementation of magnet schools, these program resources can be used in pursuit of the objectives of the Elementary and Secondary Education Act (ESEA), which supports State and local efforts to enable all elementary and secondary students to achieve to high standards and holds schools, LEAs, and States accountable for ensuring that their students do so. In particular, the MSAP provides an opportunity for eligible entities to focus on expanding their capacity to provide public school choice to students who attend schools identified for improvement, corrective action, or restructuring under Title I, Part A of the ESEA.

Priorities: This competition includes four competitive preference priorities which are explained in the following paragraphs.

Competitive Preference Priorities: In accordance with 34 CFR 75.105(b)(2)(ii), Priorities 1, 2, and 3 are from the regulations for this program (34 CFR 280.32). Priority 4 is from the notice of final priority for this program, published in the **Federal Register** on March 9, 2007 (72 FR 10729).

For FY 2010, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i) we award up to an additional 40 points to an application, depending on how well the application meets these priorities. The maximum possible points for each priority are indicated in parentheses following the title of the competitive preference priority. These points are in addition to any points the application earns under the selection criteria.

These priorities are:

Priority 1—Need for assistance (up to 10 additional points). The Secretary evaluates the applicant's needs for assistance under the MSAP regulations in 34 CFR part 280, by considering—

(a) The costs of fully implementing the magnet schools project as proposed;

(b) The resources available to the applicant to carry out the project if funds under the program were not provided;

(c) The extent to which the costs of the project exceed the applicant's resources; and

(d) The difficulty of effectively carrying out the approved plan and the project for which assistance is sought, including consideration of how the design of the magnet schools project—*e.g.,* the type of program proposed, the location of the magnet school within the LEA—impacts on the applicant's ability to carry out the approved plan successfully.

Priority 2—New or revised magnet school projects (up to 10 additional points). The Secretary determines the extent to which the applicant proposes to carry out new magnet schools projects or significantly revise existing magnet schools projects.

Priority 3—Selection of students (up to 10 additional points). The Secretary determines the extent to which the applicant proposes to select students to attend magnet schools by methods such as lottery, rather than through academic examination.

Priority 4—Expanding Capacity to Provide Choice (up to 10 additional points). This priority supports projects that will—

(1) Help parents whose children attend low-performing schools (that is, schools that have been identified for school improvement, corrective action, or restructuring under Title I of the Elementary and Secondary Education Act of 1965, as amended) by—

(a) Selecting schools identified for school improvement, corrective action, or restructuring under Title I as magnet schools to be funded under this project and improving the quality of teaching and instruction in these schools; or

(b) Maximizing the opportunity for students in low-performing schools to attend higher-performing magnet schools funded under the project and thereby reduce minority group isolation in the low-performing sending schools; and

(2) Effectively inform parents whose children attend low-performing schools about choices that are available to them in the magnet schools funded under the project.

Note 1: For the purpose of this priority, *school improvement* has the meaning given in 34 CFR 200.32(a)(1), *corrective action* has the meaning given in 34 CFR 200.33(a), and *restructuring* has the meaning given in 34 CFR 200.34(a).

Note 2: Priority 4 provides for an applicant to earn up to 10 priority points. To earn a maximum of 10 points an applicant must meet both paragraph (1)(a) and (1)(b) and paragraph (2) of the priority. An applicant proposing only to use the approach in paragraph 1(a) in one or more schools in the district and that meets paragraph (2) would earn up to 5 points. Similarly, an applicant proposing only to use the approach in paragraph 1(b) in one or more other schools in the district and that meets paragraph (2) would earn up to 5 additional points. Applicants proposing to use one or both approaches must also meet paragraph (2) in order to receive points under this priority.

Background for Priority 4: Paragraph 1(a) supports eligible applicants that propose to convert one or more schools identified for improvement, corrective action, or restructuring under Title I into magnet schools. Paragraph 1(b) supports eligible applicants that would use higher-performing schools as magnet schools and, by doing so, significantly increase the opportunity for students attending schools identified for school improvement, corrective action, or restructuring to participate in public school choice by attending a higher-performing school. Under paragraph 1(b), an eligible applicant would need to ensure that the magnet school would have sufficient space available to accommodate students who would likely be interested in transferring from schools identified for school improvement, corrective action, or restructuring. Additionally, the applicant would need to show how the enrollment of the magnet and/or sending schools (*i.e.,* the schools identified for school improvement, corrective action, or restructuring from which students would transfer) would change in a manner that resulted in the elimination, reduction, or prevention of minority group isolation in those sending schools.

Program Authority: 20 U.S.C. 7231–7231j.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 75, 77, 79, 80, 81, 82, 84, 85, 97, 98, and 99. (b) The regulations for this program in 34 CFR part 280 as amended by the interim final regulations published elsewhere in this issue of the **Federal Register.** (c) The notice of final priority for the MSAP, published in the **Federal Register** on March 9, 2007 (72 FR 10729).

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $100,000,000.

Estimated Range of Awards: $350,000–$4,000,000 per year.

Estimated Average Size of Awards: $2,500,000 per year.

Maximum Award: We will not fund any application at an amount exceeding the maximum amount of $4,000,000 per year specified in section 5309(c) of the Elementary and Secondary Education Act of 1965, as amended (ESEA), for a single fiscal year. We may choose not to further consider or review applications with budget requests for any 12-month budget period that exceed this amount, if we conclude, during our initial review of the application, that the proposed goals and objectives cannot be obtained with the specified maximum amount.

Estimated Number of Awards: 40.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months.

III. Eligibility Information

1. *Eligible Applicants:* LEAs or consortia of LEAs.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

3. *Other:* Applicants must submit with their applications one of the following types of desegregation plans to establish eligibility to receive MSAP assistance: (a) A desegregation plan required by a court order; (b) a desegregation plan required by a State agency or an official of competent jurisdiction; (c) a desegregation plan required by the Office for Civil Rights (OCR), United States Department of Education (Department), under Title VI of the Civil Rights Act of 1964 (Title VI plan); or (d) a voluntary desegregation plan adopted by the applicant and submitted to us for approval as part of the application. Under the MSAP regulations, applicants are required to provide all of the information required in 34 CFR 280.20(a) through (g), as amended by the interim final regulations published elsewhere in this issue of the **Federal Register,** in order to satisfy the civil rights eligibility requirements found in 34 CFR 280.2(a)(2) and (b).

In addition to the particular data and other items for required and voluntary desegregation plans described in the application package, an application must include—

Signed civil rights assurances (included in the application package);

A copy of the applicant's desegregation plan; and

An assurance that the desegregation plan is being implemented or will be implemented if the application is funded.

Required Desegregation Plans

1. *Desegregation plans required by a court order.* An applicant that submits a desegregation plan required by a court order must submit complete and signed copies of all court or State documents demonstrating that the magnet schools are a part of the approved desegregation plan. Examples of the types of documents that would meet this requirement include—

A Federal or State court order that establishes or amends a previous order or orders by establishing additional or different specific magnet schools;

A Federal or State court order that requires or approves the establishment of one or more unspecified magnet schools or that authorizes the inclusion of magnet schools at the discretion of the applicant.

2. *Desegregation plans required by a State agency or official of competent jurisdiction.* An applicant submitting a desegregation plan ordered by a State agency or official of competent jurisdiction must provide documentation that shows that the desegregation plan was ordered based upon a determination that State law was violated. In the absence of this documentation, the applicant should consider its desegregation plan to be a voluntary plan and submit the data and information necessary for voluntary plans.

3. *Title VI required desegregation plans.* An applicant that submits a desegregation plan required by OCR under Title VI must submit a complete copy of the desegregation plan demonstrating that magnet schools are part of the approved plan.

4. *Modifications to required desegregation plans.* A previously approved desegregation plan that does not include the magnet school or program for which the applicant is now seeking assistance must be modified to include the magnet school component. The modification to the desegregation

plan must be approved by the court, agency, or official that originally approved the plan. An applicant that wishes to modify a previously approved OCR Title VI desegregation plan to include different or additional magnet schools must submit the proposed modification for review and approval to the OCR regional office that approved its original plan.

An applicant should indicate in its application if it is seeking to modify its previously approved plan. However, all applicants must submit proof of approval of all modifications to their desegregation plans to the Department by June 2, 2010. Proof of plan modifications should be mailed to the person and address identified under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Voluntary Desegregation Plans

A voluntary desegregation plan must be approved by ED each time an application is submitted for funding. Even if ED has approved a voluntary desegregation plan in an LEA in the past, the plan must be resubmitted for approval as part of the application.

The enrollment and other information as required by the regulations in 34 CFR 280.20(f) and (g) for applicants with voluntary desegregation plans (specific requirements are detailed in the application package) are critical to our determination of an applicant's eligibility under a voluntary desegregation plan.

The purposes of the MSAP include the reduction, elimination, or prevention of minority group isolation. All voluntary desegregation plans proposed in an LEA's application must be adequate under Title VI.

IV. Application and Submission Information

1. *Address To Request Application Package:* You can obtain an application package via the Internet, from the Education Publications Center (ED Pubs), or from the program office.

To obtain a copy via the Internet, use the following address: *http://www.ed.gov/fund/grant/apply/grantapps/index.html.*

To obtain a copy from ED Pubs, write, fax, or call the following: U.S. Department of Education—ED Pubs—NTIS, P.O. Box 22207, Alexandria, VA 22304. Telephone, toll free: 1–877–433–7827. FAX: (703) 605–6791. If you use a telecommunications device for the deaf (TDD), call, toll free: 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *http://www.ed.gov/pubs/edpubs.html* or at its e-mail address: *edpubs@inet.ed.gov.*

If you request an application from ED Pubs, be sure to identify this program as follows: CFDA number 84.165A.

To obtain a copy from the program office, contact: Rosie Kelley, U.S. Department of Education, 400 Maryland Avenue, SW., Room 4W221, Washington, DC 20202–6450. Telephone: (202) 260–1108 or by e-mail: *FY10MSAPCOMP@ed.gov.* If you use a 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 person listed in this section.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Notice of Intent To Apply: The Department will be able to develop a more efficient process for reviewing grant applications if it has a better understanding of the number of entities that intend to apply for funding under this competition. Therefore, the Secretary strongly encourages each potential applicant to notify the Department by sending a short e-mail message indicating the applicant's intent to submit an application for funding. The e-mail need not include information regarding the content of the proposed application, only the applicant's intent to submit it. This e-mail notification should be sent to *FY10MSAPCOMP@ed.gov.* Applicants that do not provide this e-mail notification may still apply for funding.

Page Limit: The application narrative is where you, the applicant, address the selection criteria and two of the competitive preference priorities that reviewers use to evaluate your application. The two competitive preference priorities that must be addressed in the application narrative are Competitive Preference Priority 1—Need for Assistance; and Competitive Preference Priority 4—Expanding Capacity to Provide Choice. You must limit the application narrative to the equivalent of no more than 100 pages, using the following standards:

- A "page" is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, 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. An application submitted in any other font (including Times Roman or Arial Narrow) will be not accepted.

The page limit does not apply to the cover sheet; the budget section, including the narrative budget justification; the assurances, certifications, the desegregation plan and related information; the forms used to respond to Competitive Preference Priority 2—New or revised magnet schools projects and Competitive Preference Priority 3—Selection of students; or the one-page abstract, the resumes, or letters of support. However, the page limit does apply to all of the application narrative.

Our reviewers will not read any pages of your application that—

- Exceed the page limit; or
- Exceed the equivalent of the page limit if you apply other standards.

3. *Submission Dates and Times:*

Applications Available: March 8, 2010.

Date of Pre-Application Meeting: The Department will hold a pre-application meeting for prospective applicants on Friday, March 26, 2010, from 1:30 p.m. to 3:30 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 MSAP, competitive preference priorities, selection criteria, application content, 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, MSAP staff also will be available from 3:30 p.m. to 4:30 p.m. 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 *FY10MSAPCOMP@ed.gov.* There is no registration fee for attending this meeting. For further information contact Rosie Kelley, U.S. Department of Education, Office of Innovation and

Improvement, room 4W221, 400 Maryland Avenue, SW., Washington, DC 20202. Telephone: (202) 260–0911 or by e-mail: *FY10MSAPCOMP@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 accessible format), notify the contact person listed in this notice at least two weeks 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: May 3, 2010.

Applications for grants under this competition must be submitted electronically using the Electronic Grant Application System (e-Application) accessible through the Department's e-Grants site. 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. 6. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: July 2, 2010.

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 competition.

5. *Funding Restrictions:* We specify unallowable costs in 34 CFR 280.41. We reference additional regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Other Submission Requirements:* Applications for grants under this competition must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the Magnet Schools Assistance Program—CFDA Number 84.165A must be submitted electronically using e-Application, accessible through the Department's e-Grants Web site at: *http://e-grants.ed.gov.*

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.*

While completing your electronic application, you will be entering data online that will be saved into a database. You may not e-mail an electronic copy of a grant application to us.

Please note the following:

• You must complete the electronic submission of your grant application by 4:30:00 p.m., Washington, DC time, on the application deadline date. E–Application will not accept an application for this competition after 4:30:00 p.m., Washington, DC time, on the application deadline date. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the application process.

• The hours of operation of the e-Grants Web site are 6:00 a.m. Monday until 7:00 p.m. Wednesday; and 6:00 a.m. Thursday until 8:00 p.m. Sunday, Washington, DC time. Please note that, because of maintenance, the system is unavailable between 8:00 p.m. on Sundays and 6:00 a.m. on Mondays, and between 7:00 p.m. on Wednesdays and 6:00 a.m. on Thursdays, Washington, DC time. Any modifications to these hours are posted on the e-Grants Web site.

• 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 attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three file types specified in this paragraph 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.

• Prior to submitting your electronic application, you may wish to print a copy of it for your records.

• After you electronically submit your application, you will receive an automatic acknowledgment that will include a PR/Award number (an identifying number unique to your application).

• Within three working days after submitting your electronic application, fax a signed copy of the SF 424 to the Application Control Center after following these steps:

(1) Print SF 424 from e-Application.

(2) The applicant's Authorizing Representative must sign this form.

(3) Place the PR/Award number in the upper right hand corner of the hard-copy signature page of the SF 424.

(4) Fax the signed SF 424 to the Application Control Center at (202) 245–6272.

• We may request that you provide us original signatures on other forms at a later date.

Application Deadline Date Extension in Case of e-Application Unavailability: If you are prevented from electronically submitting your application on the application deadline date because e-Application is unavailable, we will grant you an extension of one business day to enable you to transmit your application electronically, by mail, or by hand delivery. We will grant this extension if—

(1) You are a registered user of e-Application and you have initiated an electronic application for this competition; and

(2) (a) E-Application is unavailable for 60 minutes or more between the hours of 8:30 a.m. and 3:30 p.m., Washington,

DC time, on the application deadline date; or

(b) E-Application is unavailable for any period of time between 3:30 p.m. and 4:30:00 p.m., Washington, DC time, on the application deadline date.

We must acknowledge and confirm these periods of unavailability before granting you an extension. To request this extension or to confirm our acknowledgment of any system unavailability, you may contact either (1) the person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT** (see VII. Agency Contact) or (2) the e-Grants help desk at 1–888–336–8930. If e-Application is unavailable due to technical problems with the system and, therefore, the application deadline is extended, an e-mail will be sent to all registered users who have initiated an e-Application. Extensions referred to in this section apply only to the unavailability of e-Application.

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 e-Application because—

- You do not have access to the Internet; or
- You do not have the capacity to upload large documents to e-Application; *and*
- No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevents you from using the Internet to submit your application. If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Rosie Kelley, U.S. Department of Education, 400 Maryland Avenue, SW., room 4W221, Washington, DC 20202. FAX: (202) 260–1108.

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 84.165A), 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 84.165A), 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 grant 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

Selection Criteria: The selection criteria for this program are from 34 CFR 75.210 (Quality of Project Services) and 34 CFR 280.31 (Quality of personnel, Quality of project design, Budget and resources, Evaluation plan, Commitment and capacity). The quality of project design criterion is based on sections 5305(b)(1)(A), 5305(b)(1)(B), 5305(b)(1)(D)(i), 5305(b)(2)(D) and 5307(b) of the ESEA, in accordance with 34 CFR 75.209 and 280.30. All of the selection criteria are listed in this section and in the application package.

The maximum score for all the selection criteria is 100 points. The maximum score for each criterion is included in parentheses. Each criterion also includes the factors that reviewers will consider in determining whether an application meets the criterion.

Points awarded under these selection criteria are in addition to any points an applicant earns under the competitive preference priorities in this notice. The maximum score an application may receive based on the priority points and the selection criteria is 140 points.

The selection criteria are as follows:

(a) *Quality of project services.* (25 points)

(1) The Secretary considers the quality of the services to be provided by the proposed project.

(2) In determining the quality of the services to be provided by the proposed project, the Secretary considers the quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(3) In addition, the Secretary considers one or more of the following factors:

(i) The extent to which the services to be provided by the proposed project are appropriate to the needs of the intended recipients or beneficiaries of those services.

(iii) The extent to which the services to be provided by the proposed project reflect up-to-date knowledge from research and effective practice.

(iv) The likely impact of the services to be provided by the proposed project on the intended recipients of those services.

(v) The extent to which the training or professional development services to be

provided by the proposed project are of sufficient quality, intensity, and duration to lead to improvements in practice among the recipients of those services.

(vii) The likelihood that the services to be provided by the proposed project will lead to improvements in the achievement of students as measured against rigorous academic standards.

(ix) The extent to which the services to be provided by the proposed project involve the collaboration of appropriate partners for maximizing the effectiveness of project services.

(b) *Quality of personnel.* (15 points)

(1) The Secretary reviews each application to determine the qualifications of the personnel the applicant plans to use on the project.

(2) The Secretary determines the extent to which—

(i) The project director (if one is used) is qualified to manage the project;

(ii) Other key personnel are qualified to manage the project;

(iii) Teachers who will provide instruction in participating magnet schools are qualified to implement the special curriculum of the magnet schools; and

(iv) The applicant, as part of its nondiscriminatory employment practices will ensure that its personnel are selected for employment without regard to race, religion, color, national origin, sex, age, or disability.

(3) To determine personnel qualifications, the Secretary considers experience and training in fields related to the objectives of the project, including the key personnel's knowledge of and experience in curriculum development and desegregation strategies.

(c) *Quality of project design.* (25 points)

(1) The Secretary reviews each application to determine the quality of the project design based on sections 5305(b)(1)(A), 5305(b)(1)(B), 5305(b)(1)(D)(i), 5305(b)(2)(D) and 5307(b) of the ESEA.

(2) The Secretary determines the extent to which each magnet school for which funding is sought will—

(i) Promote desegregation, including how each proposed magnet school program will increase interaction among students of different social, economic, ethnic and racial backgrounds.

(ii) Improve student academic achievement for all students attending each magnet school program, including the manner and extent to which each magnet school program will increase student academic achievement in the instructional area or areas offered by the school;

(iii) Implement high-quality activities that are directly related to improving student academic achievement based on the State's challenging academic content standards and student academic achievement standards or directly related to improving students' reading skills or knowledge of mathematics, science, history, geography, English, foreign languages, art, or music, or to improving vocational, technological, and professional skills; and

(iv) Carry out a high-quality education program that will encourage greater parental decision-making and involvement.

(d) *Budget and resources.* (10 points)

The Secretary reviews each application to determine the adequacy of the resources and the cost-effectiveness of the budget for the project, including—

(1) The adequacy of the facilities that the applicant plans to use;

(2) The adequacy of the equipment and supplies that the applicant plans to use; and

(3) The adequacy and reasonableness of the budget for the project in relation to the objectives of the project.

(e) *Evaluation plan.* (10 points)

The Secretary determines the extent to which the evaluation plan for the project—

(1) Includes methods that are appropriate to the project;

(2) Will determine how successful the project is in meeting its intended outcomes, including its goals for desegregating its students and increasing student achievement; and

(3) Includes methods that are objective and that will produce data that are quantifiable.

(f) *Commitment and capacity.* (15 points)

(1) The Secretary reviews each application to determine whether the applicant is likely to continue the magnet school activities after assistance under the regulations is no longer available.

(2) The Secretary determines the extent to which the applicant—

(i) Is committed to the magnet schools project; and

(ii) Has identified other resources to continue support for the magnet school activities when assistance under this program is no longer available.

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:* 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:* We have established five performance measures for the MSAP, four annual measures and two long-term measures:

(a) The percentage of magnet schools whose student applicant pool reduces, eliminates or prevents minority group isolation.

(b) Percentage of magnet schools whose students from major racial and ethnic groups meet or exceed State annual progress standards in reading/language arts.

(c) Percentage of magnet schools whose students from major racial and ethnic groups meet or exceed State annual progress standards in mathematics.

(d) The cost per Student in a Magnet School.

(e) Percentage of magnet schools that received assistance that are still operating magnet school programs 3 years after Federal funding ends.

(f) Percentage of magnet schools that received assistance that meet State standards at least 3 years after Federal funding ends.

VII. Agency Contact

For Further Information Contact: Anna Hinton, U.S. Department of Education, 400 Maryland Avenue, SW., Room 4W229, Washington, DC 20202–5970. Telephone: (202) 260–1108 or by e-mail: *FY10MSAPCOMP@ed.gov.* If you use a TDD, call the FRS, at 1–800–877–8339.

VIII. Other Information

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** in section VII of this notice.

Electronic Access to This Document: 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) on the Internet at the following site: *http://www.ed.gov/news/fedregister.* To use PDF you must have Adobe Acrobat Reader, which is available free at this site.

Note: 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 on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: February 25, 2010.

James H. Shelton III,

Assistant Deputy Secretary for Innovation and Improvement.

[FR Doc. 2010–4416 Filed 3–3–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Savannah River Site

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Savannah River Site. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register.**

DATES: Monday, March 22, 2010 1 p.m.–5 p.m. Tuesday, March 23, 2010 8:30 a.m.–4 p.m.

ADDRESSES: Embassy Suites, 200 Stoneridge Drive, Columbia, SC 29210.

FOR FURTHER INFORMATION CONTACT: Sheron Smith, Office of External Affairs, Department of Energy, Savannah River Operations Office, P.O. Box A, Aiken, SC 29802; Phone: (803) 952–9480.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda

Monday, March 22, 2010

1 p.m. Combined Committee Session
5 p.m. Adjourn

Tuesday, March 23, 2010

8:30 a.m. Approval of Minutes, Agency Updates
Public Comment Session
Chair and Facilitator Updates
Waste Management Committee Report
Public Comment Session
12 p.m. Lunch Break
1 p.m. Strategic and Legacy Management Committee Report
Facility Disposition and Site Remediation Committee Report
Nuclear Materials Committee Report
Administrative Committee Report
Public Comment Session
4 p.m. Adjourn

If needed, time will be allotted after public comments for items added to the agenda and administrative details. A final agenda will be available at the meeting on Monday, March 22, 2010.

Public Participation: The EM SSAB, Savannah River Site, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Sheron Smith at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Sheron Smith's office at the address or telephone listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Sheron Smith at the address or phone number listed above. Minutes will also be available at the following website: *http://www.srs.gov/general/outreach/srs-cab/srs-cab.html.*

Issued at Washington, DC on March 1, 2010.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. 2010–4515 Filed 3–3–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Advisory Board Meeting

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Advisory Board (EMAB). The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register.**

DATES: Wednesday, March 31, 2010 9 a.m.–5 p.m.

ADDRESSES: Crystal Gateway Marriott, 1700 Jefferson Davis Highway, Arlington, Virginia 22202.

FOR FURTHER INFORMATION CONTACT: Terri Lamb, Designated Federal Officer, EMAB (EM–42), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585. Phone (202) 586–9007; fax (202) 586–0293 or e-mail: *terri.lamb@em.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of EMAB is to provide the Assistant Secretary for Environmental Management (EM) with advice and recommendations on corporate issues confronting the EM program. EMAB will contribute to the effective operation of the program by providing individual citizens and representatives of interested groups an opportunity to present their views on issues facing EM and by helping to secure consensus recommendations on those issues.

Tentative Agenda Topics

- EM Program Update
- Energy Park Initiative
- Acquisition, Project Management and Quality Assurance
- American Recovery and Reinvestment Act and Strategic Planning
- EM Human Capital
- Board Business and Subcommittee Updates

Public Participation: EMAB welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Terri Lamb at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to the agenda should contact Terri Lamb at the address or telephone number listed

above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Terri Lamb at the address or phone number listed above. Minutes will also be available at the following Web site *http://www.em.doe.gov/stakepages/emabmeetings.aspx.*

Issued at Washington, DC on March 1, 2010.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. 2010–4521 Filed 3–3–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Northern New Mexico

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Northern New Mexico. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register.**

DATES: Wednesday, March 31, 2010, 1 p.m.–7 p.m.

ADDRESSES: The Lodge at Santa Fe, 750 North Saint Francis Drive, Santa Fe, New Mexico 87501.

FOR FURTHER INFORMATION CONTACT: Menice Santistevan, Northern New Mexico Citizens' Advisory Board (NNMCAB), 1660 Old Pecos Trail, Suite B, Santa Fe, NM 87505. Phone (505) 995–0393; Fax (505) 989–1752 or E-mail: *msantistevan@doeal.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda:

1 p.m. Call to Order by Co-Deputy Designated Federal Officers, Ed Worth and Lee Bishop
Establishment of a Quorum, Lorelei Novak
- Roll Call
- Excused Absences

Welcome and Introductions, Ralph Phelps
Approval of Agenda
Approval of December 27, 2010 Meeting Minutes
1:15 p.m. Public Comment Period
1:30 p.m. Old Business
- Written reports
- Other items

1:45 p.m. New Business
2 p.m. Overview of Los Alamos National Security Reorganization, Michael Graham
3 p.m. Break
3:15 p.m. Presentation on the Inventory of Waste at Area G, George Henckel
4 p.m. Consideration and Action on Draft Recommendation(s)
5 p.m. Dinner Break
6 p.m. Public Comment Period
6:15 p.m. Continue Consideration and Action on Draft Recommendation(s)
7 p.m. Adjourn

Public Participation: The EM SSAB, Northern New Mexico, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Menice Santistevan at least seven days in advance of the meeting at the telephone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Menice Santistevan at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Menice Santistevan at the address or phone number listed above. Minutes and other Board documents are on the Internet at: *http://www.nnmcab.org/.*

Issued at Washington, DC on February 26, 2010.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. 2010–4520 Filed 3–3–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Methane Hydrate Advisory Committee

AGENCY: Department of Energy, Office of Fossil Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Methane Hydrate Advisory Committee. Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that notice of these meetings be announced in the **Federal Register.**

DATES: Friday, March 26, 2010, 3 p.m. to 5 p.m. (Eastern Daylight Time).

ADDRESSES: TMS, Inc., 955 L'Enfant Plaza North, SW., Suite 1500, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Edith Allison, U.S. Department of Energy, Office of Oil and Natural Gas, Washington, DC 20585. Phone: 202–586–1023.

SUPPLEMENTARY INFORMATION:

Purpose of the Committee: The purpose of the Methane Hydrate Advisory Committee is to provide advice on potential applications of methane hydrate to the Secretary of Energy, and assist in developing recommendations and priorities for the Department of Energy Methane Hydrate Research and Development Program.

Tentative Agenda

2:45 p.m.–3 p.m. Registration
3 p.m.–3:15 p.m. Welcome and Introductions
3:15 p.m.–3:45 p.m. Discussion of the Plans for FY2011 Gas Hydrate R&D in the Basic Energy Sciences Program in the Office of Science
3:45 p.m.–4:45 p.m. Preparation of Comments and Recommendations to the Secretary of Energy Regarding Moving Gas Hydrate R&D from the Office of Fossil Energy to the Office of Science
4:45 p.m.–5 p.m. Final Announcements and Adjourn

Public Participation: The meeting is open to the public. The Chairman of the Committee will conduct the meeting to facilitate the orderly conduct of business. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact Edith Allison at the address or telephone number listed above. You must make your request for an oral statement at least five business days prior to the meeting, and reasonable provisions will be made to include the presentation on

the agenda. Public comment will follow the 10 minute rule.

Minutes: The minutes of this meeting will be available for public review and copying within 60 days at the Freedom of Information Public Reading Room, Room 1G–033, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Issued at Washington, DC, on February 26, 2010.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. 2010–4519 Filed 3–3–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Advanced Scientific Computing Advisory Committee

AGENCY: Department of Energy, Office of Science.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Advanced Scientific Computing Advisory Committee (ASCAC). Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Tuesday, March 30, 2010, 9 a.m. to 5 p.m.; Wednesday, March 31, 2010, 9 a.m. to 12 p.m.

ADDRESSES: American Geophysical Union, (AGU), 2000 Florida Avenue, NW., Washington, DC 20009–1277.

FOR FURTHER INFORMATION CONTACT: Melea Baker, Office of Advanced Scientific Computing Research; SC–21/Germantown Building; U.S. Department of Energy; 1000 Independence Avenue, SW.; Washington, DC 20585–1290; Telephone (301)–903–7486, (E-mail: *Melea.Baker@science.doe.gov*).

SUPPLEMENTARY INFORMATION:

Purpose of the Meeting: The purpose of this meeting is to provide advice on the advanced scientific computing research program.

Tentative Agenda: Agenda will include discussions of the following:

Tuesday, March 30, 2010

ASCR program update
FY11 Budget request
ARRA update
Exascale Computing
ASCAC Exascale Subcommittee progress report
Public Comment
Committee Dinner—Open to the Public

Wednesday, March 31, 2010

ASCAC COV update
Joule Code team report
Role of Computing in Basic Energy Sciences
Public Comment

Public Participation: The meeting is open to the public. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, or participate in the tour or committee dinner, you should contact Melea Baker via FAX at 301–903–4846 or via e-mail *(Melea.Baker@science.doe.gov).* You must make your request for an oral statement at least 5 business days prior to the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

Minutes: The minutes of this meeting will be available for public review and copying within 30 days at the Freedom of Information Public Reading Room; 1E–190, Forrestal Building; 1000 Independence Avenue, SW.; Washington, DC 20585; between 9 a.m. and 4 p.m., Monday through Friday, except holidays.

Issued in Washington, DC on March 1, 2010.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. 2010–4518 Filed 3–3–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined No.tice of Filings

February 17, 2010.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP10–370–000.

Applicants: Kinder Morgan Interstate Gas Trans. LLC.

Description: Kinder Morgan Interstate Gas Transmission LLC submits Original Sheet No. 4G.03 to FERC Gas Tariff, Fourth Revised Volume No. 1A, to be effective 3/1/10.

Filed Date: 02/12/2010.

Accession Number: 20100216–0201.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 24, 2010.

Docket Numbers: RP10–371–000.

Applicants: Kinder Morgan Interstate Gas Trans. LLC.

Description: Kinder Morgan Interstate Gas Transmission LLC submits Ninth Revised Sheet No. 4G.02 to FERC Gas Tariff, Fourth Revised Volume No. 1A.

Filed Date: 02/05/2010.

Accession Number: 20100216–0202.

Comment Date: 5 p.m. Eastern Time on Friday, February 19, 2010.

Docket Numbers: RP10–372–000.

Applicants: Rockies Express Pipeline LLC.

Description: Rockies Express Pipeline LLC submits Eighth Revised Sheet No. 8 *et al.* to FERC Gas Tariff, Second Revised Volume No. 1, to be effective 2/13/10.

Filed Date: 02/12/2010.

Accession Number: 20100216–0203.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 24, 2010.

Docket Numbers: RP10–373–000.

Applicants: Rockies Express Pipeline LLC.

Description: Rockies Express Pipeline LLC submits Seventh Revised Sheet No. 8C *et al.* to FERC Gas Tariff, Second Revised Volume No. 1, to be effective 2/12/10.

Filed Date: 02/12/2010.

Accession Number: 20100216–0204.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 24, 2010.

Docket Numbers: RP10–374–000.

Applicants: CenterPoint Energy Gas Transmission Co.

Description: CenterPoint Energy Gas Transmission Co's requests for a limited waiver of tariff provisions and expedited consideration.

Filed Date: 02/12/2010.

Accession Number: 20100216–0205.

Comment Date: 5 p.m. Eastern Time on Friday, February 19, 2010.

Docket Numbers: RP10–375–000.

Applicants: Texas Eastern Transmission LP.

Description: Texas Eastern Transmission, LP submits its FERC Gas Tariff, Seventh Revised Volume 1 and First Revised Volume 2, to be effective 3/14/10.

Filed Date: 02/12/2010.

Accession Number: 20100216–0206.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 24, 2010.

Docket Numbers: RP10–376–000.

Applicants: Columbia Gulf Transmission Company.

Description: Columbia Gulf Transmission Company's Annual Report on Operational Purchases and Sales.

Filed Date: 02/16/2010.

Accession Number: 20100216–5108.

Comment Date: 5 p.m. Eastern Time on Monday, March 01, 2010.

Docket Numbers: RP10–377–000.

Applicants: Hardy Storage Company LLC.

Description: Hardy Storage Company, LLC Annual Report on Operational Transactions.

Filed Date: 02/16/2010.

Accession Number: 20100216–5109.

Comment Date: 5 p.m. Eastern Time on Monday, March 01, 2010.

Docket Numbers: RP10–380–000.

Applicants: Kinder Morgan Interstate Gas Pipeline LLC.

Description: Kinder Morgan Interstate Gas Pipeline LLC submits Tenth Revised Sheet No. 4G.02 *et al.* to FERC Gas Tariff, Fourth Revised Volume No. 1–A.

Filed Date: 02/16/2010.

Accession Number: 20100217–0220.

Comment Date: 5 p.m. Eastern Time on Monday, March 01, 2010.

Docket Numbers: RP10–381–000.

Applicants: Columbia Gulf Transmission Company.

Description: Columbia Gulf Transmission Company requests waiver of the Annual Transportation Retainage Rate Adjustment (TRA) set forth in section 33.2 of the General Terms and Conditions of its tariff which requires Columbia Gulf to file its TRA by March 1, to be effective 4/1/10.

Filed Date: 02/16/2010.

Comment Date: 5 p.m. Eastern Time on Friday, February 19, 2010.

Docket Numbers: RP10–382–000.

Applicants: Columbia Gas Transmission, LLC.

Description: Columbia Gas Transmission Company, LLC requests waiver of the Annual Retainage Adjustment Mechanism (RAM) set forth in Section 35.2 of the General Terms and Conditions of its tariff which requires Columbia Gas to file its RAM by March 1, to be effective 4/1/10.

Filed Date: 02/16/2010.

Comment Date: 5 p.m. Eastern Time on Friday, February 19, 2010.

Any person desiring to intervene or to protest in any of the above proceedings 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) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. 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. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also 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.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–4563 Filed 3–3–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

February 12, 2010.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP10–362–000.

Applicants: North Baja Pipeline, LLC.

Description: North Baja Pipeline, LLC submits FTS–1 Lateral Rate Schedule negotiated rate agreement.

Filed Date: 02/04/2010.

Accession Number: 20100205–0205.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 16, 2010.

Docket Numbers: RP10–363–000.

Applicants: National Fuel Gas Supply Corporation.

Description: National Fuel Gas Supply Corporation submits Second Revised Sheet 25 *et al* to FERC Gas Tariff, Fourth Revised Volume 1, to be effective 3/6/10.

Filed Date: 02/04/2010.

Accession Number: 20100205–0206.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 16, 2010.

Docket Numbers: RP10–364–000.

Applicants: Iroquois Gas Transmission System, L.P.

Description: Iroquois Gas Transmission System, LP submits Third Revised Sheet No 6K to its FERC Gas Tariff, First Revised Volume No 1.

Filed Date: 02/05/2010.

Accession Number: 20100205–0207.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 17, 2010.

Docket Numbers: RP10–365–000.

Applicants: North Baja Pipeline, LLC.

Description: North Baja Pipeline, LLC submits Eighth Revised Sheet No 4 to FERC Gas Tariff, Original Volume No 1.

Filed Date: 02/04/2010.

Accession Number: 20100205–0208.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 16, 2010.

Docket Numbers: RP10–366–000.

Applicants: Texas Gas Transmission, LLC.

Description: Texas Gas Transmission, LLC submits First Revised Sheet No 200 *et al* to FERC Gas Tariff, Third Revised Volume No 1.

Filed Date: 02/04/2010.

Accession Number: 20100205–0209.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 16, 2010.

Docket Numbers: RP10–367–000.

Applicants: Colorado Interstate Gas Company.

Description: Colorado Interstate Gas Company submits Eleventh Revised Sheet 229A *et al* to its FERC Gas Tariff, First revised Volume 1.

Filed Date: 02/05/2010.

Accession Number: 20100205–0210.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 17, 2010.

Docket Numbers: RP10–368–000.

Applicants: Cheyenne Plains Gas Pipeline Company, LLC.

Description: Cheyenne Plains Gas Pipeline Company, LLC submits Thirteenth revised Sheet 1 to its Original Volume 1.

Filed Date: 02/05/2010.

Accession Number: 20100205–0211.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 17, 2010.

Docket Numbers: RP10–369–000.

Applicants: Kinder Morgan Louisiana Pipeline LLC.

Description: Kinder Morgan Louisiana Pipeline LLC's Penalty Revenue Crediting Report Filing for Year Ending Dec. 31, 2009.

Filed Date: 02/09/2010.

Accession Number: 20100209–5058.

Comment Date: 5 p.m. Eastern Time on Monday, February 22, 2010.

Any person desiring to intervene or to protest in any of the above proceedings 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) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. 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. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

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Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–4564 Filed 3–3–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

February 23, 2010.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC10–48–000.

Applicants: Ridgeline Alternative Energy LLC.

Description: Application for Authorization Under Section 203 of the Federal Power Act of Ridgeline Alternative Energy LLC.

Filed Date: 02/23/2010.

Accession Number: 20100223–5082.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 16, 2010.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG10–12–000.

Applicants: Green Country Operating Services, LLC.

Description: Supplemental Information of Green Country Operating Services, LLC.

Filed Date: 02/04/2010.

Accession Number: 20100204–5099.

Comment Date: 5 p.m. Eastern Time on Thursday, February 25, 2010.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER98–511–013; ER97–4345–025.

Applicants: Oklahoma Gas and Electric Company, OGE Energy Resources, Inc.

Description: Supplemental Market Power Analysis of Oklahoma Gas and Electric Company & OGE Energy Resources, Inc.

Filed Date: 02/19/2010.

Accession Number: 20100219–5067.

Comment Date: 5 p.m. Eastern Time on Friday, March 12, 2010.

Docket Numbers: ER98–2157–018; ER03–9–017; ER06–1313–005.

Applicants: Kansas Gas and Electric Company, Westar Energy, Inc.

Description: Westar Energy, Inc submits an amended triennial market power analysis.

Filed Date: 02/19/2010.

Accession Number: 20100222–0011.

Comment Date: 5 p.m. Eastern Time on Friday, March 12, 2010.

Docket Numbers: ER99–1610–036.

Applicants: Southwestern Public Service Company.

Description: Southwestern Public Service Company submits supplement to the Triennial Market Power Analysis filed on 7/31/09.

Filed Date: 02/17/2010.

Accession Number: 20100218–0053.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 10, 2010.

Docket Numbers: ER00–1372–006; ER07–496–003.

Applicants: Alcoa Power Generating Inc.; Alcoa Power Marketing LLC.

Description: Notice of Non-Material Change in Status of Alcoa Power Generating, Inc. and Alcoa Power Marketing, LLC.

Filed Date: 02/17/2010.

Accession Number: 20100217–5098.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 10, 2010.

Docket Numbers: ER02–537–027; ER06–739–024; ER06–738–024; ER03–983–024; ER07–501–023; ER08–649–016; ER07–758–020.

Applicants: Cogen Technologies Linden Venture, L.P., Fox Energy Company LLC, Birchwood Power Partners, L.P., Shady Hills Power Company, L.L.C., East Coast Power Liden Holding, LLC, EFS Parlin Holdings, LLC, Inland Empire Energy Center, LLC.

Description: Supplement to Notice of Non-Material Changes in Status for East Coast Power Linden Holdings, LLC.

Filed Date: 02/17/2010.

Accession Number: 20100217–5039.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 10, 2010.

Docket Numbers: ER03–198–013.

Applicants: Pacific Gas and Electric Company.

Description: Pacific Gas and Electric Company's Amended Quarterly Report of Site Control for New Generation Capacity.

Filed Date: 02/18/2010.

Accession Number: 20100218–5081.

Comment Date: 5 p.m. Eastern Time on Thursday, March 11, 2010.

Docket Numbers: ER04–714–021; ER04–157–032; EL05–89–010.

Applicants: Florida Power & Light Co New England; Bangor Hydro-Electric Company.

Description: Refund Report of Central Maine Power Company.

Filed Date: 02/22/2010.

Accession Number: 20100222–5013.

Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: ER08–313–006; ER08–923–005; ER08–1307–004; ER08–1308–006; ER08–1357–004; ER08–1358–004; ER08–1359–004.

Applicants: Xcel Energy Services Inc.; Southwest Power Pool Inc.

Description: Compliance Refund Report of Xcel Energy Services Inc.

Filed Date: 02/18/2010.

Accession Number: 20100218–5083.

Comment Date: 5 p.m. Eastern Time on Thursday, March 11, 2010.

Docket Numbers: ER08–1569–003.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, LLC submits revised sheets as Attachment A and Attachment B and request that the Commission issue to its order by no later 4/20/10 etc.
Filed Date: 02/19/2010.
Accession Number: 20100219–0219.
Comment Date: 5 p.m. Eastern Time on Friday, March 12, 2010.

Docket Numbers: ER09–335–005; ER07–1117–010; ER05–1232–019.
Applicants: J.P. Morgan Ventures Energy Corporation; BE KJ LLC.
Description: Supplement to Updated Market Power Analysis and Order Nos. 697 and 697–A Compliance Filing of J.P. Morgan Ventures Energy Corporation and BE KJ LLC.
Filed Date: 02/17/2010.
Accession Number: 20100217–5038.
Comment Date: 5 p.m. Eastern Time on Wednesday, March 10, 2010.

Docket Numbers: ER09–1048–002; ER06–615–059.
Applicants: California Independent System Operator Corporation.
Description: California Independent System Operator Corporation submits amendments to the ISO's FERC Electric Tariff.
Filed Date: 02/18/2010.
Accession Number: 20100219–0204.
Comment Date: 5 p.m. Eastern Time on Thursday, March 11, 2010.

Docket Numbers: ER09–1050–003; ER09–1192–003.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool. Inc submits revisions to its Open Access Transmission Tariff and Bylaws.
Filed Date: 02/18/2010.
Accession Number: 20100219–0205.
Comment Date: 5 p.m. Eastern Time on Thursday, March 11, 2010.

Docket Numbers: ER09–1142–005.
Applicants: New York Independent System Operator, Inc.
Description: New York Independent System Operator, Inc submits compliance revisions to the NYISO's Market Administration and Control Area Services Tariff.
Filed Date: 02/18/2010.
Accession Number: 20100219–0203.
Comment Date: 5 p.m. Eastern Time on Thursday, March 11, 2010.

Docket Numbers: ER09–1723–007.
Applicants: Dry Lake Wind Power, LLC.
Description: Refund Report of Dry Lake Wind Power, LLC.
Filed Date: 02/22/2010.
Accession Number: 20100222–5142.
Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: ER10–382–001.
Applicants: Florida Power Corporation.
Description: Florida Power Corporation submits an amendment to the 12/2/09 filing of an agreement with Seminole Electric Coop. Inc, which was designated Rate Schedule 211 etc.
Filed Date: 02/17/2010.
Accession Number: 20100217–0237.
Comment Date: 5 p.m. Eastern Time on Wednesday, March 10, 2010.

Docket Numbers: ER10–400–001.
Applicants: Mid-American Energy Company.
Description: MidAmerican Energy Co submits a compliance filing.
Filed Date: 02/18/2010.
Accession Number: 20100218–0210.
Comment Date: 5 p.m. Eastern Time on Thursday, March 11, 2010.

Docket Numbers: ER10–559–001.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc submits corrected Amended and Restated Interconnection and Operating Agreement with Crownbutte Wind Power, Inc etc.
Filed Date: 02/19/2010.
Accession Number: 20100222–0200.
Comment Date: 5 p.m. Eastern Time on Friday, March 12, 2010.

Docket Numbers: ER10–646–001.
Applicants: Arizona Public Service Company.
Description: Arizona Public Service Company submits FERC Rate Schedule No 252 Errata filing.
Filed Date: 02/22/2010.
Accession Number: 20100223–0203.
Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: ER10–664–001.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc submits the amendment to filing making the necessary revisions to section 34.1.
Filed Date: 02/19/2010.
Accession Number: 20100222–0201.
Comment Date: 5 p.m. Eastern Time on Friday, March 12, 2010.

Docket Numbers: ER10–707–001.
Applicants: Florida Power Corporation.
Description: Florida Power Corporation submits an amendment to the Florida. Municipal Power Agency Interchange Service Agreement.
Filed Date: 02/19/2010.
Accession Number: 20100219–0217.
Comment Date: 5 p.m. Eastern Time on Friday, March 12, 2010.

Docket Numbers: ER10–718–001.
Applicants: February Futures, LLC.
Description: February Futures, LLC submits errata to application for market based rate authorization.
Filed Date: 02/17/2010.
Accession Number: 20100218–0203.
Comment Date: 5 p.m. Eastern Time on Wednesday, March 10, 2010.

Docket Numbers: ER10–725–000.
Applicants: Glacial Energy of New England, Inc.
Description: Glacial Energy of New England submits informational filing.
Filed Date: 02/03/2010.
Accession Number: 20100205–0030.
Comment Date: 5 p.m. Eastern Time on Tuesday, March 02, 2010.

Docket Numbers: ER10–772–000.
Applicants: Entergy Services, Inc.
Description: Entergy Services, Inc submits Service Agreement No 563 to FERC Electric Tariff, Third Revised Volume No 3.
Filed Date: 02/18/2010.
Accession Number: 20100219–0200.
Comment Date: 5 p.m. Eastern Time on Thursday, March 11, 2010.

Docket Numbers: ER10–773–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc submits revised page to its Open Access Transmission Tariff.
Filed Date: 02/18/2010.
Accession Number: 20100219–0201.
Comment Date: 5 p.m. Eastern Time on Thursday, March 11, 2010.

Docket Numbers: ER10–774–000.
Applicants: California Independent System Operator Corporation.
Description: California Independent System Operator Corporation's 2009 Participating Load Pilot Project Report in Compliance with Order No. 719.
Filed Date: 02/18/2010.
Accession Number: 20100218–5079.
Comment Date: 5 p.m. Eastern Time on Thursday, March 11, 2010.

Docket Numbers: ER10–776–000.
Applicants: Central Vermont Public Service Corporation.
Description: Central Vermont Public Service Corporation submits revised cover sheet to cancel its cost based rate power sales tariff, FERC Electric Tariff, Original Volume 5 to be effective 4/22/10.
Filed Date: 02/19/2010.
Accession Number: 20100219–0216.
Comment Date: 5 p.m. Eastern Time on Friday, March 12, 2010.

Docket Numbers: ER10–777–000.
Applicants: Westar Energy, Inc.
Description: Westar Energy, Inc submits Rate Schedule FERC No 333.
Filed Date: 02/19/2010.
Accession Number: 20100219–0214.

Comment Date: 5 p.m. Eastern Time on Friday, March 12, 2010.

Docket Numbers: ER10–778–000.

Applicants: Cleco Power LLC.

Description: Cleco Power LLC submits Amended and Restated Interconnection and Operating Agreement between Cleco Power and Acadia Power Partners LLC designated as Cleco Power First Revised Schedule 21.

Filed Date: 02/19/2010.

Accession Number: 20100219–0215.

Comment Date: 5 p.m. Eastern Time on Friday, March 12, 2010.

Docket Numbers: ER10–779–000.

Applicants: Ohio Power Company.

Description: Ohio Power Company submits First Revised Sheet 32 *et al* to its First Revised Rate Schedule FERC No 18 *et al.*

Filed Date: 02/19/2010.

Accession Number: 20100222–0202.

Comment Date: 5 p.m. Eastern Time on Friday, March 12, 2010.

Docket Numbers: ER10–780–000.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection, LLC submits an executed interconnection service agreement with US General Service Agreement White Oak Federal Research Center *et al.*

Filed Date: 02/19/2010.

Accession Number: 20100222–0203.

Comment Date: 5 p.m. Eastern Time on Friday, March 12, 2010.

Docket Numbers: ER10–781–000.

Applicants: Westar Energy, Inc.

Description: Westar Energy submits Notice of Cancellation to First Revised Rate Schedule FERC No 253, the Electric Power Supply Agreement with City of Elwood, Kansas.

Filed Date: 02/22/2010.

Accession Number: 20100222–0219.

Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: ER10–782–000.

Applicants: Westar Energy, Inc.

Description: Westar Energy submits for filing a Notice of Cancellation to Second Revised Rate Schedule FERC No 259, the Electric Power Supply Agreement with City of Toronto. Kansas.

Filed Date: 02/22/2010.

Accession Number: 20100222–0220.

Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: ER10–783–000.

Applicants: Carolina Power & Light Company.

Description: Carolina Power & Light Company submits the Standard Large Generator Interconnection Agreement 315 with FibroMont, LLC to be effective 3/1/10.

Filed Date: 02/22/2010.

Accession Number: 20100222–0221.

Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: ER10–784–000.

Applicants: Southern California Edison Company.

Description: Southern California Edison Company submits revised rate sheets to the Interconnection Facilities Agreement and the Service Agreement for Wholesale Distribution Service Agreement with City of Rancho Cucamonga etc.

Filed Date: 02/22/2010.

Accession Number: 20100222–0223.

Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: ER10–785–000.

Applicants: Xcel Energy Operating Companies.

Description: Xcel Energy submits Ninth Revised Sheet 48–56 *et al.* to its FERC Electric Tariff, Original Volume 3 Rate Schedule 2—Revised Tariff Pages.

Filed Date: 02/22/2010.

Accession Number: 20100222–0222.

Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: ER10–786–000.

Applicants: Ameren Energy Marketing Company.

Description: Ameren Energy Marketing Company submits amended tariff sheets to its Market Based Rate Tariff.

Filed Date: 02/22/2010.

Accession Number: 20100223–0202.

Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: ER10–787–000.

Applicants: ISO New England Inc.

Description: ISO New England Inc. *et al.* submit revisions to the Forward Capacity Market rules with an effective date of 4/23/2010.

Filed Date: 02/22/2010.

Accession Number: 20100223–0201.

Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: ER10–788–000.

Applicants: PJM Interconnection, LLC.

Description: PJM Interconnection, LLC submits an executed Wholesale Market Participation Agreement.

Filed Date: 02/23/2010.

Accession Number: 20100223–0209.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 16, 2010.

Docket Numbers: ER10–789–000.

Applicants: Carolina Power & Light Company.

Description: Carolina Power & Light Company *et al.* submits an agreement entitled "Managing Non-Firm Parallel Flow Agreement" etc. to be effective 4/30/10 under ER10–789.

Filed Date: 02/23/2010.

Accession Number: 20100223–0210.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 16, 2010.

Docket Numbers: ER10–791–000.

Applicants: Innovative Energy Systems, LLC.

Description: Application for Waiver of Innovative Energy Systems, LLC.

Filed Date: 02/22/2010.

Accession Number: 20100222–5148.

Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Take notice that the Commission received the following electric reliability filings:

Docket Numbers: RR10–6–000.

Applicants: North American Electric Reliability Corp.

Description: Petition of North American Electric Reliability Corporation for Approval of Delegation Agreement with Texas Reliability Entity, Inc. and 2010 Business Plan and Budget of Texas Reliability Entity, Inc.

Filed Date: 02/19/2010.

Accession Number: 20100219–5139.

Comment Date: 5 p.m. Eastern Time on Friday, March 12, 2010.

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Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–4429 Filed 3–3–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

February 24, 2010.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER99–1005–005; ER09–304–002.

Applicants: KCP&L Greater Missouri Operations Company; Kansas City Power & Light Company.

Description: Kansas City Power & Light Co et al submits an amendment to their Triennial Market Power Filing for SPP Region and Tariff Filing.

Filed Date: 02/23/2010.

Accession Number: 20100224–0028.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 16, 2010.

Docket Numbers: ER99–1435–021; ER00–1814–009.

Applicants: Avista Corporation; Avista Turbine Power, Inc.

Description: Notice of Non-Material Change in Status of Avista Corporation, et. al. Pursuant to Order 697–C.

Filed Date: 01/29/2010.

Accession Number: 20100129–5121.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 17, 2010.

Docket Numbers: ER99–1757–016.

Applicants: Empire District Electric Company.

Description: Affidavit of Julie R Solomon which updates her previous affidavit to address revised calculations by the SPP of the SIL for certain balancing authority areas etc re The Empire District Electric Company.

Filed Date: 02/22/2010.

Accession Number: 20100223–0032.

Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: ER06–456–022; ER06–1271–017; ER06–880–017; ER06–954–018; ER07–1186–002; ER07–424–013; ER08–1065–002; ER08–1569–003; ER09–497–003; ER10–268–002; ER08–229–002.

Applicants: PJM Interconnection L.L.C.

Description: PJM Interconnection, LLC submits amendments to Schedule 12 of its Open Access Transmission Tariff to incorporate the methodology for assigning cost responsibility to Merchant Transmission Facilities etc.

Filed Date: 02/19/2010.

Accession Number: 20100222–0216.

Comment Date: 5 p.m. Eastern Time on Friday, March 12, 2010.

Docket Numbers: ER10–111–001.

Applicants: Bangor Hydro-Electric Company.

Description: Bangor Hydro Electric Company submits errata to 10/26/09 filing.

Filed Date: 02/23/2010.

Accession Number: 20100224–0205.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 16, 2010.

Docket Numbers: ER10–547–000.

Applicants: Golden Spread Electric Cooperative, Inc.

Description: Golden Spread Electric Cooperative, Inc submits corrected Second Revised Sheets 121 et al First Revised Rate Schedule 23.

Filed Date: 02/23/2010.

Accession Number: 20100223–0062.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 16, 2010.

Docket Numbers: ER10–550–001.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc submits amendment to its Dec 31 filing to request that the Commission defer the effective date of the Tariff provisions proposed in the filing to 5/1/10.

Filed Date: 02/23/2010.

Accession Number: 20100223–0061.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 16, 2010.

Docket Numbers: ER10–589–001.

Applicants: El Paso Electric Company.

Description: El Paso Electric Company submits as requested the historical documents with the headers and footers required under Order 614 specification for tariff sheet designations.

Filed Date: 02/23/2010.

Accession Number: 20100224–0204.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 16, 2010.

Docket Numbers: ER10–792–000.

Applicants: TC Energy Trading, LLC.

Description: Application of TC Energy Trading, LLC for market-based rate authority, associated waivers, blanket approvals, notification of price reporting status and request for Category 1 Seller Determination.

Filed Date: 02/23/2010.

Accession Number: 20100224–0210.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 16, 2010.

Docket Numbers: ER10–793–000.

Applicants: Wolverine Creek Goshen Interconnection,

Description: Wolverine Creek Goshen Interconnection LLC et al submits First Amendment to the Common Facilities Agreement.

Filed Date: 02/23/2010.

Accession Number: 20100224–0203.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 16, 2010.

Docket Numbers: ER10–794–000.

Applicants: Entergy Services, Inc.

Description: Entergy Services, Inc submits revisions to its open access tariff, FERC Electric Tariff.

Filed Date: 02/23/2010.

Accession Number: 20100224–0202.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 16, 2010.

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Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–4428 Filed 3–3–10; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[R08–CO–2010–0001; FRL–9121–8]

Adequacy Determination for the Denver Metro Area and North Front Range 8-Hour Ozone Attainment Plan's Motor Vehicle Emissions Budgets for Transportation Conformity Purposes; State of Colorado

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of adequacy.

SUMMARY: In this notice, EPA is notifying the public that the Agency has found that the motor vehicle emissions budgets for nitrogen oxides (NO_X) and volatile organic compounds (VOC) contained in the Denver Metro Area and North Front Range 8-Hour Ozone Attainment Plan (hereafter "Denver/NFR Ozone Attainment Plan") are adequate for transportation conformity purposes. The Denver/NFR Ozone Attainment Plan was submitted to EPA as a revision to the State Implementation Plan (SIP) on June 18, 2009, by James B. Martin, Director, Colorado Department of Public Health and Environment. As a result of our finding, the Denver Regional Council of Governments (DRCOG), the North Front Range Metropolitan Planning Organization (NFR MPO), the Colorado Department of Transportation and the U.S. Department of Transportation are required to use these motor vehicle emissions budgets for future transportation conformity determinations once this finding becomes effective.

DATES: This finding is effective March 19, 2010.

FOR FURTHER INFORMATION CONTACT: Tim Russ, Air Program (8P–AR), United States Environmental Protection Agency, Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129, (303) 312–6479, or *russ.tim@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, whenever "we," "us," or "our," are used, we mean EPA.

This notice is simply an announcement of a finding that we have already made. EPA sent a letter to the Colorado Department of Public Health and Environment (CDPHE) on January 21, 2010, stating that the motor vehicle emissions budgets (MVEB) in the submitted Denver/NFR Ozone Attainment Plan are adequate. The MVEBs in the Denver/NFR Ozone Attainment Plan were posted for adequacy review on EPA's transportation conformity Web site on October 15, 2009. The public comment period closed on November 16, 2009 and we did not receive any comments in response to the adequacy review posting (*see http://www.epa.gov/otaq/stateresources/transconf/currsips.htm#denver-me*).

The MVEBs we found adequate are presented in the following table:

Area of applicability	2010 NO_X emissions (tons per day)	2010 VOC emissions (tons per day)
Northern Subarea [1]	20.5	19.5
Southern Subarea [1]	102.4	89.7
Total Nonattainment Area	122.9	109.2

[1] The Subareas are defined in section VI of the Denver/NFR Ozone Attainment Plan.

As we stated in our January 21, 2010 letter to CDPHE, the initial conformity determination must be done using the total nonattainment area MVEBs for NO_X and VOCs. After the initial conformity determination, DRCOG and the NFR MPO may switch from using the total nonattainment area MVEBs to using the sub-area MVEBs for determining conformity. To switch to use of the sub-area MVEBs (or to subsequently switch back to use of the total nonattainment area MVEBs), DRCOG and the NFR MPO must use the process as described in the Denver/NFR Ozone Attainment Plan on pages VI–4 through VI–6.

Transportation conformity is required by section 176(c) of the Clean Air Act. The conformity rule provisions at 40 CFR part 93 require that transportation plans, programs, and projects conform to SIPs and establish the criteria and procedures for determining whether or not they do. Conformity to a SIP means that transportation activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of the National Ambient Air Quality Standard (NAAQS).

The criteria by which we determine whether a SIP's MVEBs are adequate for conformity purposes are outlined in 40 CFR 93.118(e)(4) which was promulgated August 15, 1997 (*see* 62 FR 43780). We described our process for determining the adequacy of submitted SIP MVEBs in our July 1, 2004 Transportation Conformity Rule Amendments (*see* 69 FR 40004). We used these resources in making our adequacy determination. Please note that our adequacy review is separate from our rulemaking action on the Denver/NFR Ozone Attainment Plan and should not be used to prejudge our ultimate approval or disapproval of the SIP revision. Even if we find a budget adequate, we may later disapprove the SIP.

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

Dated: February 19, 2010.

Carol Rushin,

Acting Regional Administrator, Region 8.

[FR Doc. 2010–4551 Filed 3–3–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9121–6]

Office of Research and Development; Ambient Air Monitoring Reference and Equivalent Methods: Designation of One New Equivalent Method

AGENCY: Environmental Protection Agency.

ACTION: Notice of the designation of one new equivalent method for monitoring ambient air quality.

SUMMARY: Notice is hereby given that the Environmental Protection Agency (EPA) has designated, in accordance with 40 CFR part 53, one new equivalent method for measuring concentrations of lead (Pb) in total suspended particulate matter (TSP) in the ambient air.

FOR FURTHER INFORMATION CONTACT: Surender Kaushik, Human Exposure and Atmospheric Sciences Division (MD–D205–03), National Exposure Research Laboratory, U.S. EPA, Research Triangle Park, North Carolina 27711. Phone: (919) 541–5691, email: *Kaushik.Surender@epa.gov.*

SUPPLEMENTARY INFORMATION: In accordance with regulations at 40 CFR part 53, the EPA evaluates various methods for monitoring the concentrations of those ambient air pollutants for which EPA has established National Ambient Air Quality Standards (NAAQSs) as set forth in 40 CFR part 50. Monitoring methods that are determined to meet specific requirements for adequacy are designated by the EPA as either reference methods or equivalent methods (as applicable), thereby permitting their use under 40 CFR part 58 by States and other agencies for determining compliance with the NAAQSs.

The EPA hereby announces the designation of one new equivalent method for measuring lead (Pb) in total suspended particulate matter (TSP) in the ambient air. This designation is made under the provisions of 40 CFR part 53, as amended on November 12, 2008 (73 FR 67057–67059).

The method is identified as follows: EQL–0310–189, "*Procedure for Determination of Lead in Ambient Air TSP by Hot Plate Acid Extraction and ICP–MS Analysis*."

In this method, total suspended particulate matter (TSP) is collected according to 40 CFR Appendix B to part 50, *EPA Reference Method for the Determination of Suspended Particulate Matter in the Atmosphere (High-Volume Method),* extracted on a hot plate with 3M HNO_3 according to 40 CFR Appendix G to part 50, *EPA Reference Method for the Determination of Lead in Suspended Particulate Matter Collected from Ambient Air,* and analyzed by Inductively Coupled Plasma-Mass Spectrometry (ICP–MS) based on EPA SW–846 Method 6020A.

The application for an equivalent method determination for this method was submitted by Inter-Mountain Laboratories, Incorporated, 1673 Terra Avenue, Sheridan, WY 82801 and was received by the Office of Research and Development on December 16, 2009.

The analytical procedure of this method has been tested in accordance with the applicable test procedures specified in 40 CFR part 53, as amended on November 12, 2008. After reviewing the results of those tests and other information submitted in the application, EPA has determined, in accordance with part 53, that this method should be designated as an equivalent method for lead. The information provided by the applicant will be kept on file, either at EPA's National Exposure Research Laboratory, Research Triangle Park, North Carolina 27711 or in an approved archive storage facility, and will be available for inspection (with advance notice) to the extent consistent with 40 CFR part 2 (EPA's regulations implementing the Freedom of Information Act).

As a designated equivalent method, this method is acceptable for use by states and other air monitoring agencies under the requirements of 40 CFR part 58, Ambient Air Quality Surveillance. For such purposes, the method must be used in strict accordance with the complete operating procedures (SOPs) associated with the method and subject to any specifications and limitations specified in the procedure.

Use of the method should also be in general accordance with the guidance and recommendations of applicable sections of the "Quality Assurance Handbook for Air Pollution Measurement Systems, Volume I," EPA/600/R–94/038a and "Quality Assurance Handbook for Air Pollution Measurement Systems, Volume II, Ambient Air Quality Monitoring Program" EPA–454/B–08–003, December, 2008 (available at *http://www.epa.gov/ttn/amtic/qabook.html*). Provisions concerning modification of such methods by users are specified under section 2.8 (Modifications of Methods by Users) of Appendix C to 40 CFR part 58.

Repeated noncompliance with the method procedure/SOP should be reported to: Director, Human Exposure and Atmospheric Sciences Division (MD–E205–01), National Exposure Research Laboratory, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711.

Designation of this new equivalent method is intended to assist the States in establishing and operating their air quality surveillance systems under 40 CFR part 58. Questions concerning the technical aspects of the method should be directed to the applicant.

Jewel F. Morris,

Acting Director, National Exposure Research Laboratory.

[FR Doc. 2010–4547 Filed 3–3–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9121–7]

Farm, Ranch, and Rural Communities Advisory Committee (FRRCC)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Charter Renewal

The Charter for the Environmental Protection Agency's Farm, Ranch, and Rural Communities Advisory Committee (FRRCC) will be renewed for an additional two-year period, as a necessary committee which is in the public interest, in accordance with the provisions of the Federal Advisory Committee Act (FACA), 5 U.S.C. App.2. The purpose of the FRRCC is to provide advice to the Administrator of EPA on environmental issues and policies that are of importance to agriculture and rural communities. It is determined that the FRRCC is in the public interest in connection with the performance of duties imposed on the Agency by law. Inquiries may be directed to Alicia Kaiser, U.S. EPA, (mail code 1101–A), 1200 Pennsylvania Avenue, NW., Washington, DC 20460, telephone (202) 564–7273, or *kaiser.alicia@epa.gov.*

Dated: February 18, 2010.

Lawrence Elworth,

Agricultural Counselor to the Administrator.

[FR Doc. 2010–4549 Filed 3–3–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9122–2]

Science Advisory Board Staff Office; Notification of a Public Meeting of the Science Advisory Board; Committee on Science Integration for Decision Making

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA or Agency) Science Advisory Board (SAB) Staff Office announces a public meeting of the SAB Committee on Science Integration for Decision Making.

DATES: The meeting dates are March 30, 2010 from 9 a.m. to 5 p.m. and March 31, 2010 from 8:30 a.m. to 1 p.m. (Eastern Time).

ADDRESSES: The meeting will be held in the Science Advisory Board Conference Center, 1025 F Street, NW., Suite 3705, Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: Members of the public who wish to obtain further information about this meeting must contact Dr. Angela Nugent, Designated Federal Officer (DFO). Dr. Nugent may be contacted at the EPA Science Advisory Board (1400F), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; or via telephone/voice mail; (202) 343–9981; fax (202) 233–0643; or e-mail at *nugent.angela@epa.gov.* General information about the EPA SAB, as well as any updates concerning the public meeting announced in this notice, may be found on the SAB Web site at *http://www.epa.gov/sab.*

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act (FACA), 5 U.S.C., App. 2, notice is hereby given that the SAB Committee on Science Integration for Decision Making will hold a public meeting to discuss the results of fact-finding activities conducted as part of a study of science integration supporting EPA decision making. The SAB was established pursuant to 42 U.S.C. 4365 to provide independent scientific and technical advice to the Administrator on the technical basis for Agency positions and regulations. The SAB is a Federal Advisory Committee chartered under FACA. The SAB will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies.

Background: The SAB Staff Office has rescheduled the meeting of the Committee for Science Integration for Decision Making previously announced for February 10–11, 2010 (*see* 75 FR 2542–2543) and rescheduled because of adverse weather conditions in the Washington, DC area.

The goal of the committee is to develop an original study that provides recommendations to support and/or strengthen Agency's ability to integrate science to support decision meeting. The purpose of the meeting will be to discuss the results of the committee's fact-finding discussions with EPA program and regional offices concerning their current and recent experience with science integration. The committee will also determine next steps to complete the evaluative study. Additional information on the study and the committee's activities meeting may be found on the SAB Web site at *http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Science%20Integration?OpenDocument.*

Availability of Meeting Materials: The agenda and other material in support of this upcoming meeting are posted on the SAB Web site at *http://www.epa.gov/sab.*

Procedures for Providing Public Input: Interested members of the public may submit relevant written or oral information on the topic of this advisory activity for the SAB to consider during the advisory process. *Oral Statements:* In general, individuals or groups requesting an oral presentation at a public meeting will be limited to three minutes per speaker, with no more than a total of one hour for all speakers. Interested parties should contact Dr. Nugent, DFO, in writing (preferably via e-mail) at the contact information noted above, by March 24, 2010 to be placed on a list of public speakers for the meeting. *Written Statements:* Written statements should be received in the SAB Staff Office by March 24, 2010 so that the information may be made available to the SAB committee members for their consideration. Written statements should be supplied to the DFO in the following formats: One hard copy with original signature, and one electronic copy via e-mail (acceptable file format: Adobe Acrobat PDF, WordPerfect, MS Word, MS PowerPoint, or Rich Text files in IBM–PC/Windows 98/2000/XP format). Submitters are requested to provide two versions of each document submitted with and without signatures, because the SAB Staff Office does not publish documents with signatures on its Web sites.

Accessibility: For information on access or services for individuals with disabilities, please contact Dr. Nugent at the phone number or e-mail address noted above, preferably at least ten days prior to the meeting to give EPA as much time as possible to process your request.

Dated: February 25, 2010.

Anthony F. Maciorowski,

Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. 2010–4537 Filed 3–3–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9121–9]

Public Water System Supervision Program Revision for the State of Oklahoma

AGENCY: United States Environmental Protection Agency (EPA).

ACTION: Notice of proposed approval.

SUMMARY: Notice is hereby given that the State of Oklahoma is revising its approved Public Water System Supervision Program adopting new regulations for the Lead and Copper Rule (LCR) Short-Term Regulatory Revisions and Clarifications, promulgated and published in the **Federal Register** at 72 FR 57782 on October 10, 2007. Oklahoma has adopted the LCR Short-Term Regulatory Revisions and Clarifications to strengthen the implementation of the LCR for more effective protection of public health by reducing exposure to lead in drinking water. EPA has determined that the proposed program revision submitted by Oklahoma for the LCR Short-Term Regulatory Revisions and Clarifications are no less stringent than the corresponding Federal regulations. Therefore, EPA proposes to approve these program revisions.

DATES: All interested parties may request a public hearing. A request for a public hearing must be submitted by April 5, 2010 to the Regional Administrator at the EPA Region 6 address shown below. Requests for a hearing may be denied by the Regional Administrator. However, if a substantial request for a public hearing is made by April 5, 2010, a public hearing will be held. If no timely and appropriate request for a hearing is received and the Regional Administrator does not elect to hold a hearing on his own motion, this determination shall become final and effective on April 5, 2010. Any request for a public hearing shall include the following information: the name, address, and telephone number of the individual, organization, or other entity requesting a hearing; a brief statement of

the requesting person's interest in the Regional Administrator's determination and a brief statement of the information that the requesting person intends to submit at such hearing; and the signature of the individual making the request or, if the request is made on behalf of an organization or other entity, the signature of a responsible official of the organization or other entity.

ADDRESSES: All documents relating to this determination are available for inspection between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, at the following offices: Oklahoma Department of Environmental Quality, Water Quality Division, 707 N. Robinson, Oklahoma City, Oklahoma 73101–1677; and the EPA Region 6, Drinking Water Section (6WQ–SD), 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202.

FOR FURTHER INFORMATION CONTACT: Amy Camacho, EPA Region 6, Drinking Water Section at the Dallas address given above or at telephone (214) 665–7175, or *camacho.amy@epa.gov.*

Authority: Section 1413 of the Safe Drinking Water Act, as amended (1996), and 40 CFR part 141 and 142 of the National Primary Drinking Water Regulations.

Dated: February 12, 2010.

Al Armendariz,

Regional Administrator, Region 6.

[FR Doc. 2010–4552 Filed 3–3–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2009–0778; FRL–8813–5]

Maneb; Notice of Receipt of a Request to Voluntarily Cancel a Certain Pesticide Registration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, EPA is issuing a notice of receipt of a request by the registrant to voluntarily cancel their pesticide registration.

DATES: Unless a request is withdrawn by April 5, 2010 for the registration for which the registrant requested a waiver of the 180–day comment period, orders will be issued canceling this registration. The Agency will consider withdrawal requests postmarked no later than April 5, 2010, whichever is applicable. Comments must be received on or before April 5, 2010, for those registrations where the 180–day comment period has been waived.

ADDRESSES: Submit your comments and your withdrawal request, identified by docket identification (ID) number EPA–HQ–OPP–2009–0778, 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; Written Withdrawal Request, Attention: Barbara Briscoe, Pesticide Re-evaluation Division (7508P).
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2009–0778. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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

FOR FURTHER INFORMATION CONTACT: Barbara Briscoe, Pesticide Re-evaluation Division, Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8177; e-mail address: *Briscoe.Barbara@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. Although this action may be of particular interest to persons who produce or use pesticides, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the information in this notice, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in

accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. What Action is the Agency Taking?

This notice announces receipt by the Agency of a request from a registrant to cancel one pesticide product registered under section 3 or 24(c) of FIFRA. This registration is listed in Table 1.

TABLE 1.—REGISTRATION WITH PENDING REQUEST FOR CANCELLATION

Registration No.	Product Name	Chemical Name
000352–00655	DuPont™ Manex®	Maneb

Unless a request is withdrawn by the registrant within 30 days of publication of this notice, orders will be issued canceling this registration. Users of this pesticide or anyone else desiring the retention of a registration should contact the registrant directly during this 30–day period.

Table 2 includes the name and address of record for the registrant of the product listed in Table 1.

TABLE 2.—REGISTRANT REQUESTING VOLUNTARY CANCELLATION

EPA Company No.	Company Name and Address
000352	DuPont Crop Protection Stine-Haskell Research Center P.O. Box 30 Newark, DE 19714–0030

III. What is the Agency's Authority for Taking this Action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, the Administrator may approve such a request.

IV. Procedures for Withdrawal of Request

Registrants who choose to withdraw a request for cancellation must submit such withdrawal in writing to the person listed under **FOR FURTHER INFORMATION CONTACT**, postmarked by or before April 5, 2010. This written withdrawal of the request for cancellation will apply only to the applicable FIFRA section 6(f)(1) request listed in this notice. If the product has been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling. The withdrawal request must also include a commitment to pay any reregistration fees due, and to fulfill any applicable unsatisfied data requirements.

V. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products which are currently in the United States and which were packaged, labeled, and released for shipment prior to the effective date of the cancellation action. EPA anticipates allowing sale, distribution and use in the cancellation order as described below.

1. The registrant may continue to sell or distribute existing stocks of the maneb end-use product identified in Table 1 until such stocks are exhausted.

2. Persons other than the registrant may continue to sell or distribute existing stocks of the maneb product identified in Table 1 with previously approved labeling until such stocks are exhausted.

3. Persons other than the registrant may use the maneb end-use product identified in Table 1 until exhausted. Any use of existing stocks must be in a manner consistent with the previously approved labeling for that product.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: February 25, 2010.

Richard P. Keigwin,

Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.

[FR Doc. 2010–4546 Filed 3–3–10; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection Being Submitted to the Office of Management and Budget for Review and Approval, Comments Requested

02/24/2010.

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, as required by 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 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 valid control number. 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; and (d) ways to minimize the burden of the collection of information on the respondents,

including the use of automated collection techniques or other forms of information technology and (e) ways to further reduce the information 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 valid control number.

DATES: Persons wishing to comment on this information collection should submit comments by April 5, 2010. 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 Nicholas A. Fraser, Office of Management and Budget (OMB), via fax at (202) 395–5167, or via e–mail to Nicholas_A._Fraser@omb.eop.gov and to Cathy Williams, Federal Communications Commission (FCC), via e–mail to Cathy.Williams@fcc.gov and PRA@fcc.gov. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to web page: http://www.reginfo.gov/public/do/PRAMain, (2) look for the section of the web page called ”Currently Under Review”, (3) click on the downward–pointing arrow in the ”Select Agency” box below the ”Currently Under Review” heading, (4) select ”Federal Communications Commission” from the list of agencies presented in the ”Select Agency” box, (5) click the ”Submit” button to the right of the ”Select Agency” box, and (6) when the FCC list appears, look for the title of this ICR (or its OMB Control Number, if there is one) and then click on the ICR.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection send an e–mail to PRA@fcc.gov or contact Cathy Williams on (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0748.

Title: Section 64.104, 64.1509, 64.1510, Pay–Per–Call and Other Information Services.

Form Number: Not Applicable.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for–profit entities.

Number of Respondents and Responses: 5,125 respondents; 5,175 responses.

Estimated Time per Response: 2 to 260 hours.

Frequency of Response: Annual and on occasion reporting requirements; Recordkeeping and Third party disclosure requirements.

Total Annual Burden: 47,750.

Total Annual Cost: $0.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority(s) for the information collection are found at 47 U.S.C. 228(c)(7) – (10); Pub. L. No. 192–556, 106 stat. 4181 (1992), codified at 47 U.S.C. 228 (The Telephone and Dispute Resolution Act of 1992).

Nature and Extent of Confidentiality: An assurance of confidentiality is not offered because this information collection does not require the collection of personally identifiable information from individuals.

Privacy Impact Assessment: No impact(s).

Needs and Uses: 47 CFR 64.1504 of the Commission's rules incorporates the requirements of Sections 228(c)(7)–(10) of the Communications Act restricting the manner in which toll–free numbers may be used to charge telephone subscribers for information services. Common carriers may not charge a calling party for information conveyed on a toll–free number call, unless the calling party: (1) has executed a written agreement that specifies the material terms and conditions under which the information is provided, or (2) pays for the information by means of a prepaid account, credit, debit, charge, or calling card and the information service provider gives the calling party an introductory message disclosing the cost and other terms and conditions for the service. The disclosure requirements are intended to ensure that consumers know when charges will be levied for calls to toll–free numbers and are able to obtain information necessary to make informed choices about whether to purchase toll–free information services.

47 CFR 64.1509 of the Commission rules incorporates the requirements of 47 U.S.C. (c)(2) and 228 (d)(2)–(3) of the Communications Act. Common carriers that assign telephone numbers to pay–per–call services must disclose to all interested parties, upon request, a list of all assigned pay–per–call numbers. For each assigned number, carriers must also make available: (1) a description of the pay–per–call services; (2) the total cost per minute or other fees associated with the service; and (3) the service provider's name, business address, and telephone number. In addition, carriers handling pay–per–call services must establish a toll–free number that consumers may call to receive information about pay–per–call services. Finally, the Commission requires carriers to provide statements of pay–per–call rights and responsibilities to new telephone subscribers at the time service is established and, although not required by statute, to all subscribers annually.

Under 47 CFR 64.1510 of the Commission's rules, telephone bills containing charges for interstate pay–per–call and other information services must include information detailing consumers' rights and responsibilities with respect to these charges. Specifically, telephone bills carrying pay–per–call charges must include a consumer notification stating that: (1) the charges are for non–communication services; (2) local and long distance telephone services may not be disconnected for failure to pay per–call charges; (3) pay–per–call (900 number) blocking is available upon request; and (4) access to pay–per–call services may be involuntarily blocked for failure to pay per–call charges. In addition, each call billed must show the type of services, the amount of the charge, and the date, time, and duration of the call. Finally, the bill must display a toll–free number which subscribers may call to obtain information about pay–per–call services. Similar billing disclosure requirements apply to charges for information services either billed to subscribers on a collect basis or accessed by subscribers through a toll–free number. The billing disclosure requirements are intended to ensure that telephone subscribers billed for pay–per–call or other information services can understand the charges levied and are informed of their rights and responsibilities with respect to payment of such charges.

Federal Communications Commission.

Alethea Lewis,

Federal Register Liaison, Office of the Secretary, Office of Managing Director.

[FR Doc. 2010–4412 Filed 3–3–10; 8:45 am]

BILLING CODE 6712–01–S

FEDERAL COMMUNICATIONS COMMISSION

[DA 10–315]

Consumer Advisory Committee

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: The Commission announces the next meeting date and agenda of its Consumer Advisory Committee (“Committee”). The purpose of the

Committee is to make recommendations to the Commission regarding consumer issues within the jurisdiction of the Commission and to facilitate the participation of all consumers in proceedings before the Commission.

DATES: The meeting of the Committee will take place on Friday, March 19, 2010, 9 a.m. to 4 p.m., at the Commission's Headquarters Building, Room TW–C305.

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

FOR FURTHER INFORMATION CONTACT: Scott Marshall, Consumer and Governmental Affairs Bureau, (202) 418–2809 (voice), (202) 418–0179 (TTY), or e-mail *Scott.Marshal@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Public Notice DA 10–315, released February 25, 2010, announcing the agenda, date and time of the Committee's next meeting. At its March 19, 2010 meeting, the Committee is expected to ratify a recommendation regarding truth-in-billing to be filed in CG Docket 09–158, CC Docket 98–170 and WC Docket 04–36 (In the Matter of Consumer Information and Disclosure, Truth-in-billing and Billing Format, IP-enabled Services, Notice of Inquiry), which was provisionally adopted at its February 12, 2010 meeting. Further amendments to the TIB recommendation may also be considered. The Committee is also expected to receive briefings, or consider recommendations regarding, the National Broadband Plan, the Consumer Information and Disclosure NOI, and the open internet proceeding. The Committee will receive reports from its working groups and may also consider other matters within the jurisdiction of the Commission. A limited amount of time on the agenda will be available for oral comments from the public attending at the meeting site. Meetings are open to the public and are broadcast live with open captioning over the Internet from the FCC Live Web page at *http://www.fcc.gov/live/.*

The Committee is organized under, and operates in accordance with, the provisions of the Federal Advisory Committee Act, 5 U.S.A., App. 2 (1988). A notice of each meeting will be published in the **Federal Register** at least fifteen (15) days in advance of the meeting. Records will be maintained of each meeting and made available for public inspection. Members of the public may send written comments to: Scott Marshall, Designated Federal Officer of the Committee. *scott.marshal@fcc.gov.*

The meeting site is fully accessible to people using wheelchairs or other mobility aids. Sign language interpreters, open captioning, assistive listening devices, and Braille copies of the agenda and handouts will be provided on site.

Simultaneous with the webcast, the meeting will be available through Accessible Event, a service that works with your web browser to make presentations accessible to people with disabilities. You can listen to the audio and use a screen reader to read displayed documents. You can also watch the video with open captioning. Accessible Event is available at, *http://accessibleevent.com.* The web page prompts for an Event Code which is, 005202376. To learn about the features of Accessible Event, consult its User's Guide at, *http://accessibleevent.com/doc/user_guide/.* Other reasonable accommodations for people with disabilities are available upon request. The request should include a detailed description of the accommodation needed and contact information. Please provide as much advance notice as possible; last minute requests will be accepted, but may be impossible to fill. Send an e-mail to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

Federal Communications Commission.

Joel Gurin,

Chief, Consumer and Governmental Affairs Bureau.

[FR Doc. 2010–4423 Filed 3–3–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Public Safety and Homeland Security Bureau; Federal Advisory Committee Act; Communications Security, Reliability, and Interoperability Council; Notice of Public Meeting

February 26, 2010.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice advises interested persons that the Federal Communications Commission's (FCC) Communications Security, Reliability, and Interoperability Council (CSRIC) will hold its second meeting on March 22, 2010, from 9 a.m. to 1 p.m. in the Commission Meeting Room of the Federal Communications Commission, Room 59184 TW–C305, 445 12th Street, SW., Washington, DC 20554.

DATES: March 22, 2010.

ADDRESSES: Federal Communications Commission, Room TW–C305 (Commission Meeting Room), 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Jeffery Goldthorp, Designated Federal Officer of the FCC's CSRIC, (202) 418–1096 (voice) or *jeffery.goldthorp@fcc.gov* (e-mail); or Jean Ann Collins, Deputy Designated Federal Officer of the FCC's CSRIC, 202–418–2792 (voice) or *jeanann.collins@fcc.gov* (e-mail).

SUPPLEMENTARY INFORMATION: The CSRIC is a Federal Advisory Committee that will provide recommendations to the FCC regarding best practices and actions the FCC can take to ensure optimal security, reliability, and interoperability of communications systems. On March 19, 2009, the FCC, pursuant to the Federal Advisory Committee Act, renewed the charter for the CSRIC for a period of two years through March 18, 2011.

At this meeting, the co-chairs of each CSRIC working group will provide an update of the working group's plan for completing its tasks and progress made to date. One working group, Working Group 4A, will present recommendations regarding Best Practices for Reliable 9–1–1 and E9–1–1. Presentations will also be made by individuals from some of the entities represented on the CSRIC. Members of the general public may attend the meeting. The FCC will attempt to accommodate as many people as possible. However, admittance will be limited to seating availability. The Commission will provide audio and/or video coverage of the meeting over the Internet from the FCC's Web page at *http://www.fcc.gov/live.* The public may submit written comments before the meeting to Jeffery Goldthorp, the FCC's Designated Federal Officer for the CSRIC by e-mail to *Jeffery.goldthorp@fcc.gov* or U.S. Postal Service Mail to Jeffery Goldthorp, Chief, Communications Systems Analysis Division, Public Safety and Homeland Security Bureau, Federal Communications Commission, 445 12th Street, SW., Room 7–A325, Washington, DC 20554.

Open captioning will be provided for this event. Other reasonable accommodations for people with disabilities are available upon request. Requests for such accommodations should be submitted via e-mail to *fcc504@fcc.gov* or by calling the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (tty). Such requests should include a detailed description of the accommodation needed. In addition,

please include a way the FCC can contact you if it needs more information. Please allow at least five days advance notice; last minute requests will be accepted, but may be impossible to fill.

Additional information regarding the CSRIC can be found at: *http://www.fcc.gov/pshs/advisory/csric/.*

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2010–4565 Filed 3–3–10; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day-10–09AY]

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 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Laboratory Response Network (LRN)—Existing Data Collection in use without an OMB Control Number—National Center for Preparedness, Detection, and Control of Infectious Diseases (NCPDCID), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Laboratory Response Network (LRN) was established by the Department of Health and Human Services (HHS), Centers for Disease Control and Prevention (CDC) in accordance with Presidential Decision Directive 39, which outlined national anti-terrorism policies and assigned specific missions to federal departments and agencies. The LRN's mission is to maintain an integrated national and international network of laboratories that can respond to suspected acts of biological, chemical, or radiological terrorism and other public health emergencies.

When Federal, state and local public health laboratories voluntarily join the LRN, they assume specific responsibilities and are required to provide information to the LRN Program Office at CDC. Each laboratory must submit and maintain complete information regarding the testing capabilities of the laboratory. Biannually, laboratories are required to review, verify and update their testing capability information. Complete testing capability information is required in order for the LRN Program Office to determine the ability of the Network to respond to a biological or chemical terrorism event. The sensitivity of all information associated with the LRN requires the LRN Program Office to obtain personal information about all individuals accessing the LRN Web site. In addition, the LRN Program Office must be able to contact all laboratory personnel during an event so each laboratory staff member that obtains access to the restricted LRN Web site must provide his or her contact information to the LRN Program Office.

As a requirement of membership, LRN Laboratories must report all biological and chemical testing results to the LRN Program at CDC using a CDC developed software tool called the LRN Results Messenger. This information is essential for surveillance of anomalies, to support response to an event that may involve multiple agencies and to manage limited resources. LRN Laboratories must also participate in and report results for Proficiency Testing Challenges or Validation Studies. LRN Laboratories participate in multiple Proficiency Testing Challenges, Exercises and/or Validation Studies every year consisting of five to 500 simulated samples provided by the LRN Program Office. It is necessary to conduct such challenges in order to verify the testing capability of the LRN Laboratories. The rarity of biological or chemical agents perceived to be of bioterrorism concern prevents some LRN Laboratories from maintaining proficiency as a result of day-to-day testing. Simulated samples are therefore distributed to ensure proficiency across the LRN. The results obtained from testing these simulated samples must also be entered into Results Messenger for evaluation by the LRN Program Office.

During a surge event resulting from a bioterrorism or chemical terrorism attack, LRN Laboratories are also required to submit all testing results using LRN Results Messenger. The LRN Program Office requires these results in order to track the progression of a bioterrorism event and respond in the most efficient and effective way possible and for data sharing with other Federal partners involved in the response. The number of samples tested during a response to a possible event could range from 10,000 to more than 500,000 samples depending on the length and breadth of the event. Since there is potentially a large range in the number of samples for a surge event, CDC estimates the annualized burden for this event will be 3,000,000 hours or 625 responses per respondent.

Semiannually the LRN Program Office may conduct a Special Data Call to obtain additional information from LRN Member Laboratories in regards to biological or chemical terrorism preparedness. Special Data Calls are conducted using the LRN Web site.

Respondents are public health laboratorians. There are no costs to respondents other than their time. The total estimated annualized burden for this information collection is 3,176,400 hours.

ESTIMATE OF ANNUALIZED BURDEN HOURS

Forms	Respondents	Number of respondents	Average number of responses per respondent	Average burden per response (in hours)
Biennial Requalification	Public Health Laboratorians ...	100	1	2
General Surveillance Testing Results	Public Health Laboratorians ...	200	25	24
Proficiency Testing/Validation Testing Results	Public Health Laboratorians ...	200	5	56
Surge Event Testing Results	Public Health Laboratorians ...	200	625	24
Special Data Call	Public Health Laboratorians ...	200	2	30/60

Dated: February 26, 2010.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2010–4510 Filed 3–3–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day-10–0736)

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 Maryam I. Daneshvar, CDC Acting 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

Human Smoking Behavior Study (OMB No. 0920–0736, exp. 3/31/2010)—Reinstatement with Change—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Cigarettes are currently ranked as full-flavor, light or ultralight on the basis of machine-measured levels of smoke toxins (yield categories). The machine-based methods approximate human smoking patterns under controlled conditions but may not accurately reflect conditions of actual use, moreover, public health data have not consistently shown differences in health outcomes among smokers of cigarettes of different machine-smoked yield categories. Comparison of cigarette smoke emissions using machine-smoking methods will continue until something superior is developed, therefore, machine-smoking must be adequately informed to yield results that better reflect human smoking behavior.

In 2007, the Centers for Disease Control and Prevention (CDC) received OMB approval for a study designed to elucidate patterns of human smoking behavior, quantify biomarkers of exposure to smoke toxins under conditions of actual use, and determine how smoking behavior modifies the relationship between cigarette yield category, biomarkers of exposure, and measures of cardiovascular reactivity. The study has been a collaborative endeavor involving the National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP) and the National Center for Environmental Health (NCEH). Information has been collected from adult smokers of full-flavor, light and ultralight cigarettes, however, the target number of respondents was not achieved during the initial approval period.

CDC requests OMB approval to reinstate the information collection after the expiration date (OMB No. 0920–0736, exp. 3/31/2010) in order to meet recruitment goals and complete the data analysis as outlined in the original approval. Respondents will be asked to participate in a laboratory-based descriptive study of smoking behavior and analysis of biomarkers of exposure. Respondents will make two visits to a laboratory for measurements and complete a brief smoking diary during the one-day interval between the two laboratory visits. Indicators of smoking behavior such as ventilation pore-blocking behavior, puff volume, puff duration, puff velocity and inter-puff interval will be assessed. Measures of exposure to be assessed include expired-air carbon monoxide boost, carcinogens, nicotine and its metabolites in urine, cotinine in saliva and solanesol in cigarette butts as an indicator of total smoke exposure.

The goals of this project are to characterize the range of human smoking behavior for a variety of cigarette categories and machine-smoked yields, and to estimate the levels of biomarkers of exposure with the various cigarette styles.

CDC Requests OMB approval for two years. During this period there will be a reduction in total burden due to the limited number of respondents needed to complete the study. No changes to the data collection instruments or the estimated burden per response are proposed. Participation in the study 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 hours)	Total burden (in hours)
Adult Smokers	CATI Screener	150	1	5/60	13
	Visit 1 Screener	70	1	5/60	6
	Smoking Diary	61	1	10/60	10
	Laboratory Visit	61	2	1	122
Total					151

Dated: February 25, 2010.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2010–4514 Filed 3–3–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–10–0009]

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 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

National Disease Surveillance Program I—Case Reports (OMB No. 0920–0009, exp. 3/31/2010)—Revision—National Center for Zoonotic, Vector-borne, and Enteric Diseases (NCZVED), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Formal surveillance of 16 separate reportable diseases has been ongoing to meet the public demand and scientific interest in accurate, consistent, epidemiologic data. These ongoing disease reports include: Creutzfeldt-Jakob Disease (CJD), Cyclospora, Dengue, Hantavirus, Kawasaki Syndrome, Legionellosis, Lyme disease, Malaria, Plague, Q Fever, Reye Syndrome, Tickborne Rickettsial Disease, Trichinosis, Tularemia, Typhoid Fever, and Viral Hepatitis. The Active Bacterial Surveillance (ABCs) forms were removed in 2007 and were approved as separate documents under OMB control number 0920–0802. Case report forms from state and territorial health departments enable CDC to collect demographic, clinical, and laboratory characteristics of cases of these diseases. This revision incorporates the removal of the ABCs surveillance forms and minor changes to the Malaria surveillance form.

The purpose of the proposed study is to direct epidemiologic investigations, identify and monitor trends in reemerging infectious diseases or emerging modes of transmission, to search for possible causes or sources of the diseases, and develop guidelines for prevention and treatment. The data collected will also be used to recommend target areas most in need of vaccinations for selected diseases and to determine development of drug resistance. Because of the distinct nature of each of the diseases, the number of cases reported annually is different for each. There is no cost to respondents other than their time. The estimated annualized burden for this data collection is 11,441 hours.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondent	Form	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Epidemiologist	Tyhphoid fever	55	6	20/60
	Viral hepatitis	55	200	25/60
	CJD	20	2	20/60
	Cyclosporiasis	55	10	15/60
	Dengue	55	182	15/60
	Hantavirus	40	3	20/60
	Kawasaki Syndrome	55	8	15/60
	Legionellosis	23	12	20/60
	Lyme Disease	52	385	10/60
	Malaria	55	20	15/60
	Plague	11	1	20/60
	Q Fever	55	1	10/60
	Reye Syndrome	50	1	20/60
	Tick-borne Rickettsia	55	18	10/60
	Trichinosis	25	1	20/60
	Tularemia	55	2	20/60

Dated: February 25, 2010.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2010–4512 Filed 3–3–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; Comment Request; The Agricultural Health Study: A Prospective Cohort Study of Cancer and Other Disease Among Men and Women in Agriculture (NCI)

SUMMARY: 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 National Cancer Institute (NCI), the National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

Proposed Collection: Title: The Agricultural Health Study: A Prospective Cohort Study of Cancer and Other Disease Among Men and Women in Agriculture (NCI) (OMB#: 0925–0406). *Type of Information Collection Request:* Revision. *Need and Use of Information Collection:* The purpose of this information collection is to

continue and complete updating the occupational and environmental exposure information as well as medical history information for respondents enrolled in the Agriculture Health Study. This represents a request to continue and complete phase III (2005–2010) of the study. The primary objectives of the study are to determine the health effects resulting from occupational and environmental exposures in the agricultural environment. Secondary objectives include evaluating biological markers that may be associated with agricultural exposures and risk of certain types of cancer. Questionnaire data will be collected by using computer assisted telephone interview (CATI) and in-person interview (CAPI) systems for telephone screeners and home visit interviews, respectively. Some respondents will also be asked to participate in the collection of biospecimens including blood, urine, and buccal cells (loose cells from the respondent's mouth). The findings will provide valuable information concerning the potential link between agricultural exposures and cancer and other chronic diseases among agricultural Health Study cohort members, and this information may be generalized to the entire agricultural community. *Frequency of Response:* One or Three. *Affected Public:* Private Sector, Farms. *Type of Respondents:* Licensed pesticide applicators and their spouses. The annual reporting burden is as follows:

ESTIMATES OF HOUR BURDEN

Type of respondent	Instrument	Estimated annual number of respondents	Frequency of response	Average time per response minutes/hour	Annual burden hours
Private Applicators	CATI Screener	960	1	5/60 (0.083)	80
Private Applicators	Home Visit CAPI and Biospecimens × 1.	310	1	95/60 (1.5)	465
Private Applicators	Home Visit CAPI and Biospecimens × 3.	10	3	95/60 (1.5)	45
Private Applicators, Spouses, Commercial Applicators.	Introductory Telephone Contact and Buccal Cell.	150	1	5/60 (0.083)	13
Total		1430			603

The annualized cost to respondents is estimated at $16,153 each year for a three-year period.

There are no capital costs, operating costs, and/or maintenance costs to report.

Request for Comments: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, 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 those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Michael Alavanja, Dr.P.H, Occupational and Environmental Epidemiology Branch, Division of Cancer Epidemiology and Genetics, National Cancer Institute, NIH, Executive Plaza South, Room 8000, 6120 Executive Blvd., Rockville, MD 20892, or call 301–496–9093, or e-mail your request, including your address to: *alavanjm@mail.nih.gov.*

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

Dated: February 26, 2010.

Vivian Horovitch-Kelley,

NCI Project Clearance Liaison, National Institutes of Health.

[FR Doc. 2010–4567 Filed 3–3–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration on Aging

Agency Information Collection Activities; Proposed Collection; Comment Request; Service; Provider Study

AGENCY: Administration on Aging, HHS.

ACTION: Notice.

SUMMARY: The Administration on Aging (AoA) 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, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection requirements relating to Area Agency on Aging and Local Service Provider Study.

DATES: Submit written or electronic comments on the collection of information by May 3, 2010.

ADDRESSES: Submit electronic comments on the collection of information to: *jennifer.klocinski@aoa.hhs.gov.*

Submit written comments on the collection of information to Administration on Aging, Office of Evaluation, Washington, DC 20201.

FOR FURTHER INFORMATION CONTACT: Jennifer Klocinski at 202–357–0146.

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 request 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, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, AoA is publishing notice of the proposed collection of information set forth in this document. With respect to the following collection of information, AoA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of AoA's functions, including whether the information will have practical utility; (2) the accuracy of AoA'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.

The Administration on Aging collects annual program data at the state level and has sponsored studies to collect information regarding the Area Agencies on Aging. The third component of the Aging Network that administers and implements OAA programs, the Local Service Providers are poorly understood and characterized. The purpose of this data collection is to better understand the relationship between the Area Agencies on Aging and the Local Service Providers with whom they work to provide OAA programs to seniors. This data collection focuses on two areas: an investigation of the feasibility of compiling a national inventory of aging services providers; and an investigation of how Area Agencies on Aging utilize their providers to achieve program goals. This information will be used by AoA to determine the capacity of the provider network to meet the needs of the expected increase in the percentage of persons 60 years and older. The proposed data collection tools may be found on the AoA Web site at *http://www.aoa.gov/AoARoot/Program_Results/Program_Evaluation.aspx.*

AoA estimates the burden of this collection of information as follows: 200 hours

Dated: March 1, 2010.

Kathy Greenlee,

Assistant Secretary for Aging.

[FR Doc. 2010–4602 Filed 3–3–10; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0205]

James A. Holland; Denial of Hearing; Final Debarment Order

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is denying James A. Holland's request for a hearing and is issuing an order under the Federal Food, Drug, and Cosmetic Act (the act) debarring Holland for 5 years from providing services in any capacity to a person who has an approved or pending drug product application. FDA bases this order on a finding that Holland was convicted of a misdemeanor under Federal law for conduct relating to the development or approval of a drug product or otherwise relating to the regulation of a drug product under the act and that the type of conduct underlying the conviction undermines the process for the regulation of drugs. In determining the appropriateness and length of Holland's debarment period, FDA has considered the relevant factors listed in the act. Holland has failed to file with the agency information and analysis sufficient to create a basis for a hearing concerning this action.

DATES: The order is effective March 4, 2010.

ADDRESSES: Submit applications for termination of debarment to the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: G. Matthew Warren, Office of Scientific Integrity, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993, 301–796–4613.

SUPPLEMENTARY INFORMATION:

I. Background

On April 24, 2007, Holland, formerly the head of the oncology program at the Stratton Veterans Affairs Medical Center, pled guilty to failing to establish and maintain a required record under section 505(i) of the act (21 U.S.C. 355(i)) in violation of sections 301(e) of the act (21 U.S.C. 331(e)). On March 31, 2009, the United States District Court for the Northern District of New York sentenced Holland to 5 years of probation for his resulting Federal misdemeanor conviction under section 303(a)(1) of the act (21 U.S.C. 333(a)(1)). The basis for this conviction was Holland's failure to establish and maintain adequate and accurate case histories for the subjects of clinical trials he oversaw.

Holland is subject to debarment based on a finding, under section 306(b) of the act, (1) that he was convicted of a misdemeanor under Federal law for conduct relating to the development or approval of a drug product or otherwise relating to the regulation of a drug product under the act and (2) that the type of conduct underlying the conviction undermines the process for the regulation of drugs. Holland's conduct related to the development or approval of a drug product in that it involved clinical trials designed to study the effectiveness of drug products for possible approval by FDA.

By letter dated June 1, 2009, FDA served Holland a notice proposing to debar him for 5 years from providing services in any capacity to a person having an approved or pending drug product application. By letter dated July 1, 2009, Holland, through counsel, requested a hearing on the proposal. In his request for a hearing, Holland does not dispute his misdemeanor conviction under Federal law, as alleged by FDA. However, he asserts that he has appealed the conviction to the United States Court of Appeals for the Second Circuit.

We reviewed Holland's request for a hearing and find that Holland has not created a basis for a hearing because hearings will be granted only if there is a genuine and substantial issue of fact. Hearings will not be granted on issues of policy or law, on mere allegations, denials, or general descriptions of positions and contentions, or on data and information insufficient to justify the factual determination urged or the action requested (see 21 CFR 12.24(b)).

The Acting Chief Scientist and Deputy Commissionerhas considered Holland's arguments and concludes that they are unpersuasive and fail to raise a genuine and substantial issue of fact requiring a hearing.

II. Arguments

In support of his hearing request, Holland argues that the conviction on which FDA bases his proposed debarment is currently on appeal. However, under 306(b)(2)(B)(i), Holland

is subject to debarment if FDA finds that he "has been convicted of—* * * a misdemeanor under Federal law" and that "the type of conduct which served as the basis for such conviction undermines the process for the regulation of drugs." FDA has made both findings, and Holland does not dispute either finding. Section 306 contains no requirement that a conviction be finalized on appeal before it subjects an individual to debarment. In fact, under 306(l)(1)(A), "a person is considered to have been convicted of a criminal offense—* * * when a judgment of conviction has been entered against the person * * * regardless of whether there is an appeal pending." Moreover, under 306(d)(3), Holland may apply to FDA to have the debarment order withdrawn if his conviction is reversed. It is therefore clear from section 306 that a pending appeal for a conviction does not preclude FDA's reliance on that conviction for debarment.

III. Findings and Order

Therefore, the Acting Chief Scientist and Deputy Commissioner, under section 306(b)(2)(B)(i)(I) of the act and under authority delegated to him, finds (1) that Holland has been convicted of a misdemeanor under Federal law for conduct relating to the development or approval of a drug product or otherwise relating to the regulation of a drug product under the act and (2) that the type of conduct which served as the basis for that conviction undermines the process for the regulation of drugs. FDA has considered the relevant factors listed in section 306(c)(3) of the act and determined that a debarment of 5 years is appropriate.

As a result of the foregoing findings, Holland is debarred for 5 years from providing services in any capacity to a person with an approved or pending drug product application under section 505, 512, or 802 of the act (21 U.S.C. 355, 360b, or 382), or under section 351 of the Public Health Service Act (42 U.S.C. 262), effective (see **DATES**) (see 21 U.S.C. 335a(c)(1)(B) and (c)(2)(A)(iii) and 21 U.S.C. 321(dd)). Any person with an approved or pending drug product application who knowingly uses the services of Holland, in any capacity during his period of debarment, will be subject to civil money penalties. If Holland, during his period of debarment, provides services in any capacity to a person with an approved or pending drug product application, he will be subject to civil money penalties. In addition, FDA will not accept or review any abbreviated new drug applications submitted by or with the assistance of Holland during his period of debarment.

Any application by Holland for termination of debarment under section 306(d) of the act should be identified with Docket No. FDA–2009–N–0205 and sent to the Dockets Management Branch (see **ADDRESSES**). All such submissions are to be filed in four copies. The public availability of information in these submissions is governed by 21 CFR 10.20(j). Publicly available submissions may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Publicly available submissions may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Dated: January 22, 2010.

Jesse L. Goodman,

Acting Chief Scientist and Deputy Commissioner for Science and Public Health.

[FR Doc. 2010–4449 Filed 3–3–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2006–D–0223] (formerly 2006D–0383)

Guidance for Industry: Characterization and Qualification of Cell Substrates and Other Biological Materials Used in the Production of Viral Vaccines for Infectious Disease Indications; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a document entitled "Guidance for Industry: Characterization and Qualification of Cell Substrates and Other Biological Materials Used in the Production of Viral Vaccines for Infectious Disease Indications," dated February 2010. The guidance document provides recommendations to manufacturers of viral vaccines for the characterization and qualification of cell substrates, viral seeds, and other biological materials used for the production of viral vaccines for human use. The guidance announced in this notice finalizes the draft guidance entitled "Guidance for Industry: Characterization and Qualification of Cell Substrates and Other Biological Starting Materials Used in the Production of Viral Vaccines for the Prevention and Treatment of Infectious Diseases," dated September 2006, and replaces the information specific to viral vaccines for the prevention and treatment of infectious diseases that the agency provided in the 1993 document entitled "Points to Consider in the Characterization of Cell Lines Used to Produce Biologicals."

DATES: Submit electronic or written comments on agency guidances at any time.

ADDRESSES: Submit written requests for single copies of the guidance to the Office of Communication, Outreach and Development (HFM–40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448. Send one self-addressed adhesive label to assist the office in processing your requests. The guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 301–827–1800. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

Submit electronic or written comments on the guidance. Submit electronic comments to *http://www.regulations.gov*. Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Paul E. Levine, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448, 301–827–6210.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a document entitled "Guidance for Industry: Characterization and Qualification of Cell Substrates and Other Biological Materials Used in the Production of Viral Vaccines for Infectious Disease Indications," dated February 2010. The guidance document provides manufacturers of viral vaccines with recommendations for the characterization and qualification of cell substrates, viral seeds, and other biological materials used for the production of viral vaccines for human use. The recommendations in the guidance may be used to support a Biologics License Application or an application for an Investigational New Drug.

In the **Federal Register** of September 29, 2006 (71 FR 57547), FDA announced the availability of the draft guidance entitled "Guidance for Industry: Characterization and Qualification of

Cell Substrates and Other Biological Starting Materials Used in the Production of Viral Vaccines for the Prevention and Treatment of Infectious Diseases," dated September 2006. FDA received numerous comments on the draft guidance and those comments were considered as the guidance was finalized. In addition, editorial changes were made to improve clarity. The guidance announced in this notice finalizes the draft guidance dated September 2006, and replaces information specific to viral vaccines for the prevention and treatment of infectious diseases contained in the 1993 document entitled "Points to Consider in the Characterization of Cell Lines Used to Produce Biologicals." The guidance is also intended to supplement recommendations on the production of viral vaccines for the prevention and treatment of infectious diseases, provided in the International Conference on Harmonisation (ICH) guidance documents entitled "Q5A Viral Safety Evaluation of Biotechnology Products Derived from Cell Lines of Human or Animal Origin"dated September 1998 (63 FR 51074; September 24, 1998) and "Q5D Derivation and Characterisation of Cell Substrates Used for Production of Biotechnological/Biological Products" (63 FR 50244; September 21, 1998).

For the production of biological products not covered under this guidance, we recommend that you refer to the "Points to Consider in the Characterization of Cell Lines Used to Produce Biologicals," dated 1993.

The guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents FDA's current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act

The guidance refers to previously approved collections of information found in FDA Regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). Most of the collections of information to which the guidance refers are covered by 21 CFR part 601 (BLAs (biologics license application)) and part 312 (INDs (investigational new drugs)), and were approved under OMB Control No. 0910–0338 and 0910–0014, respectively. For the remaining referenced collections of information, those in 21 CFR 640.3 and 640.63 have been approved under OMB Control Number 0910–0116; those in 21 CFR part 211, including § 211.160(b), have been approved under OMB Control Number 0910–0139; and those in 21 CFR part 58 have been approved under OMB Control No. 0910–0119.

III. Comments

Interested persons may, at any time, submit to the Division of Dockets Management (see **ADDRESSES**) elecronic or written comments regarding the guidance. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. A copy of the guidance and received comments are available for public examination in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

IV. Electronic Access

Persons with access to the Internet may obtain the guidance at either *http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/default.htm*, *http://www.fda.gov/cber/guidelines.htm* or *http://www.regulations.gov*.

Dated: March 1, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–4553 Filed 3–3–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Program Project: Computational Resource Review.

Date: March 24–26, 2010.

Time: 6:30 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: Estancia La Jolla Hotel & Spa, 9700 N. Torrey Pines Road, La Jolla, CA 92037.

Contact Person: Raymond Jacobson, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5858, MSC 7849, Bethesda, MD 20892. 301–996–7702. *jacobsonrh@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Program Project: Opiate Drug Abuse and CNS Vulnerability to HIV.

Date: March 25–26, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive,Bethesda, MD 20892. (Virtual Meeting.)

Contact Person: Robert Freund, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3200, MSC 7848, Bethesda, MD 20892. 301–435–1050. *freundr@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Fellowships: AIDS Predoctoral and Postdoctoral.

Date: March 30–31, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Virtual Meeting.)

Contact Person: Hilary D. Sigmon, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5216, MSC 7852, Bethesda, MD 20892. (301) 594–6377. *sigmonh@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: February 25, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–4487 Filed 3–3–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as

amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel, Immunobiology of Xenotransplantation.

Date: March 22–23, 2010.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard at Marriott, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: Jay Bruce Sundstrom, PhD, Scientific Review Officer, Scientific Review Program, DEA/NIAID/NIH/DHHS, Room 3119, 6700B Rockledge Drive, MSC–7616, Bethesda, MD 20892–7616, 301–496–7042, *sundstromj@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: February 24, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–4476 Filed 3–3–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Tooth Development and Mineralization,

Date: March 24, 2010.

Time: 2 p.m. to 5 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: Priscilla B. Chen, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4104, MSC 7814, Bethesda, MD 20892. (301) 435–1787. *chenp@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Developmental Pharmacology.

Date: March 31–April 1, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Virtual Meeting.)

Contact Person: Janet M. Larkin, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1102, MSC 7840, Bethesda, MD 20892. 301–806–2765. *larkinja@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Fellowships: Physiology and Pathobiology of Musculoskeletal, Oral, and Skin Systems (F10B).

Date: March 31, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Ritz-Carlton, Washington DC, 1150 22nd Street, NW., Washington, DC 20037.

Contact Person: Abdelouahab Aitouche, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4222, MSC 7812, Bethesda, MD 20892. 301–435–2365. *aitouchea@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)

Dated: February 25, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–4486 Filed 3–3–10; 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 Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Development of Blood Donor Tests for the Presence of Human Babesia Microorganisms.

Date: March 16, 2010.

Time: 1:15 p.m. to 4 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call.)

Contact Person: Youngsuk Oh, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7182, Bethesda, MD 20892–7924. 301–435–0277. *yoh@mail.nih.gov.*

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Patient Oriented Research Career Enhancement Awards.

Date: March 17–18, 2010.

Time: 8 a.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: Ritz-Carlton, 1150 22nd Street NW., Washington, DC 20037.

Contact Person: Mark Roltsch, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7192, Bethesda, MD 20892–7924. 301–435–0287. *roltschm@nhlbi.nih.gov.*

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Catheter for Delivering High Intensity Focused Ultrasound for Transluminal and Endocavitary Intervention.

Date: March 18, 2010.

Time: 2 p.m. to 3 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call.)

Contact Person: Youngsuk Oh, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7182, Bethesda, MD 20892–7924. 301–435–0277. *yoh@mail.nih.gov.*

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Research Demonstration and Dissemination Projects.

Date: March 24, 2010.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call.)

Contact Person: Holly K. Krull, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7188, Bethesda, MD 20892–7924. 301–435–0280. *krullh@nhlbi.nih.gov.*

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Childhood Obesity Prevention and Treatment.

Date: March 26, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.

Contact Person: Robert T. Su, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7202, Bethesda, MD 20892–7924. 301–435–0297. *sur@mail.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: February 25, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–4489 Filed 3–3–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Rehabilitation Sciences.

Date: March 12, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Alexandria Old Town, 1767 King Street, Alexandria, VA 22314.

Contact Person: Jo Pelham, BA, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4102, MSC 7814, Bethesda, MD 20892, (301) 435–1786, *pelhamj@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Dental Sciences.

Date: March 18–19, 2010.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting)

Contact Person: Larry Pinkus, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4132, MSC 7802, Bethesda, MD 20892, (301) 435–1214, *pinkusl@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Program Project: NeuroAIDS.

Date: March 24–25, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting)

Contact Person: Eduardo A Montalvo, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5108, MSC 7852, Bethesda, MD 20892, (301) 435–1168, *montalve@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: for ACE and NAED.

Date: March 25–26, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting)

Contact Person: Jose H. Guerrier, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5218, MSC 7852, Bethesda, MD 20892, 301–435–1137, *guerriej@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: February 23, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–4491 Filed 3–3–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel, Health, Behavior, and the Gene-Social Environment.

Date: March 22, 2010.

Time: 10 a.m. to 12:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, RM 2C212, Bethesda, MD 20892. (Telephone Conference Call.)

Contact Person: Rebecca J. Ferrell, PhD, Scientific Review Officer, National Institute on Aging, Gateway Building Rm. 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20892. 301–402–7703, *ferrellrj@mail.nih.gov.*

Name of Committee: National Institute on Aging Special Emphasis Panel, Longevity Consortium.

Date: March 23, 2010.

Time: 11 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892. (Telephone Conference Call.)

Contact Person: Alicja L Markowska, PhD, DSC, Scientific Review Officer, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301–496–9666. *markowsa@nia.nih.gov.*

Name of Committee: National Institute on Aging Special Emphasis Panel, Long Life Family Studies,

Date: March 31, 2010.

Time: 9:30 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892. (Telephone Conference Call.)

Contact Person: Alicja L Markowska, PhD, DSC, Scientific Review Officer, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue, Suite 2C212,

Bethesda, MD 20892, 301–496–9666. *markowsa@nia.nih.gov.*

Name of Committee: National Institute on Aging Special Emphasis Panel, EUREKA—2010.

Date: March 31, 2010.

Time: 12 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892. (Telephone Conference Call.)

Contact Person: Alexander Parsadanian, PhD., Scientific Review Officer, National Institute on Aging, Gateway Building 2C/212, 7201 Wisconsin Avenue, Bethesda, MD 20892, 301–402–7703. *PARSADANIANA@NIA.NIH.GOV.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: February 24, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–4485 Filed 3–3–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel, Consortia for High-Throughput-Enabled Structural Biology Partnerships (U01).

Date: April 1–2, 2010.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Margaret J. Weidman, PhD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN18B, Bethesda, MD 20892, 301–594–3663.

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: February 25, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–4484 Filed 3–3–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel; MBRS SCORE Neuroscience & Physiology.

Date: April 2, 2010.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency, Bethesda, MD 20814.

Contact Person: Brian R Pike, PhD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN18, Bethesda, MD 20892, 301–594–3907, *pikbr@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: February 25, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–4483 Filed 3–3–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel, Special Emphasis Panel Meeting, ZGM1 CBCB (SB).

Date: March 26, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Hotel—Bethesda, Bethesda, MD 20814.

Contact Person: Arthur L. Zachary, PhD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 3AN–12, Bethesda, MD 20892, (301) 594–2886, *zacharya@nigms.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: February 25, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–4482 Filed 3–3–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Meeting

Pursuant to section 10(a) 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 open to the public, 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.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel, Laboratory Support for the Division of Epidemiology, Statistics and Prevention-I and II.

Date: March 24, 2010.

Time: 2 p.m. to 3:30 p.m.

Agenda: To provide concept review of proposed concept review.

Place: National Institutes of Health, 6100 Executive Boulevard, Room 5B01, Rockville, MD 20852. (Telephone Conference Call.)

Contact Person: Sathasiva B. Kandasamy, PhD, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, 6100 Executive Boulevard, Room 5B01, Bethesda, MD 20892–9304. (301) 435–6680.*skandasa@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: February 25, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–4481 Filed 3–3–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; 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 Child Health and Human Development Special Emphasis Panel, Mechanisms of Acclimatization (Perinatology).

Date: April 1, 2010.

Time: 1 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6100 Executive Boulevard, Room 5B01, Bethesda, MD 20892. (Telephone Conference Call)

Contact Person: Rita Anand, PhD, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute, of Child Health and Human Development, NIH, 6100 Executive Blvd. Room 5B01, Bethesda, MD 20892, (301) 496–1487, *anandr@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: February 25, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–4480 Filed 3–3–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; 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 Child Health and Human Development Special Emphasis Panel, The Role of Human-Animal Interaction in Child Health and Development.

Date: March 23–24, 2010.

Time: 9 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: St. Gregory Hotel, 2033 M Street, NW., Washington, DC 20036.

Contact Person: Marita R. Hopmann, PhD, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, 6100 Building, Room 5B01, Bethesda, MD 20892. (301) 435–6911. *hopmannm@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: February 25, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–4479 Filed 3–3–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Research Resources; 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 Center for Research Resources Special Emphasis Panel;

Date: March 25, 2010.

Time: 8 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: 6701 Democracy Blvd., Democracy 1, 1082, Bethesda, MD (Virtual Meeting).

Contact Person: Sheri A. Hild, PhD, Scientific Review Officer, National Institutes of Health, National Center for Research Resources, Office of Review, 6701 Democracy Blvd, Rm. 1082, Bethesda, MD 20892, 301–435–0811, *hildsa@mail.nih.gov*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research; 93.371, Biomedical Technology; 93.389, Research Infrastructure, 93.306, 93.333; 93.702, ARRA Related Construction Awards, National Institutes of Health, HHS)

Dated: February 24, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–4478 Filed 3–3–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Seeding Team Science in Diabetes Endocrinology and Metabolic Diseases (R24).

Date: March 19, 2010.

Time: 1 p.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892. (Telephone Conference Call.)

Contact Person: Thomas A. Tatham, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 760, 6707 Democracy Boulevard, Bethesda, MD 20892–5452. (301) 594–3993. *tathamt@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Cystic Fibrosis Research and Translation Core Centers.

Date: April 7–8, 2010.

Time: 5 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Marriott Courtyard Gaithersburg Washingtonian Center, 204 Boardwalk Place, Gaithersburg, MD 20878.

Contact Person: Robert Wellner, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 757, 6707 Democracy Boulevard, Bethesda, MD 20892–5452. (301) 594–4721. *rw175w@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: February 24, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–4477 Filed 3–3–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Gastrointestinal Physiology and Pathophysiology.

Date: March 15, 2010.

Time: 11 a.m. to 2 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: Patricia Greenwel, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2178, MSC 7818, Bethesda, MD 20892. 301–435–1169. *greenwep@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel, PAR08–154: Global Infectious Disease Training Program.

Date: March 19, 2010.

Time: 7:30 a.m. to 10 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard by Marriott, 5520 Wisconsin Avenue, Mayfair Combination Conference Room, Chevy Chase, MD 20815.

Contact Person: Dan D. Gerendasy, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3218, MSC 7843, Bethesda, MD 20892. 301–408–9164. *gerendad@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Oocytes and Embryos.

Date: March 22, 2010.

Time: 11 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Virtual Meeting.)

Contact Person: Krish Krishnan, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6164, MSC 7892, Bethesda, MD 20892. (301) 435–1041. *krishnak@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, RFA–OD–09–010: ARRA RC4 Sustainable Community-Linked Infrastructure Panel 1.

Date: March 25–26, 2010.

Time: 8:30 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Ellen K. Schwartz, EDD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3048F, MSC 7770,Bethesda, MD 20892. 301–408–9046. *schwarte@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Genomics and Computational Biology SEP.

Date: March 25–26, 2010.

Time: 9 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: Michael K. Schmidt, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2214, MSC 7890, Bethesda, MD 20892. (301) 435–1147. *mschmidt@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: Biological Chemistry and Macromolecular Biophysics.

Date: March 25–26, 2010.

Time: 11 a.m. to 10 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Virtual Meeting.)

Contact Person: Donald L. Schneider, PhD, Scientific Review Officer, Center for

Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5160, MSC 7842, Bethesda, MD 20892. (301) 435–1727. *schneidd@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, PAR08–22: FIRCA and GRIP in Behavioral Social Sciences.

Date: March 26, 2010.

Time: 8 a.m. to 7 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard by Marriott Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: Dan D. Gerendasy, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3218, MSC 7843, Bethesda, MD 20892. 301–408–9164. *gerendad@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Fellowship: Technology Development.

Date: April 1, 2010.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard by Marriott Chevy Chase, 5520 Wisconsin Ave, Chevy Chase, MD 20815.

Contact Person: Alessandra M. Bini, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5142, MSC 7840, Bethesda, MD 20892. 301–435–1024. *binia@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: February 24, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–4494 Filed 3–3–10; 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: Heart, Lung, and Blood Initial Review Group; Heart, Lung, and Blood Program Project Review Committee.

Date: March 19, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Jeffrey H. Hurst, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7208, Bethesda, MD 20892–7924, 301–435–0303, *hurstj@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: February 23, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–4493 Filed 3–3–10; 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 Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Sickle Cell Disease Advisory Committee.

The meeting will be open to the public, 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.

Name of Committee: Sickle Cell Disease Advisory Committee.

Date: March 26, 2010.

Time: 8:30 a.m. to 4:30 p.m.

Agenda: Discussion of Programs and Issues.

Place: National Institutes of Health, 6701 Rockledge Drive, 10th Floor, Conference Room 10091, Bethesda, MD 20892.

Contact Person: W. Keith Hoots, Director, Division of Blood Diseases and Resources, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Suite 9030, Bethesda, MD 20892, 301–435–0080, *hootswk@nhlbi.nih.gov.*

Information is also available on the Institute's/Center's home page: *http://www.nhlbi.nih.gov/meetings/index.htm,* where an agenda and any additional information for the meeting will be posted when available.

(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: February 23, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–4492 Filed 3–3–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Clinical Center; 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 NIH Advisory Board for Clinical Research.

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 section 552b(c)(6), Title 5 U.S.C., as amended to discuss personnel matters, the disclosure of which would constitute a clearly unwarranted invasion of privacy.

Name of Committee: NIH Advisory Board for Clinical Research.

Date: March 22, 2010.

Open: 10 a.m. to 1:15 p.m.

Agenda: To review the FY11 Clinical Center Budget.

Place: National Institutes of Health, Building 10, 10 Center Drive, CRC Medical Board Room 4–2551, Bethesda, MD 20892.

Closed: 1:15 p.m. to 2 p.m.

Agenda: To review and evaluate personnel matters.

Place: National Institutes of Health, Building 10, 10 Center Drive, CRC Medical Board Room 4–2551, Bethesda, MD 20892.

Contact Person: Maureen E Gormley, Executive Secretary, Mark O. Hatfield Clinical Research Center, National Institutes of Health, Building 10, Room 6–2551, Bethesda, MD 20892, (301) 496–2897.

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.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Dated: February 25, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–4490 Filed 3–3–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Request for Measures of Patient Experiences of Cancer Care

AGENCY: Agency for Healthcare Research and Quality, HHS.

ACTION: Notice of request.

SUMMARY: The Agency for Healthcare Research and Quality (AHRQ), in collaboration with the National Cancer Institute (Nd), is soliciting voluntary submission of survey instruments and items, which ask adult survey respondents to assess the care delivered by cancer care providers. AHRQ is seeking these items and measures from researchers, survey firms, cancer care providers, patient advocacy groups, individual cancer patients, and other stakeholders who are interested in the development of survey measures of patient experiences of cancer care. To be as inclusive as possible, AHRQ is requesting such instruments and individual items, along with any available documentation of their validity and reliability and descriptions of survey methods for using them.

Organizations can submit items for use in either or both of the two related initiatives to develop measures of the experience with cancer care. The first initiative will focus on identifying items and survey instruments that can be used by AHRQ as candidate items for a standardized instrument to measure patient assessment of cancer care. The ultimate goal of this process is to develop and test a survey that will be part of the CAHPS family of survey instruments. Submitters of items sent in response to this announcement and subsequently incorporated into the CAHPS® Survey for Cancer Care will be acknowledged in explanatory material accompanying the survey instrument and published on the CAHPS® Web site (*https://www.cahps.AHRQ.gov*). The instrument will be made available to the public under the CAHPS® trademark to encourage both widespread use and uniformity of criteria by which cancer care providers can be compared by consumers and others. Organizations that field CAHPS® Surveys with the trademarked CAHPS® name on them are required to follow all implementation and reporting instructions set out on the CAHPS® Web site.

The second initiative will focus on the identification of items for use in a new tool being developed to measure Patient Centered Communication (PCC) in cancer care. While both initiatives are related to the patient care experience, the PCC instruments will focus primarily on elements of the communication between patients and clinicians throughout the spectrum of cancer care (*i.e.,* exchanging information, fostering healing relationships, managing uncertainty, recognizing and responding to emotions, making decisions, and enabling self-management and patient navigation through the care continuum) as cited in Epstein & Street (Epstein RM, Street RL Jr. Patient Centered Communication in Cancer Care: Promoting Healing and Reducing Suffering. National Cancer Institute, NIH Publication No. 07–6225. Bethesda, MD, 2007). Submitters of items sent in response to this announcement and subsequently incorporated into the PCC instruments will be acknowledged in explanatory material accompanying the survey instruments and published on the NCI Web site (*http://outcomes.cancer.gov/areas/pcc/*).

In addition to the patient perspective on the care they receive, the PCC instruments will address communication from the perspective of the treating clinicians.

AHRQ will consider all submitted instruments and items for inclusion in the final survey instruments under development. Submitters will not be identified with specific items in the final instrument, but will be included in a list of those who contributed candidate instruments and items if so desired. Please include a statement with your submission indicating whether or not you wish to be identified as a contributor.

DATES: Please submit instruments and supporting information to Dr. William Lawrence (see address below) on or before April 2, 2010.

ADDRESSES: Submissions should include a brief cover letter, a copy of the instrument or items for consideration and supporting information as specified under "Submission Criteria" below. Submissions may be in the form of a letter or e-mail, preferably with an electronic file in a standard word processing format on a CD or as an e-mail attachment. Electronic submissions are encouraged. Please do not use acronyms unless clearly defined. Responses to this request should be submitted to: Dr. William Lawrence, Agency for Healthcare Research and Quality, 540 Gaither Road, Rockville, MD 20850, Phone: (301) 427–1517, Fax: (301) 427–1520, E-mail: *william.lawrence@AHRQ.hhs.gov.* To facilitate handling of submissions, please include full information about the instrument developer, any copyright holder and person to contact: (a) Name, (b) title, (c) organization, (d) mailing address, (e) telephone number, (f) fax number, and (g) e-mail address. A copy or citation of relevant peer-reviewed journal articles is also desirable, but not required. For citations, please include the title of the article, author(s), publication year, journal name, volume, issue, and page numbers where the article appears and/or other applicable evidence to support the value of the instrument or items for measuring patients' experience (or the clinicians experience for the PCC initiative) of cancer care.

All submissions must include a written statement granting AHRQ the right to use and authorize others to use the submitted instruments, items, and their documentation for the above-described purposes. Thus, this statement must indicate whether you are interested in submitting the items or instruments for use in the first initiative (CAHPS® Survey for Cancer Care), the second initiative (PCC Surveys), or both. This statement must be signed by an individual authorized to act for any holder of copyright on each submitted measure or instrument. The authority of the signatory to provide such authorization should be described in the letter. Submitters' willingness to grant to AHRQ the right to use and authorize others to use their instruments, items, and measures means that AHRQ will have a license to grant free access and rights to use all elements of the early and final versions of the CAHPS® and/or PCC instruments, in accordance with the instruments' supporting administration information and instructions.

FOR FURTHER INFORMATION CONTACT: William Lawrence, MD, MS, from the

Center for Outcomes and Evidence, Agency for Healthcare Research and Quality, (please see contact information above).

Submission Criteria

The survey development teams are interested in instruments and items through which cancer patients can assess the care they receive from providers as well as the providers' communication skill. They are also interested in instruments and items through which clinicians can assess delivered care or communication. In addition to survey items and instruments, the development teams are interested in observational measures and their associated scoring systems. AHRQ, in collaboration with experienced investigators, will evaluate all submitted instruments and items. Instruments and items may be adopted verbatim, in whole or in part, or may be modified. AHRQ will assume responsibility for the final measure sets as well as any future modifications to either survey.

Each voluntary submission should include the following related descriptive information, to the extent that it is available:

- The name of the instrument (or observational measure);
- Domain(s) or key concepts covered in the survey;
- Language(s) in which the instrument is available;
- Evidence of cultural/cross group comparability;
- Cognitive screening or assessments used and cognitive testing results;
- Method of selection of respondent (*i.e.,* patient) or patient representative or spokesperson (*i.e.,* most appropriate family member/significant other, if more than one available);
- Response rates;
- Cost estimates for data collection;
- Instrument reliability (internal consistency, test-retest, etc.);
- Validity (content, construct, criterion-related);
- Methods and results of field-testing; and,
- Description of sampling strategies and data collection protocols, including such elements as mode of administration, informed consent materials, use of advance letters, timing and frequencies of contacts;
- For the PCC initiative, indicate whether the instrument (or observational measure) is designed for use with patients or clinicians, as well as a statement indicating whether or not the submitter wishes to be acknowledged when the instrument is published on the NCI Web site.

In addition, a description of how extensively the survey has been fielded should also be included in the submission materials. Measures that have been tested or implemented in just one or two research studies would have more limited value than those tested or implemented more widely, but measures will be considered on an individual basis when evaluating the measures needing further testing as a prerequisite to their inclusion in CAHPS® or PCC draft and final survey tools.

Submission of copies of existing report formats developed to disclose findings to consumers and providers is desirable, but not required. Additionally, information about existing database(s) for the instrument(s) submitted is helpful, but not required for submission. Evidence of meeting the validity, reliability, and other criteria may be demonstrated through submission of peer-reviewed journal article(s) or through the best evidence available at the time of submission.

SUPPLEMENTARY INFORMATION:

Background

AHRQ is a leader in developing and testing instruments for quantitative measurement of consumer experience within the healthcare system of the United States as evidenced by the development and widespread use of CAHPS® survey products. The Consumer Assessment of Healthcare Providers and Systems (CAHPS®) program is a public-private initiative to develop standardized surveys of patient experience of care received in ambulatory and facility settings. Standardization of measures is essential for meaningful comparison of performance across providers and settings. While CAHPS® instruments have been highly regarded within the industry and provide valuable information, until now, no CAHPS® condition-specific surveys have been developed. Use of a standardized measurement instrument for cancer care will provide several benefits including: Comparable information across cancer care providers for the public about the quality of care; data-based recommendations for quality improvement efforts and a data base to stimulate further research in this area. AHRQ, through a collaborative process with NCI and other stakeholders, has initiated the process for this project.

The steps to advance this initiative are described below:

- Survey Development and Testing: The process by which measures will be defined and the most useful instruments or measures identified is as follows: Instruments submitted will be evaluated by the project team in consultation with AHRQ and NCI staff to determine if they meet high priority or common measurement needs and to identify whether additional measure development is required. Additional measure development will be done as needed.

Until the trademarked versions or each instrument are available, access to and use of draft versions will require explicit written permission from AHRQ and sharing of testing results with the CAHPS® team. testing

- Implementation Plan: The final tools and a description of the survey process as well as instructions for implementing of the final standardized CAHPS® and PCC cancer care instruments will be made available at no cost to the public on AHRQ and NCI Web sites and will include requirements and information related to their use in future data collections, analysis, and public reporting.

Dated: February 16, 2010.

Carolyn M. Clancy,

Director, AHRQ.

[FR Doc. 2010–4387 Filed 3–3–10; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Statement of Organization, Functions, and Delegations of Authority

Part C (Centers for Disease Control and Prevention) of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (45 FR 67772–76, dated October 14, 1980, and corrected at 45 FR 69296, October 20, 1980, as amended most recently at 75 FR 7489–7490, dated February 19, 2010) is amended to reflect the establishment of the Office of Infectious Diseases, Centers for Disease Control and Prevention.

Section C–B, Organization and Functions, is hereby amended as follows: After the mission statement for the Centers for Disease Control and Prevention (C), insert the following:

Office of Infectious Diseases (CV). The mission of the Office of Infectious Diseases (OID) is to lead, promote, and facilitate science, programs, and policies to reduce the burden of infectious diseases in the United States and globally.

Office of the Director (CVA). (1) Serves as the principal advisor to the

CDC Director on infectious disease issues; (2) assists the CDC Director in formulating and communicating strategic initiatives and policies; (3) informs the CDC Director about key infectious disease issues; (4) represents the CDC Director externally on infectious disease issues; (5) provides strategic leadership to CDC's infectious disease national centers; (6) develops overall strategic directions, sets priorities, and promotes science, policies, and programs related to infectious diseases; (7) ensures that agency-wide decisions on resource allocation are aligned with infectious disease priorities; (8) works with infectious disease national centers, other CDC centers and offices, and public health partners to develop and implement infectious disease goals and objectives; (9) identifies infectious disease issues of public health importance and launches strategic initiatives to address them, including developing shared goals and monitoring progress and accomplishments; (10) recruits and supports an efficient, effective, and vibrant work force, and fosters a safe and healthy work environment; (11) enhances cooperation, collaboration, and partnerships across multiple sectors, domestically and globally; (12) ensures integrity, transparency, and excellence in public health science and practice; (13) conducts ongoing evaluation and adjustment of infectious disease activities to ensure optimal effectiveness and efficiency; (14) promotes an environment that increases synergies and efficiencies and reduces duplication within CDC's infectious disease programs; and (15) provides direction and leadership for external and internal program reviews of the infectious disease national centers' initiatives, performance, and achievements.

Influenza Coordination Unit (CVA4). The mission of the Influenza Coordination Unit (ICU) is to synchronize all aspects of CDC's pandemic influenza preparedness and response from strategy through implementation and evaluation. In carrying out its mission, the ICU: (1) Serves as the principal advisor to the CDC Director and Deputy Director for Infectious Diseases on pandemic influenza preparedness and response activities, assisting the Director and Deputy Director for Infectious Diseases in formulating and communicating strategic pandemic initiatives and policies; (2) provides strategic leadership for CDC in the areas of pandemic preparedness and response, including setting priorities and promoting science, policies, and programs related to pandemic influenza; (3) strategically manages a $150+ million budget and allocates funds across the agency to ensure appropriate resources for high priority areas; and (4) conducts ongoing evaluation and adjustment of pandemic preparedness and response activities, in coordination with the National Response Framework and other emergency preparedness guidance, to ensure optimal public health effectiveness and efficient use of human and fiscal resources.

Dated: February 23, 2010.

William P. Nichols,

Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2010–4391 Filed 3–3–10; 8:45 am]

BILLING CODE 4160–18–M

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

[Docket No. TSA–2009–0018]

Extension of Agency Information Collection Activity Under OMB Review: Certified Cargo Screening Program

AGENCY: Transportation Security Administration, DHS.

ACTION: 30-Day notice.

SUMMARY: This notice announces that the Transportation Security Administration (TSA) has forwarded the Information Collection Request (ICR), OMB control number 1652–0053, abstracted below to the Office of Management and Budget (OMB) for renewal in compliance with the Paperwork Reduction Act. The ICR describes the nature of the information collection and its expected burden. TSA published a **Federal Register** notice, with a 60-day comment period soliciting comments, of the following collection of information on November 16, 2009, 74 FR 58967. TSA has received no comments. The collections include: (1) Applications from entities that wish to become Certified Cargo Screening Facilities (CCSF) or operate as a TSA-approved validation firm; (2) personal information to allow TSA to conduct security threat assessments on key individuals employed by the CCSFs and validation firms; (3) implementation of a standard security program or submission of a proposed modified security program; (4) information on the amount of cargo screened; (5) recordkeeping requirements for CCSFs and validation firms; and (6) submission of validation reports to TSA. TSA is seeking the renewal of the ICR for the continuation of the program in order to secure passenger aircraft carrying cargo by the deadlines set out in the Implementing Recommendations of the 9/11 Commission Act of 2007.

DATES: Send your comments by April 5, 2010. A comment to OMB is most effective if OMB receives it within 30 days of publication.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to Desk Officer, Department of Homeland Security/TSA, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: Joanna Johnson,, TSA Paperwork Reduction Act (PRA) Officer, Office of Information Technology (OIT), TSA–11, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6011; telephone (571) 227–3651; e-mail *TSAPRA@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (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 unless it displays a valid OMB control number. The ICR documentation is available at *http://www.reginfo.gov.* Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement 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;

(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 using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Information Collection Requirement

Title: Certified Cargo Screening Program.

Type of Request: Renewal of one currently approved collection.

OMB Control Number: 1652–0053.

Form(s): The forms used for this collection of information include the CCSF Facility Profile Application (TSA Form 419B), CCSF Principal Attestation (TSA Form 419D), Security Profile (TSA Form 419E), Security Threat Assessment Application (TSA Form 419F), TSA Approved Validation Firms Application (TSA Form 419G), Aviation Security Known Shipper Verification (TSA Form 419H), CCSF Indirect Air Carrier Reporting Template, CCSF Shipper Reporting Template, and the CCSF Independent Cargo Screening Facility Reporting Template.

Affected Public: The collections of information that make up this ICR involve entities other than aircraft operators located off-airport and includes facilties upstream in the air cargo supply chain, such as shippers, manufacturers, warehousing entities, distributors, third party logistics companies and Indirect Air Carriers located in the United States.

Abstract: TSA is seeking the approval from OMB for the collections of information contained in the ICR. Congress identified specific requirements for TSA in the area of air cargo security in the Aviation and Transportation Security Act (ATSA), Public Law 107–71: (1) To provide for screening of all property, including U.S. mail, cargo, carry-on and checked baggage, and other articles, that will be carried aboard a passenger aircraft; and (2) to establish a system to screen, inspect, report, or otherwise ensure the security of all cargo that is to be transported on passenger aircraft as soon as practicable. In the Implementing Recommendations of the 9/11 Commission Act of 2007, Public Law 110–53, Congress requires that 50 percent of cargo transported on passenger aircraft is screened by February 2009, and 100 percent of such cargo is screened by August 2010.

TSA must proceed with the ICR for this program in order to meet the Congressional mandates, and current and new regulations (49 CFR 1522, 1542.209, 1544.205, 1546.205, 1548, and 1549) that enable them to accept, screen, and transport air cargo. The uninterrupted collection of this information will allow TSA to continue to ensure implementation of these vital security measures for the protection of the traveling public.

TSA will certify qualified facilities as CCSFs. Companies seeking to become CCSFs are required to submit an application to TSA at least 90 days before the intended date of operation. TSA will allow the regulated entity to operate as a CCSF in accordance with a TSA-approved security program. Prior to certification, the CCSF must also submit to an assessment by a TSA-approved validator. The regulated entities must also collect personal information and submit such information to TSA so that TSA may conduct security threat assessments (STA) for individuals with unescorted access to cargo, and who have responsibility for screening cargo under 49 CFR parts 1544, 1546, or 1548. CCSF facilities must provide information on the amount of cargo screened and other cargo screening metrics at an approved facility. CCSFs must also maintain screening, training, and other security-related records of compliance. A firm interested in operating as a TSA-approved validation firm must also apply for TSA approval. Validation firms will need to provide the following information: (1) Applications from entities seeking to become TSA-approved validation firms; (2) personal information so individuals performing, assisting or supervising validation assessments, and security coordinators can undergo STAs; (3) implementation of a standard security program provided by TSA or submission of a proposed modified security program; (4) recordkeeping requirements, including that validation firms maintain assessment reports; and (5) submission of validation reports conducted by validators.

Number of Respondents: 5,663.

Estimated Annual Burden Hours: An estimated 718,481 hours.

Issued in Arlington, Virginia, on February 26, 2010.

Joanna Johnson,

TSA Paperwork Reduction Act Officer, Office of Information Technology.

[FR Doc. 2010–4441 Filed 3–3–10; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2009–0001]

Agency Information Collection Activities: Submission for OMB Review; Comment Request, OMB No. 1660–NEW; FEMA Preparedness Grants: Emergency Management Performance Grant (EMPG)

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice; 30-day notice and request for comments; new information; OMB No. 1660–NEW; FEMA Form—None.

SUMMARY: The Federal Emergency Management Agency (FEMA) has submitted the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission describes the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort and resources used by respondents to respond) and cost, and the actual data collection instruments FEMA will use.

DATES: Comments must be submitted on or before April 5, 2010.

ADDRESSES: Submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *oira.submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Office of Records Management, 1800 South Bell Street, Arlington, VA 20598–3005, facsimile number (202) 646–3347, or e-mail address *FEMA-Information-Collections@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Collection of Information

Title: FEMA Preparedness Grants: Emergency Management Performance Grant (EMPG). The title has changed since publication of the 60-Day **Federal Register** Notice at 74 FR 59237, Nov. 17, 2009.

Type of information collection: New information collection.

OMB Number: 1660–NEW.

Form Titles and Numbers: FEMA Form—None.

Abstract: The Emergency Management Performance Grants (EMPG) assist State and local governments in enhancing and sustaining all-hazards emergency management capabilities. The EMPG Work Plan narrative must demonstrate how proposed projects address gaps, deficiencies, and capabilities in current programs and the ability to provide enhancements consistent with the purpose of the program and guidance provided by FEMA. FEMA uses the information to provide details, timelines, and milestones on proposed projects.

Affected Public: State, Local or Tribal Government.

Estimated Number of Respondents: 58.

Frequency of Response: On occasion.

Estimated Average Hour Burden per Respondent: 3 hours.

Estimated Total Annual Burden Hours: 174 hours.

Estimated Cost: There is no annual reporting or recordkeeping costs associated with this collection.

Larry Gray,

Director, Office of Records Management, Office of Management, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2010–4444 Filed 3–3–10; 8:45 am]

BILLING CODE 9111–78–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2009–0001]

Agency Information Collection Activities: Submission for OMB Review; Comment Request, OMB No. 1660–0105; Household Preparedness Telephone Survey

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice; 30-day notice and request for comments; revision of a currently approved information collection; OMB No. 1660–0105; FEMA Form 088–0–2, Household Preparedness Telephone Survey.

SUMMARY: The Federal Emergency Management Agency (FEMA) has submitted the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission describes the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort and resources used by respondents to respond) and cost, and the actual data collection instruments FEMA will use.

DATES: Comments must be submitted on or before April 5, 2010.

ADDRESSES: Submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *oira.submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Office of Records Management, 1800 South Bell Street, Arlington, VA 20598–3005, facsimile number (202) 646–3347, or e-mail address *FEMA-Information-Collections@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Collection of Information

Title: Community Preparedness and Participation Survey.

Type of information collection: Revision of a currently approved information collection.

OMB Number: 1660–0105.

Form Titles and Numbers: FEMA Form 088–0–2, Household Preparedness Telephone Survey.

Abstract: FEMA's Community Preparedness Division would like to renew a currently approved collection to evaluate the state of preparedness nationally. The Community Preparedness Division analyzes the data collected through this telephone survey of the public to identify progress and gaps in citizen and community preparedness and participation. This information is used by the Community Preparedness Division, and Citizen Corps Councils to tailor awareness and recruitment campaigns, messaging and public information efforts, and strategic planning initiatives to more effectively improve the state of citizen preparedness and participation across the country.

Affected Public: Individuals or households.

Estimated Number of Respondents: 9,750.

Frequency of Response: Once.

Estimated Average Hour Burden per Respondent: .33 burden hours.

Estimated Total Annual Burden Hours: 3,247 hours.

Estimated Cost: $70,784.60.

Dated: February 19, 2010.

Larry Gray,

Director, Office of Records Management, Office of Management, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2010–4446 Filed 3–3–10; 8:45 am]

BILLING CODE 9111–05–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2009–0001]

Agency Information Collection Activities: Submission for OMB Review; Comment Request, OMB No. 1660–NEW; FEMA Preparedness Grants: Emergency Operations Center (EOC) Grant Program

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice; 30-day notice and request for comments; new information collection; OMB No. 1660–NEW; FEMA Form 089–3, EOC Grant Program Investment Justification and Scoring Criteria; FEMA Form 089–18, Prioritization of Competitive Investment Justifications Template.

SUMMARY: The Federal Emergency Management Agency (FEMA) has submitted the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission describes the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort and resources used by respondents to respond) and cost, and the actual data collection instruments FEMA will use.

DATES: Comments must be submitted on or before April 5, 2010.

ADDRESSES: Submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *oira.submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Office of Records Management, 1800 South Bell Street, Arlington, VA 20598–3005, facsimile number (202) 646–3347, or e-mail address *FEMA–Information-Collections@dhs.gov*.

SUPPLEMENTARY INFORMATION:

Collection of Information

Title: FEMA Preparedness Grants: Emergency Operations Center (EOC) Grant Program.

Type of information collection: New information collection.

OMB Number: 1660–NEW.

Form Titles and Numbers: FEMA Form 089–3, EOC Grant Program Investment Justification and Scoring Criteria; FEMA Form 089–18, Prioritization of Competitive Investment Justifications Template.

Abstract: The Emergency Operations Center (EOC) Grant Program is intended to improve emergency management and preparedness capabilities by supporting flexible, sustainable, secure, and interoperable EOCs with a focus on addressing identified deficiencies and needs. Fully capable emergency operations facilities at the State, territory, local and/or tribal levels are an essential element of a comprehensive national emergency management system and are necessary to ensure continuity of operations and continuity of government in major disasters caused by any hazard. The information collection activity is the collection of financial and programmatic information from State, territory, local, tribal, and/or for-profit partners pertaining to grant and cooperative agreement awards that include application, program narrative statements, grant award, performance information, outlay reports, grant funding and property management, and closeout information. The information enables FEMA and any federal partners to evaluate applications and make award decisions, monitor ongoing performance and manage the flow of federal funds, and to appropriately close out grants or cooperative agreements.

Affected Public: State, Local or Tribal Government.

Estimated Number of Respondents: 756.

Frequency of Response: On occasion.

Estimated Average Hour Burden per Respondent: 13.5 hours.

Estimated Total Annual Burden Hours: 5,908 hours.

Estimated Cost: There is no annual reporting or recordkeeping costs associated with this collection.

Larry Gray,

Director, Office of Records Management, Office of Management, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2010–4447 Filed 3–3–10; 8:45 am]

BILLING CODE 9111–78–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2009–0001]

Agency Information Collection Activities: Proposed Collection; Comment Request, 1660–0006; National Flood Insurance Program Policy Forms

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice; 60-day notice and request for comments; extension, without change, of a currently approved information collection; OMB No. 1660–0006; FEMA Form 086–0–1, Flood Insurance Application; FEMA Form 086–0–2, Flood Insurance Cancellation/Nullification Request Form; FEMA Form 086–0–3, Flood Insurance General Change Endorsement; FEMA Form 086–0–5, Flood Insurance Preferred Risk Policy Application; FEMA Form 086–0–4, V-Zone Risk Factor Rating Form and Instructions.

SUMMARY: The Federal Emergency Management Agency, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a proposed extension, without change, of a currently approved information collection. In accordance with the Paperwork Reduction Act of 1995, this Notice seeks comments concerning the application process for property owners to obtain insurance coverage under the National Flood Insurance Program (NFIP).

DATES: Comments must be submitted on or before May 3, 2010.

ADDRESSES: To avoid duplicate submissions to the docket, please use only one of the following means to submit comments:

(1) *Online.* Submit comments at *http://www.regulations.gov* under docket ID FEMA–2009–0001. Follow the instructions for submitting comments.

(2) *Mail.* Submit written comments to Office of Chief Counsel, Regulation and Policy Team, DHS/FEMA, 500 C Street, SW., Room 835, Washington, DC 20472–3100.

(3) *Facsimile.* Submit comments to (703) 483–2999.

(4) *E-mail.* Submit comments to *FEMA-POLICY@dhs.gov.* Include docket ID FEMA–2009–0001 in the subject line.

All submissions received must include the agency name and docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice that is available on the Privacy and Use Notice link on the Administration Navigation Bar of *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Contact Mary Ann Chang, Mitigation Directorate, FEMA, 703–605–0421 for additional information. You may contact the Office of Records Management for copies of the proposed collection of information at facsimile number (202) 646–3347 or e-mail address: *FEMA-Information-Collections@dhs.gov.*

SUPPLEMENTARY INFORMATION: The National Flood Insurance Program (NFIP) is authorized by Public Law 90–448 (1968) and expanded by Public Law 93–234 (1973). The National Flood Insurance Act of 1968 requires that the Federal Emergency Management Agency (FEMA) provided flood insurance at full actuarial rates reflecting the complete flood risk to structures built or substantially improved on or after the effective date for the initial Flood Insurance Rate Map (FIRM) for the community, or after December 31, 1974, whichever is later, so that the risks associated with buildings in flood-prone areas are borne by those located in such areas and not by the taxpayers at large. In accordance with Public Law 93–234, the purchase of flood insurance is mandatory when Federal or federally related financial assistance is being provided for acquisition or construction of buildings located, or to be located, within FEMA-identified special flood hazard areas of communities that are participating in the NFIP.

Collection of Information

Title: National Flood Insurance Program Policy Forms.

Type of Information Collection: Extension, without change, of a currently approved information collection.

OMB Number: 1660–0006.

Form Titles and Numbers: FEMA Form 086–0–1, Flood Insurance Application; FEMA Form 086–0–2, Flood Insurance Cancellation/Nullification Request Form; FEMA Form 086–0–3, Flood Insurance General Change Endorsement; FEMA Form 086–0–5, Flood Insurance Preferred Risk Policy Application; FEMA Form 086–0–

4, V-Zone Risk Factor Rating Form and Instructions.

Abstract: In order to provide for the availability of policies for flood insurance, policies are marketed through the facilities of licensed insurance agents or brokers in the various States. Applications from agents or brokers are forwarded to a servicing company designated as fiscal agent by the Federal Insurance Administration (FIA). Upon receipt and examination of the application and required premium, the servicing company issues the appropriate Federal flood insurance policy.

Affected Public: Individual and Households, Business or other for-profit, Farms, State, local, or Tribal Government.

Estimated Total Annual Burden Hours: 9,480.58.

TABLE A.12—ESTIMATED ANNUALIZED BURDEN HOURS AND COSTS

Type of respondent	Form name/form No.	Number of respondents	Number of responses per respondent	Avg. burden per response (in hours)	Total annual burden (in hours)	Avg. hourly wage rate	Total annual respondent cost
Individual and Household, Business or other for profit, Not-for-profit institutions, Farms, State, local, or Tribal Government (Property Owner).	Flood Insurance Application/ FEMA Form 086–0–1.	5,859	1	.2 Hours (12 Minutes).	1,171.8 Hours (70,308 Minutes).	$30.66	$35,927
Individual and Household, Business or other for profit, Not-for-profit institutions, Farms, State, local, or Tribal Government (Property Owner).	Flood Insurance Cancellation/ Nullification Request Form/ FEMA Form 086–0–2.	2,958	1	.125 Hours (7.5 Minutes).	369.75 Hours (22,185 Minutes).	30.66	11,337
Individual and Household, Business or other for profit, Not-for-profit institutions, Farms, State, local, or Tribal Government (Property Owner).	Flood Insurance General Change Endorsement/ FEMA Form 086–0–3.	19,920	1	.15 Hours (9 Minutes).	2,988 Hours (179,280 Minutes).	30.66	91,612
Individual and Household, Business or other for profit, Not-for-profit institutions, Farms, State, local, or Tribal Government (Property Owner).	Flood Insurance Preferred Risk Policy Application/FEMA Form 086–0–5.	1,090	1	.133 Hours (8 Minutes).	145.33 Hours (8,720 Minutes).	30.66	4,456
Individual and Household, Business or other for profit, Not-for-profit institutions, Farms, State, local, or Tribal Government (Property Owner).	Renewal Premium Notice/ No Form.	93,514	1	.05 Hours (3 Minutes).	4,675.7 Hours (280,542 Minutes).	30.66	143,357
Business or other for profit (Surveyors).	V-Zone Risk Factor Rating Form and Instructions/ FEMA Form 086–0–4 (including reference to the Coastal Construction Manual CD).	20	1	6.5 Hours (390 Minutes).	130 Hours (7,800 Minutes).	48.50	6,305
Total		123,631			9,480.58		292,994

Estimated Cost: The estimated cost due to annual operation or maintenance costs associated with this collection equal $6,387,400.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) Evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) 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; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) 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.

Dated: February 19, 2010.

Larry Gray,

Director, Office of Records Management, Office of Management, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2010–4445 Filed 3–3–10; 8:45 am]

BILLING CODE 9110–11–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

[Docket No. TSA–2004–19515]

Extension of Agency Information Collection Activity Under OMB Review: Air Cargo Security Requirements

AGENCY: Transportation Security Administration, DHS.

ACTION: 30-Day notice.

SUMMARY: This notice announces that the Transportation Security Administration (TSA) has forwarded the Information Collection Request (ICR), OMB control number 1652–0040, abstracted below to the Office of Management and Budget (OMB) for

renewal in compliance with the Paperwork Reduction Act. The ICR describes the nature of the information collection and its expected burden. TSA published a **Federal Register** notice, with a 60-day comment period soliciting comments, of the following collection of information on November 16, 2009, 74 FR 58969. TSA has not received any comments. The collections of information that make up this ICR involve five broad categories affecting airports, passenger aircraft operators, foreign air carriers, indirect air carriers operating under a security program, and all-cargo carriers. These five categories are: security programs, security threat assessments (STA), known shipper data via the Known Shipper Management System (KSMS), cargo screening reporting, and evidence of compliance recordkeeping.

DATES: Send your comments by April 5, 2010. A comment to OMB is most effective if OMB receives it within 30 days of publication.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to Desk Officer, Department of Homeland Security/TSA, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: Joanna Johnson, TSA Paperwork Reduction Act (PRA) Officer, Office of Information Technology (OIT), TSA–11, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6011; telephone (571) 227–3651; e-mail *TSAPRA@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (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 unless it displays a valid OMB control number. The ICR documentation is available at *http://www.reginfo.gov.* Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement 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;

(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 using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Information Collection Requirement

Title: Air Cargo Security Requirements.

Type of Request: Renewal of one currently approved collection.

OMB Control Number: 1652–0040.

Form(s): Aviation Security Known Shipper Verification Form, Aircraft Operator or Air Carrier Reporting Template, Security Threat Assessment Application, Aviation Security Known Shipper Verification Form.

Affected Public: The collections of information that make up this ICR involve regulated entities including airports, passenger aircraft operators, foreign air carriers, indirect air carriers operating under a security program, and all-cargo carriers.

Abstract: TSA is seeking renewal of an expiring collection of information. Congress set forth in the Aviation and Transportation Security Act (ATSA), Public Law 107–71, two specific requirements for TSA in the area of air cargo security: (1) To provide for screening of all property, including U.S. mail, cargo, carry-on and checked baggage, and other articles, that will be carried aboard a passenger aircraft; and (2) to establish a system to screen, inspect, report, or otherwise ensure the security of all cargo that is to be transported in all-cargo aircraft as soon as practicable. In the Implementing Recommendations of the 9/11 Commission Act of 2007, Public Law 110–53, Congress requires that 50 percent of cargo transported on passenger aircraft is screened by February 2009, and 100 percent of such cargo is screened by August 2010.

TSA must proceed with this ICR for this program in order to meet the Congressional mandates and current regulations (49 CFR 1542.209, 1544.205, 1546.205, and part 1548) that enable them to accept, screen, and transport air cargo. The uninterrupted collection of this information will allow TSA to continue to ensure implementation of these vital security measures for the protection of the traveling public.

This information collection requires the "regulated entities," who may include passenger and all-cargo aircraft operators, foreign air carriers, and indirect air carriers (IACs), to implement a standard security program or to submit modifications to TSA for approval, and update such programs as necessary. The regulated entities must also collect personal information and submit such information to TSA so that TSA may conduct security threat assessments (STA) for individuals with unescorted access to cargo, and any individual who has responsibility for screening cargo under 49 CFR parts 1544, 1546, or 1548. Aircraft operators and foreign air carriers must report the volume of accepted and screened cargo transported on passenger aircraft. Further, TSA will collect identifying information for both companies and individuals whom aircraft operators, foreign air carriers, and IACs have qualified to ship cargo on passenger aircraft. This information is primarily collected electronically via the Known Shipper Management System (KSMS). Whenever the information cannot be entered into KSMS, the regulated entity must conduct a physical visit of the shipper using the Aviation Security Known Shipper Verification Form and subsequently enter that information into KSMS. These regulated entities must also maintain records pertaining to security programs, training, and compliance. The forms used in this collection of information include the Aviation Security Known Shipper Verification Form, Cargo Reporting Template, and the Security Threat Assessment Application.

Number of Respondents: 4,890.

Estimated Annual Burden Hours: An estimated 73,567 hours.

Issued in Arlington, Virginia, on February 26, 2010.

Joanna Johnson,

TSA Paperwork Reduction Act Officer, Office of Information Technology.

[FR Doc. 2010–4443 Filed 3–3–10; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

[Docket No. TSA–2002–11334]

Intent To Request Renewal From OMB of One Current Public Collection of Information: Aviation Security Infrastructure Fee Records Retention

AGENCY: Transportation Security Administration, DHS.

ACTION: 60-Day notice.

SUMMARY: The Transportation Security Administration (TSA) invites public comment on one currently approved Information Collection Request (ICR),

OMB control number 1652–0001, abstracted below that we will submit to the Office of Management and Budget (OMB) for renewal in compliance with the Paperwork Reduction Act. The ICR describes the nature of the information collection and its expected burden. The information collection would require the retention of certain information necessary for TSA to help set the Aviation Security Infrastructure Fee (ASIF), including information about air carriers' and foreign air carriers' costs related to screening passengers and property in calendar year 2000.

DATES: Send your comments by May 3, 2010.

ADDRESSES: Comments may be e-mailed to *TSAPRA@dhs.gov* or delivered to the TSA Paperwork Reduction Act (PRA) Officer, Office of Information Technology (OIT), TSA–40, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6040.

FOR FURTHER INFORMATION CONTACT: Joanna Johnson at the above address, or by telephone (571) 227–3651.

SUPPLEMENTARY INFORMATION:

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (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 unless it displays a valid OMB control number. The ICR documentation is available at *http://www.reginfo.gov.* Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement 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;

(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 using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Information Collection Requirement

OMB Control Number 1652–0001; Aviation Security Infrastructure Fee Records Retention, 49 CFR part 1511. To help defray TSA's costs of providing civil aviation security services, and as authorized by 49 U.S.C. 44940, TSA published in the **Federal Register** on February 20, 2002, an interim final rule adding part 1511 to the Transportation Security Regulations, which imposed a fee known as the Aviation Security Infrastructure Fee (ASIF) on certain air carriers and foreign air carriers. *See* 67 FR 7926, as codified at 49 CFR part 1511. The amount of ASIF collected by TSA from the carriers, both overall and per carrier, is based upon the carriers' aggregate and individual costs, respectively, for screening passengers and property in calendar year 2000. 49 U.S.C. 44940(a)(2)(B)(i), (ii).

In conjunction with the issuance of part 1511, TSA requested OMB approval to collect information necessary for TSA to establish the ASIF, including information about the carriers' individual and aggregate costs related to screening passengers and property in calendar year 2000. This information collection included submissions to TSA of data on the carriers' screening-related costs and also of independent audits of that data. This information collection is currently approved under OMB number 1652–0001.

Purpose of Information Collection

Under Part 1511, carriers must retain any and all documents, records, or information related to the amount of the ASIF, including all information applicable to the carrier's calendar year 2000 security costs and information reasonably necessary to complete an audit. The information collection proposed under this notice is intended to apply to the retention requirement of 49 CFR 1511.9. This requirement includes retaining the source information for the calendar year 2000 screening costs reported to TSA; the calculations and allocations performed to assign costs submitted to TSA; information and documents reviewed and prepared for the required independent audit; the accountant's working papers, notes, worksheets, and other relevant documentation used in the audit; and, if applicable, the specific information leading to the accountant's opinion, including any determination that the accountant could not provide an audit opinion.

Description of Information Collection

The information collection, submission, and retention requirement applies to each air carrier and foreign air carrier that incurred costs for the screening of passengers and property in calendar year 2000. It is estimated that the 191 respondent air carriers and foreign air carriers will each on average incur $104.06 annually, which includes $54.60 in records storage and $50 in labor costs for 2 hours of records management at $25 per hour. For each subsequent year, the total burden for 196 air carriers is estimated at $19,875.46 per year. Thus, the annual average burden related to this requirement for all respondents combined over a three-year period is at a cost of $59,626.38. The subject records may be used by TSA to make determinations regarding security-related costs in calendar year 2000, including conducting reviews and otherwise ensuring compliance with 49 CFR 1511.

Issued in Arlington, Virginia, on February 26, 2010.

Joanna Johnson,

TSA Paperwork Reduction Act Officer, Office of Information Technology.

[FR Doc. 2010–4442 Filed 3–3–10; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2010–N027; 80221–1112–0000–F2]

San Diego County Water Authority Natural Communities Conservation Program/Habitat Conservation Plan, San Diego and Riverside Counties, CA

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability of draft environmental impact report/environmental impact statement, receipt of incidental take permit application, and notice of public meetings.

SUMMARY: The San Diego County Water Authority (Water Authority/Applicant) has applied to us, the U.S. Fish and Wildlife Service (Service), for an incidental take permit under the Endangered Species Act of 1973, as amended (Act). The Applicant is requesting a permit to incidentally take 37 animal species and seeking assurances for 27 plant species (including 19 Federally listed species) during the term of the proposed 55-year permit. The permit is needed to authorize take of listed animal species due to construction, operations, and maintenance activities in the approximately 992,000-acre (401,450-hectare) Plan Area in western San Diego County and south-central Riverside County, California. We are requesting public comment on the Draft Water Authority Natural Communities Conservation Program/Habitat Conservation Plan (NCCP/HCP), Draft Implementing Agreement, and Draft

Environmental Impact Report/Environmental Impact Statement (EIR/EIS).

We have prepared the Draft EIS, which is the Federal portion of the Draft EIR/EIS, to analyze the impacts of issuing an incidental take permit based on the Water Authority's proposed NCCP/HCP. The Draft EIR portion of the joint document was prepared by the Water Authority in compliance with the California Environmental Quality Act. The analyses provided in the Draft EIR/EIS are intended to inform the public of the proposed action (*i.e.,* permit issuance), alternatives, and associated impacts; address public comments received during the scoping period for the Draft EIR/EIS; disclose the direct, indirect, and cumulative environmental effects of the proposed action and each of the alternatives; and indicate any irreversible commitment of resources that would result from implementation of the proposed action.

DATES: Please send written comments on or before June 2, 2010.

Two public meetings have been scheduled for the EIR, and we will accept comments for the EIS at these meetings. These public meetings will be held on the following dates:

1. March 17, 2010, 7 p.m. to 9 p.m., Escondido, CA.

2. March 18, 2010, 7 p.m. to 9 p.m., San Diego CA.

ADDRESSES: Please send written comments to Mr. Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Suite 101, Carlsbad, CA 92011. You may also submit comments by facsimile to (760) 431–5902.

Information and comments related specifically to the draft EIR and the California Environmental Quality Act should be submitted to Mr. Bill Tippets, San Diego County Water Authority, 4677 Overland Avenue, San Diego, CA 92123.

The public meeting locations are:

1. *Escondido:* Escondido City Hall, Mitchell Room, 201 North Broadway, Escondido, CA 92025.

2. *Kearney Mesa:* San Diego County Water Authority, 4677 Overland Avenue, San Diego, CA 92123.

FOR FURTHER INFORMATION CONTACT: Ms. Karen A. Goebel, Assistant Field Supervisor, at the Carlsbad Fish and Wildlife Office address above; telephone (760) 431–9440.

SUPPLEMENTARY INFORMATION:

Availability of Documents

Documents available for public review include the Water Authority's permit application, the Public Review Draft NCCP/HCP and Appendices, the accompanying Draft Implementing Agreement, and the Draft EIR/EIS.

For copies of the documents, please contact the Service by telephone at (760) 431–9440, or by letter to the Carlsbad Fish and Wildlife Office (*see* **FOR FURTHER INFORMATION CONTACT**). Copies of the Draft Water Authority NCCP/HCP, Draft EIR/EIS, and Draft Implementing Agreement also are available for public review, by appointment, during regular business hours, at the Carlsbad Fish and Wildlife Office or at the San Diego County Water Authority Office (4677 Overland Avenue, San Diego, California 92123). Copies are also available for viewing in select San Diego County and Riverside County public libraries (listed below) and at the Water Authority's Web site: *http://www.sdcwa.org/.*

1. Carlsbad Public Library—Reference Desk. 1775 Dove Lane, Carlsbad, CA 92009.

2. Chula Vista Public Library—Reference Desk. 365 F Street, Chula Vista, CA 91910.

3. Escondido Public Library—Reference Desk. 239 S. Kalmia Street, Escondido, CA 92025.

4. Lakeside Public Library—Reference Desk. 9839 Vine Street, Lakeside, CA 92040.

5. Mission Valley Branch Library—Reference Desk. 2123 Fento Parkway, San Diego, CA 92108.

6. San Diego Public Library—Reference Desk. 820 E Street, San Diego, CA 92101.

7. Temecula Public Library—Reference Desk. 30600 Pauba Road, Temecula, CA 92592.

Background

Section 9 of the Endangered Species Act of 1973, as amended (Act; 16 U.S.C. 1531 *et seq.*), and Federal regulations prohibit the "take" of fish and wildlife species Federally listed as endangered or threatened. Take of Federally listed fish or wildlife is defined under the Act as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect listed species, or attempt to engage in such conduct (16 U.S.C. 1538). "Harm" includes significant habitat modification or degradation that actually kills or injures listed wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, and sheltering (50 CFR 17.3(c)). Under limited circumstances, we may issue permits to authorize incidental take, which is defined under the Act as take that is incidental to, and not the purpose of, otherwise lawful activities. Although take of plant species is not prohibited under the Act, and therefore cannot be authorized under an incidental take permit, plant species are proposed to be included on the permit in recognition of the conservation benefits provided to them under the NCCP/HCP. Regulations governing incidental take permits for threatened and endangered species are found in 50 CFR 17.32 and 17.22, respectively. All species included on the incidental take permit, if issued, would receive assurances under the Service's "No Surprises" regulation (50 CFR 17.22(b)(5) and 17.32(b)(5)).

The Applicant seeks incidental take authorization for 37 animal species and assurances for 27 plant species. Collectively the 64 listed and unlisted species are referred to as "Covered Species" by the NCCP/HCP and include 27 plant species (6 endangered, 5 threatened, and 16 unlisted); 5 invertebrate species (3 endangered and 2 unlisted); 2 amphibian species (1 endangered and 1 unlisted); 9 reptile species (all unlisted); 13 bird species (2 endangered, 1 threatened, and 10 unlisted); and 8 mammal species (1 endangered and 7 unlisted). The permit would provide take authorization for all animal species and assurances for all plant species identified by the NCCP/HCP as "Covered Species." Take authorized for listed covered animal species would be effective upon permit issuance. For currently unlisted covered animal species, take authorization would become effective concurrent with listing, should the species be listed under the Act during the permit term.

The proposed permit would include the following eight Federally listed animal species: Stephens' kangaroo rat (*Dipodomys stephensi;* endangered), least Bell's vireo (*Vireo bellii pusillus;* endangered), coastal California gnatcatcher (*Polioptila californica californica;* threatened), southwestern willow flycatcher (*Empidonax traillii extimus;* endangered), arroyo toad (*Anaxyrus (=Bufo) californicus;* endangered), Quino checkerspot butterfly (*Euphydryas editha quino;* endangered), Riverside fairy shrimp (*Streptocephalus woottoni;* endangered), and San Diego fairy shrimp (*Branchinecta sandiegoensis;* endangered). The proposed permit would include assurances for the following 11 Federally listed plant species: Encinitas baccharis (*Baccharis vanessae;* threatened), Munz's onion (*Allium munzii;* endangered), Otay mesa mint (*Pogogyne nudiuscula;* endangered), Otay tarplant (*Deinandra conjugens;* threatened), San Diego ambrosia (*Ambrosia pumila;* endangered), San Diego button-celery (*Eryngium aristulatum* var. *parishii;*

endangered), San Diego mesa mint (*Pogogyne abramsii;* endangered), San Diego thorn-mint (*Acanthomintha ilicifolia;* threatened), spreading navarretia (*Navarretia fossalis;* threatened), thread-leaved brodiaea (*Brodiaea filifolia;* threatened), and willowy monardella (*Monardella viminea;* endangered). *See* the Draft EIR/EIS and NCCP/HCP for information on unlisted species proposed for coverage under the permit.

The Draft Water Authority NCCP/HCP is intended to protect and sustain viable populations of native plant and animal species and their habitats in perpetuity through avoidance, minimization, and mitigation measures, including purchase of lands for permanent conservation and use of mitigation credits in mitigation banks previously established to address mitigation requirements associated with the proposed NCCP/HCP. The proposed NCCP/HCP and permit would accommodate the Water Authority's ongoing operations and maintenance requirements, future facility upgrades, and construction of new facilities that are needed to maintain a safe, reliable water source to its member agencies and the San Diego region.

The Water Authority's NCCP/HCP Plan Area encompasses approximately 992,000 acres (401,450 hectares) in western San Diego County and the vicinity of Lake Skinner in south-central Riverside County. The NCCP/HCP is intended to function independently of other HCPs within the San Diego region (*e.g.,* San Diego Multiple Species Conservation Plan [MSCP] and its associated subarea plans, and Western Riverside County's Multiple Species Habitat Conservation Plan [MSHCP]).

As described in the Draft NCCP/HCP and the Draft EIR/EIS, the proposed NCCP/HCP would provide protection measures for species on Water Authority property and easements, in part by using available mitigation credits from mitigation banks previously established or in planning by the Water Authority as habitat management areas (HMAs). Covered activities, including planned and future projects, are estimated to impact up to 373 acres (151 hectares) of habitat for Covered Species that will require mitigation over the 55-year term of the Permit. When on-site mitigation for permanent impacts is not feasible, available mitigation credits would be debited from HMAs in accordance with in-kind mitigation ratios identified in the NCCP/HCP. The Water Authority has established five HMAs (including three upland properties and two wetland creation properties) totaling 1,920 acres (775 hectares) and has set up endowments for long-term management of these areas. Of these acres, approximately 700 acres (283 hectares) would be available as credits to mitigate for project impacts to Covered Species. Costs associated with the NCCP/HCP would be funded as a capital cost under the Water Authority Capital Improvement Program's (CIP) Mitigation Program or within individually approved CIP project budgets, and/or the annual operating budget of the Water Authority's Water Resources Department. The Water Authority estimates its long-term financial needs based on the CIP and has adopted a 2-year budget cycle to address short-term funding and expenditures. Also, contingency measures have been identified should the Water Authority's costs to implement, monitor, and report on the NCCP/HCP's measures exceed the budgeted amount. The Water Authority maintains a diverse revenue base and consistently evaluates existing and potential revenue sources to ensure that funding of all Water Authority projects is adequate.

The NCCP/HCP includes measures to avoid and minimize incidental take of the Covered Species, emphasizing project design modifications to protect Covered Species and their habitats. A monitoring and reporting plan would gauge the Plan's success based on achievement of biological goals and objectives and would ensure that conservation keeps pace with development. The NCCP/HCP also includes a management program, including adaptive management, which allows for changes in the conservation program if the biological species objectives are not met, or new information becomes available to improve the efficacy of the NCCP/HCP's conservation strategy.

Covered Activities would include developing new water transmission, storage, and flow management facilities, in addition to conducting operation and maintenance activities. These Covered Activities fall under five categories, including:

(1) Construction of Capital Improvement Program Facilities;

(2) Operation and Maintenance Activities;

(3) Right-of-Way Activities;

(4) Urgent Repair Procedures; and

(5) Emergency Repair Procedures.

National Environmental Policy Act Compliance

The Draft EIR/EIS analyzes three alternatives in addition to the proposed action (*i.e.,* permit issuance based on the Draft Water Authority NCCP/HCP) described above. The other alternatives include a no-action (*i.e.,* no permit) alternative, a larger species list alternative, and a reduced plan area alternative. Two other alternatives were considered during the planning process, but were not evaluated in the Draft EIS, because neither met the purpose and need of both the Water Authority and the Service; these alternatives involved a no-take alternative and an alternative requiring the Water Authority to participate in other existing regional HCPs.

Public Comments

The Service and Water Authority invite the public to comment on the Draft NCCP/HCP, Draft Implementing Agreement, and Draft EIR/EIS during a 90-day public comment period beginning the date of this notice. Please direct comments to the Service contact listed in the **ADDRESSES** section, and any questions to the Service contact listed in the **FOR FURTHER INFORMATION CONTACT** section. 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.

Reasonable Accommodation

The public meetings are physically accessible to people with disabilities. Please make requests for specific accommodations to Bill Tippetts, San Diego County Water Authority, at (858) 522–6784, at least 5 working days prior to the meeting date.

This notice is provided under section 10(a) of the Act and Service regulations for implementing the National Environmental Policy Act of 1969 (40 CFR 1506.6). We will evaluate the application, associated documents, and comments submitted thereon to prepare a Final EIS. A permit decision will be made no sooner than 30 days after the publication of the Final EIS and completion of the Record of Decision.

Alexandra Pitts,

Acting Deputy Regional Director, Pacific Southwest Region, Sacramento, California.

[FR Doc. 2010–4468 Filed 3–3–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–6–R209–N182; 60138–1265–6CCP–S3]

Final Comprehensive Conservation Plan for the Red Rock Lakes National Wildlife Refuge, MT

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce that our final Comprehensive Conservation Plan (Plan) and finding of no significant impact (FONSI) for the Red Rock Lakes National Wildlife Refuge is available. This final Plan describes how the Service intends to manage this refuge for the next 15 years.

ADDRESSES: A copy of the Plan may be obtained by writing to U.S. Fish and Wildlife Service, Division of Refuge Planning, P.O. Box 25486, Denver Federal Center, Denver, Colorado 80225; or by download from *http://mountain-prairie.fws.gov/planning.*

FOR FURTHER INFORMATION CONTACT: Laura King, 406–644–2211, ext. 210 (phone); 406–644–2661 (fax); or *redrocks@fws.gov* (e-mail).

SUPPLEMENTARY INFORMATION:

The Red Rock Lakes National Wildlife Refuge is located 28 miles east of Monida in Beaverhead County in southwestern Montana. This 48,955-acre refuge sits at 6,670 feet above sea level and lies east of the Continental Divide near the uppermost reach of the Missouri drainage.

The refuge was established in 1935 by President Franklin D. Roosevelt. Historically, management focused on protecting and enhancing the trumpeter swan population at the refuge. In the 1930s, the refuge was their last known breeding location. The refuge played an important role in their recovery and today continues to provide protected nesting and resting areas for these magnificent birds.

The refuge has one of the most naturally diverse areas in the National Wildlife Refuge System. The refuge boasts the largest wetland complex within the Greater Yellowstone Ecosystem, as well as expansive tracts of grassland and sagebrush-steppe habitats and a small amount of mid-elevation forested areas. These habitats support over 200 species of birds, including peregrine falcons, bald eagles, short-eared owls, sandhill cranes, sage grouse, trumpeter swans and numerous other species of waterfowl and waterbirds. Common mammalian species include Shiras moose, Rocky Mountain elk, mule and white-tailed deer, badger, coyote, and red fox. In addition, wolves and grizzly bears have been documented using the refuge. There is also a remnant population of native adfluvial Arctic grayling that occurs on the refuge.

A full-time staff of five employees and various summer temporaries manage and study the refuge habitats and maintain visitor facilities. Domestic livestock grazing and prescribed fire are the primary management tools used to maintain and enhance upland habitats. Currently, four grazing cooperators are using refuge lands. Water level manipulation occurs in some areas of the refuge to improve wetland habitats.

Approximately 12,000 people visit the refuge annually. Two refuge roads and three county roads that pass through the refuge account for the majority of visitor use. The refuge is open to limited fishing, with the majority of fishing occurring on Red Rock. In addition, the refuge is open to limited hunting of ducks, geese, coots, and moose. Elk, pronghorn, moose, mule deer, and white-tailed deer are also hunted on certain areas of the refuge according to State regulations and seasons.

The draft Plan and Environmental Assessment (EA) was made available to the public for review and comment following the announcement in the **Federal Register** on September 26, 2008 (73 FR 55864–55865). The public was given 60 days to comment. Over 100 individuals and groups provided comments and appropriate changes were made to the final Plan based on substantive comments. The draft Plan and Environmental Assessment identified and evaluated four alternatives for managing the refuge for the next 15 years. Alternative B (the proposed action submitted by the planning team) was selected by the Region 6 Regional Director as the preferred alternative and will serve as the final Plan.

The final Plan identifies goals, objectives, and strategies that describe the future management of Red Rock Lakes National Wildlife Refuge. Alternative B, the preferred alternative, acknowledges the importance of naturally functioning ecological communities on the refuge. However, changes to the landscape (e.g., human alterations to the landscape, past refuge management creating wetlands, and species in peril requiring special management actions) prevent managing the refuge solely as a naturally functioning ecological community. Because some of these changes are significant, some refuge habitats will require "hands on" management actions during the life of this Plan, while others will be restored. Refuge habitats will continue to be managed utilizing water control structures, prescriptive cattle grazing, and prescribed fire. The structures that created Culver and MacDonald Ponds will be removed to restore 1.7 miles of native streams to provide habitat for spawning native adfluvial Arctic grayling, migratory birds, and native ungulates. The refuge will do this systematically over the life of the Plan, conducting numerous studies to determine the effects and best methods of restoration, including any effects on downstream users. Mechanical, biological, and chemical treatments will be used to control invasive species. Monitoring and documenting the response to management actions will be greatly expanded. Additional habitat and wildlife objectives will be clearly stated in step down management plans to be completed as this Plan is implemented. Visitor services programs will be maintained and expanded including hunting, fishing, wildlife observation and photography, environmental education and interpretation. Hunting of big game and waterfowl will continue. Big game hunting boundaries will be modified or expanded to address confusing boundaries and impacts to refuge habitats, while providing additional quality hunting opportunities. Actions will be taken to ensure that current and expanded hunting opportunities are carefully planned. The refuges' environmental education program will be modestly expanded, given the refuges' remote location. Interpretation programs will also be enhanced to better educate and orient visitors while maintaining the wilderness characteristics of the refuge. Fishing will be expanded and visitors will be encouraged to keep non-native fish species (according to State regulations) that impact native adfluvial Arctic grayling. Some refuge trails will provide interpretation and be identified on a new visitor services map. Idlewild Road will remain open, but no new roads or trails will be added. An interpreted auto tour route will be created along roads currently open to the public. Interpretation will occur through a brochure and limited signage. Both refuge campgrounds will be maintained to support wildlife dependent compatible recreation on this remote refuge and enhanced to provide access to disabled visitors. Campground users will be charged a small fee to provide funds needed to maintain the campground facilities. Seven full-time

and one permanent seasonal staff will be assigned to the refuge. Due to the lack of housing around this remote refuge, up to four residences will be constructed for this added staff.

The Service is furnishing this notice to advise other agencies and the public of the availability of the final Plan, to provide information on the desired conditions for the refuge, and to detail how the Service will implement management strategies. Based on the review and evaluation of the information contained in the EA, the Regional Director has determined that implementation of the Final Plan does not constitute a major federal action that would significantly affect the quality of the human environment within the meaning of Section 102(2)(c) of the National Environmental Policy Act. Therefore, an Environmental Impact Statement will not be prepared.

Dated: February 23, 2010.

Hugh Morrison,

Regional Director, Region 6, U.S. Fish and Wildlife Service.

[FR Doc. 2010–4513 Filed 3–3–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate a Cultural Item: The Cleveland Museum of Natural History, Cleveland, OH

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate a cultural item in the possession of The Cleveland Museum of Natural History, Cleveland, OH, that meets the definition of a "sacred object" under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the cultural item. The National Park Service is not responsible for the determinations in this notice.

The sacred object is a wooden pipe. In 1956, a pipe stem was delivered to the museum. The pipe bowl was either not sent or misplaced when unwrapped. Thus, only part of the sacred object is currently in the collection. The pipe stem measures 58 cm in length and has a black snake curling around it (Accession Number 1956–32; Catalog Number CMNH 08490). Since the bowl and stem are used together, together they comprise one object. Consequently, if the pipe bowl is found, it will be returned to the Little Traverse Bay Bands of Odawa Indians, Michigan.

The Little Traverse Bay Bands of Odawa Indians provided written evidence, *A Survey of Indian Groups in the State of Michigan,* (Holst, 1939), to show that Joe Shomin, an Odawa Chief, was an artist craftsman of great ability. According to catalogue records, Albert Heath acquired the pipe from Joe Shomin, an Odawa Indian, in Emmett County, MI. Today, Emmet County is within the Little Traverse Bay Bands of Odawa Indians reservation. Consultation evidence presented by tribal representatives' states that pipes were used in religious ceremonies by traditional Odawa religious leaders, and continue to be used in ceremonial practices.

Officials of The Cleveland Museum of Natural History have determined that, pursuant to 25 U.S.C. 3001 (3)(C), the one cultural item described above is a specific ceremonial object needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents. Officials of The Cleveland Museum of Natural History also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the sacred object and the Little Traverse Bay Bands of Odawa Indians, Michigan.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the sacred object should contact Carole Camillo, Registrar, The Cleveland Museum of Natural History, 1 Wade Oval Dr., University Circle, Cleveland, OH 44106, telephone (216) 231–4600, before April 5, 2010. Repatriation of the sacred object to the Little Traverse Bay Bands of Odawa Indians, Michigan may proceed after that date if no additional claimants come forward.

The Cleveland Museum of Natural History is responsible for notifying the Little Traverse Bay Bands of Odawa Indians, Michigan that this notice has been published.

Dated: February 3, 2010.

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. 2010–4291 Filed 3–3–10; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

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 February 20, 2010. Pursuant to section 60.13 of 36 CFR Part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St. NW., 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 March 19, 2010.

J. Paul Loether,

Chief, National Register of Historic Places/ National Historic Landmarks Program.

ARIZONA

Coconino County

Flagstaff Southside Historic District, (Flagstaff MRA (AD)) S. of downtown bordered by Route 66 and Santa Fe Railroad, Rio de Flag, and Northern Arizona University, Flagstaff, 10000107

Maricopa County

Arizona Army National Guard Arsenal, 5636 E. McDowell Rd., M5320, Phoenix, 10000108

Pima County

Tumamoc Hill Archeological District, The, 1675 W. Anklam Rd/NE corner Greasewood Rd & 22nd St., Tucson, 10000109

CALIFORNIA

Alameda County

California Cotton Mills Co. Factory, 1091 Calcot Pl., Oakland, 10000119

Los Angeles County

Bradbury House, 102 Ocean Way, Los Angeles, 10000110

Placer County

El Toyon, 211 Brook Rd, Auburn, 10000118

San Francisco County

Geneva Office Building and Power House, 2301 San Jose Ave., San Francisco, 10000111

Temple Sherith Israel, 2266 California St., San Francisco, 10000114

San Luis Obispo County

William Shipsey House, 1266 Mill St, San Luis Obispo, 10000115

San Mateo County

Southern Pacific Railroad Bayshore Roundhouse, Jctn. of Industrial Way and Bayshore Ave., Brisbane, 10000113

GEORGIA

Fulton County

Alexander, Cecil and Hermione, House, 2232 Mt. Paran Rd, N.W., Atlanta, 10000116

INDIANA

Carroll County

Delphi Courthouse Square Historic District, Roughly bounded by Monroe, s. side of Main, w. side of Market and Indiana Sts., Delphi, 10000120

Hendricks County

Plainfield Historic District, Roughly bounded by Lincoln St to the N; SE St. to the E; Ash St. to the S.; and S. Mill St to the W., Plainfield, 10000121

Henry County

Middletown Commercial Historic District, The intersection of Fifth and Locust Sts. stretching apprx. 125 ft. N. and 180 ft. S. of Locust and one block W., Middletown, 10000122

Huntington County

North Jefferson Street Historic District, Roughly bounded by W. Park Dr. and College, Madison, Collins, Oak, Stephen, and Buchanan Sts., Huntington, 10000123

Lake County

Forest-Ivanhoe Residential Historic District, (Historic Residential Suburbs in the United States, 1830–1960 MPS) Roughly bounded by 172nd Pl., E. side of Forest Ave. S to its end, and the Little Calumet River, Hammond, 10000124

Marion County

Emerson Heights Historic District, (Historic Residential Suburbs in the United States, 1830–1960 MPS) Roughly bounded by Emerson Ave., Linwood Ave., E. 10th and E. Michigan Sts., Indianapolis, 10000125

Noble County

Jefferson Union Church and Sweet Cemetery, Address Restricted Albion, 10000126

Orange County

Jenkins Place, 448–488 Liberty Rd., Orleans, 10000127

Randolph County

Windsor Mound, Address Restricted Parker City, 10000128

IOWA

Polk County

St. Paul's Episcopal Church, 815 High St., Des Moines, 10000129

MINNESOTA

Hennepin County

United States Post Office, 212 3rd Ave. S., Minneapolis, 10000130

MISSISSIPPI

Hinds County

Castle Crest, Address Restricted Jackson, 10000131

MISSOURI

St. Louis County

Pundt Brothers-Garavaglia Grocery Buildings, (South St. Louis Historic Working and Middle Class Streetcar Suburbs MPS) 2857 Lafayette Ave., Saint Louis, 10000117

MONTANA

Custer County

Northern Pacific Railway Depot, 500 Pacific Ave, Miles City, 10000132

Hill County

Kiwanis Meeting Hall, 17863 Beaver Creek Rd., Havre, 10000133

NEBRASKA

Antelope County

Neligh Mill, Irregular Tracks in Block 22, Original Town, Neligh and the N1/2 of the SE1/4 of Section 20, T25N, R6W, Neligh, 10000134

NEW YORK

Essex County

Willsboro School, The, 10 Gilliland Lane (formerly 29 School St), Willsboro, 10000135

Kings County

Parkway Theatre, 1768 St. John's Pl., Brooklyn, 10000136

Orange County

Newburgh Colored Burial Ground, Broadway & Robinson Ave. (NY Rte. 9W), City of Newburgh, 10000137

NORTH DAKOTA

Burleigh County

Bismarck Cathedral Area Historic District (2nd Boundary Increase), 104,106,112,115,116,120 E Ave B & 523 N 1st St (Remove 316,320 W Ave A & 510 N Washington St), Bismarck, 10000138

McLean County

Ingersoll School, 11 mi N on Alt 200, R. 2 mi on Hwy 200, turn R for.4 mi on gravel, Washburn, 10000139

SOUTH CAROLINA

Horry County

Conway Downtown Historic District (Boundary Increase), (Conway MRA) Portions of Main St, 3rd Ave, 4th Ave, Laurel St, Conway, 10000140

TENNESSEE

Davidson County

Hall-Harding-McCampbell House, 305 Kent Rd., Nashville, 10000141

Robertson County

Strickland Place Farm, Historic Family Farms in Middle Tennessee MPS) 7724–7726 Hwy 76 E, White House, 10000142

TEXAS

Cameron County

Brownsville City Cemetery and Hebrew Cemetery, Bound by E. 5th St., Madison St., E 2nd St., and Town Resaca, Brownsville, 10000143

Dallas County

Gulf Oil Distribution Facility, 501 Second Ave, Dallas, 10000144

Potter County

McMillen Apartments, 1320 S. Fillmore, Amarillo, 10000145

VIRGINIA

King and Queen County

Newington Archaeological Site, 697 Frazier Ferry Rd, King and Queen Courthouse, 10000146

Tazewell County

Tazewell Avenue Historic District, Tazewell Ave, Fairfax Ave, Front St., Second St., Third St., & Fourth St, Richlands, 10000147

Winchester Independent City

The Triangle Diner, (Diners of Virginia MPS) 27 W. Gerrard St., Winchester, 10000148

Request for REMOVAL has been made for the following resources:

NORTH DAKOTA

Ward County

Minot Commercial Historic District, 216 3rd Ave, Minot, 86002823

Request for BOUNDARY DECREASE has been made for the following resources:

TENNESSEE

Montgomery County

Bethlehem Methodist Church and Cemetery (Boundary Decrease), Gholson Rd., W side, about 0.5 mi. S of the jct. with Grafton Rd., Clarksville, 94000576

[FR Doc. 2010–4451 Filed 3–3–10; 8:45 am]

BILLING CODE 4312–51–P

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Weekly Listing of Historic Properties

Pursuant to (36 CFR 60.13(b,c)) and (36 CFR 63.5), this notice, through publication of the information included herein, is to apprise the public as well as governmental agencies, associations and all other organizations and individuals interested in historic preservation, of the properties added to, or determined eligible for listing in, the National Register of Historic Places from December 7 to December 11, 2009.

For further information, please contact Edson Beall via: United States Postal Service mail, at the National Register of Historic Places, 2280, National Park Service, 1849 C St. NW.,

Washington, DC 20240; in person (by appointment), 1201 Eye St. NW., 8th floor, Washington DC 20005; by fax, 202–371–2229; by phone, 202–354–2255; or by e-mail, *Edson_Beall@nps.gov.*

Dated: February 23, 2010.

J. Paul Loether,

Chief, National Register of Historic Places/ National Historic Landmarks Program.

KEY: State, County, Property Name, Address/ Boundary, City, Vicinity, Reference Number, Action, Date, Multiple Name

FLORIDA

Citrus County

Etna Turpentine Camp Archeological Site, Address Restricted, Inverness vicinity, 09001055, LISTED, 12/10/09

GEORGIA

Carroll County

Bowdon Historic District, Roughly centered along GA 166 and GA 100, Bowdon, 09001056, LISTED, 12/08/09

ILLINOIS

Cook County

East Village Historic District, Bounded by Division St. and Chicago, Hermitage and Damen Aves., Chicago, 09000459, LISTED, 12/08/09 (Ethnic (European) Historic Settlement in the city of Chicago (1860–1930))

Jo Daviess County

Chapman, John, Village Site, Address Restricted, Hanover vicinity, 09001058, LISTED, 12/10/09

LOUISIANA

Washington Parish

Moore, Bouey, Homestead, 19068 Moore Rd., Franklinton vicinity, 09001059, LISTED, 12/08/09

MARYLAND

Anne Arundel County

Queenstown Rosenwald School, 430 Queenstown Rd., Severn, 09001060, LISTED, 12/08/09 (Rosenwald Schools of Anne Arundel County, Maryland MPS)

Baltimore (Independent City)

East Monument Historic District, N. Washington St. on the W; Amtrak rail line on the N. to E. St.; S. to Monument and E to Highland Ave.;, Baltimore, 09001061, LISTED, 12/08/09

MICHIGAN

Macomb County

Wolcott Mill, 63841 Wolcott Rd., Ray, 09001063, LISTED, 12/08/09

Manistee County

Orchard Beach State Park, 2064 N. Lakeshore Rd., Manistee, 09001064, LISTED, 12/08/09

Mason County

S.S. BADGER (carferry), 700 S. William St., Ludington, 09000679, LISTED, 12/11/09

Presque Isle County

Hoeft, P.H., State Park, 5001 US 23 N., Rogers, 09001065, LISTED, 12/08/09

Onaway State Park, 3622 MI 211 N., North Allis, 09001066, LISTED, 12/08/09

Wayne County

Koebel, Charles J. and Ingrid V. (Frendberg), House, 203 Cloverly Rd., Grosse Pointe Farms, 09001068, LISTED, 12/08/09

Michigan Bell and Western Electric Warehouse, 882 Oakman Blvd., Detroit, 09001069, LISTED, 12/08/09

MINNESOTA

Blue Earth County

Dodd Ford Bridge, Co. Rd. 147 over Blue Earth River, Shelby vicinity, 09001070, LISTED, 12/09/09 (Iron and Steel Bridges in Minnesota MPS)

NEBRASKA

Wayne County

Wayne Commercial Historic District, S. Main, N. Main and 2nd St., Wayne, 09001071, LISTED, 12/08/09

NEW JERSEY

Essex County

Anderson Park, SE corner of Bellevue and North Mountain Ave., Montclair, 09001073, LISTED, 12/11/09

Hunterdon County

Case-Dvoor Farmstead, 111 Mine St., Raritan, 09001074, LISTED, 12/11/09

Morris County

Montville Schoolhouse, 6 Taylortown, Montville, 09001075, LISTED, 12/11/09

Vreeland, Nicholas, Outkitchen, 52 Jacksonville Rd., Towaco, Montville, 09001076, LISTED, 12/11/09 (Dutch Stone Houses in Montville MPS)

Whippany Burying Yard, NJ 10, Hanover, 09001077, LISTED, 12/11/09

Sussex County

Casper and Abraham Shafer Grist Mill Complex, 928 Main St., Stillwater Township, 09000653, LISTED, 12/10/09

Union County

All Souls Church, 724 Park Ave., Plainfield City, 09001078, LISTED, 12/11/09

Frazee, Elizabeth and Gershom, House, 1451 Raritan Rd., Scotch Plains, 09000971, LISTED, 12/07/09

NEW YORK

Albany County

Norman Vale, 6030 Nott Rd., Guilderland, 09001079, LISTED, 12/11/09 (Mexico MPS)

Cortland County

Stage Coach Inn, 2548 Clarks Corners Rd., Lapeer, 09001080, LISTED, 12/11/09

Kings County

Congregational Church of the Evangel, 1950 Bedford Ave., Brooklyn, 09001081, LISTED, 12/11/09

Ocean Parkway Jewish Center, 550 Ocean Pkwy., Brooklyn, 09001082, LISTED, 12/11/09

Madison County

Chittenango Pottery, 11–13 Pottery St., Chittenango, 09001083, LISTED, 12/11/09

Nassau County

DuPont-Guest Estate, S. side of Northern Blvd. between Cotillion Ct. & DuPont Ct., Brookville, 09001084, LISTED, 12/11/09

New York County

Westbeth, 55 Bethune St., New York, 09001085, LISTED, 12/08/09

Queens County

Church-in-the-Gardens, The, 50 Ascan Ave., Forest Hills, 09001086, LISTED, 12/11/09

Sullivan County

Jewish Center of Lake Huntington, 13 Co. Rd. 116, Lake Huntington, 09001087, LISTED, 12/11/09

Wayne County

Preston-Gaylord Cobblestone Farmhouse, 7563 Lake Rd., Sodus, 09001088, LISTED, 12/11/09 (Cobblestone Architecture of New York State MPS)

NORTH CAROLINA

Currituck County

Jarvisburg Colored School, 7301 NC 158, Jarvisburg, 09001104, LISTED, 12/11/09

Durham County

Hope Valley Historic District, Avon Rd., Chelsea Circle, Cornwall Rd., Devon Rd. Exeter Way, Littlewoods Ln., Norwich Way, Stratford Rd., Durham, 09001105, LISTED, 12/11/09 (Durham MRA)

SOUTH CAROLINA

Richland County

Spigner, A. Fletcher, House, 2028 Wheat St., Columbia, 09001107, LISTED, 12/11/09

VIRGINIA

Albemarle County

Lewis Mountain, 1 Lewis Mountain Pkwy., Charlottesville vicinity, 09001052, LISTED, 12/07/09

[FR Doc. 2010–4450 Filed 3–3–10; 8:45 am]

BILLING CODE 4312–51–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–634]

In the Matter of: Certain Liquid Crystal Display Modules, Products Containing Same, and Methods Using the Same; Notice of Commission Determination to Rescind a Limited Exclusion Order and Cease and Desist Orders

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to rescind the limited exclusion order issued in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Clint A. Gerdine, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 708–2310. 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 (*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 March 4, 2008, based on a complaint filed by Sharp Corporation ("Sharp") of Japan. 73 FR 11678. The complaint, as amended and supplemented, alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain liquid crystal display devices, products containing same, and methods for using the same by reason of infringement of certain claims of U.S. Patent Nos. 6,879,364 ("the '364 patent"); 6,952,192 ("the '192 patent"); 7,304,703 ("the '703 patent"); and 7,304,626 ("the '626 patent"). The complaint further alleged the existence of a domestic industry. The Commission's notice of investigation named the following respondents: Samsung Electronics Co., Ltd. of Korea; Samsung Electronics America, Inc. of Ridgefield Park, New Jersey; and Samsung Semiconductor, Inc. of San Jose, California (collectively, "Samsung").

On June 12, 2009, the presiding administrative law judge ("ALJ") issued his final initial determination ("ID") finding a violation of section 337 by Samsung with respect to all four patents at issue and his recommendations on remedy and bonding. On June 29, 2009, Samsung and the Commission investigative attorney ("IA") filed petitions for review of the final ID. The IA and Sharp filed responses to the petitions on July 7, 2009. On September 9, 2009, the Commission issued notice of its determination not to review the ALJ's final ID and requested written submissions on the issues of remedy, the public interest, and bonding from the parties and interested non-parties. 74 FR 47616–17 (Sept. 16, 2009).

On September 16 and 23, 2009, respectively, complainant Sharp, the Samsung respondents, and the IA filed briefs and reply briefs on the issues for which the Commission requested written submissions. On September 21, 2009, Samsung filed a petition for reconsideration of the Commission's determination not to review certain portions of the final ID. On October 19, 2009, the Commission issued an order denying the petition for reconsideration.

On October 30, 2009, Samsung filed a supplemental submission on the issues of remedy, the public interest, and bonding. On November 2 and 3, 2009, respectively, Sharp and the IA filed a response to Samsung's supplemental submission.

On November 9, 2009, the Commission issued notice of its determination to terminate the investigation with a finding of a violation of section 337, and issued: (1) A limited exclusion order prohibiting the unlicensed entry of LCD devices, including display panels and modules, and products containing the same that infringe one or more of (i) claims 5–7 of the '364 patent; (ii) claims 1 and 4 of the '192 patent; (iii) claims 1–2, 6–8, 13–14, and 16–17 of the '703 patent; and (iv) claims 10, 17, and 20 of the '626 patent, where the infringing LCD devices are manufactured abroad by or on behalf of, or are imported by or on behalf of, Samsung, or any of its affiliated companies, parents, subsidiaries, licensees, contractors, or other related business entities, or successors or assigns; and (2) cease and desist orders prohibiting Samsung Electronics America, Inc. and Samsung Semiconductor, Inc. from conducting any of the following activities in the United States: importing, selling, marketing, advertising, distributing, offering for sale, transferring (except for exportation), and soliciting U.S. agents or distributors for, LCD devices, including display panels and modules, and products containing the same that infringe one or more of (i) claims 5–7 of the '364 patent; (ii) claims 1 and 4 of the '192 patent; (iii) claims 1–2, 6–8, 13–14, and 16–17 of the '703 patent; and (iv) claims 10, 17, and 20 of the '626 patent. 74 FR 58978–79 (November 16, 2009).

On February 12, 2010, complainant Sharp and respondent Samsung filed a joint petition to rescind the remedial orders under Commission Rule 210.76(a)(1) on the basis of a settlement agreement between the parties. The parties asserted that their settlement agreement constitutes "changed conditions of fact or law" sufficient to justify rescission of the order under Commission Rule 210.76(a)(1), 19 CFR 210.76(a)(1). The IA did not oppose the joint petition.

Having reviewed the parties' submissions, the Commission has determined that the settlement agreement satisfies the requirement of Commission Rule 210.76(a)(1), 19 CFR 210.76(a)(1), that there be changed conditions of fact or law. The Commission therefore has issued an order rescinding the limited exclusion order and cease and desist orders previously issued in this investigation.

This action is taken under the authority of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) and section 210.76(a)(1) of the Commission's Rules of Practice and Procedure (19 CFR 210.76(a)(1)).

Issued: March 1, 2010.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 2010–4556 Filed 3–3–10; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OMB Number 1121–0166]

Bureau of Justice Assistance; Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-Day Notice of Information Collection Under Review Extension of currently approved collection. Bureau of Justice Assistance Application Form:

Public Safety Officers' Disability Benefits.

The Department of Justice, Office of Justice Programs, Bureau of Justice Assistance, will be submitting the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. This proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for "sixty days" until May 3, 2010. If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact M. Berry at 202–616–6500/1–866–268–0079, Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, 810 7th Street, NW., Washington, DC 20531 via facsimile at 202–305–1367 or by e-mail at *M.A.Berry@ojp.usdoj.gov*.

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 agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

— Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of information collection:* Extension of currently approved collection.

(2) *The title of the form/collection: OJP FORM 3650/7 Public Safety Officers Disability Benefits.*

(3) The agency form number, if any, and the applicable component of the Department sponsoring the collection: None. Bureau of Justice Assistance, Office of Justice Programs, United States Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief* abstract:

Primary: Dependents of public safety officers who were killed or permanently and totally disabled in the line of duty.

Abstract: BJA's Public Safety Officers' Benefits (PSOB) division will use the PSOEA Application information to confirm the eligibility of applicants to receive PSOEA benefits. Eligibility is dependent on several factors, including the applicant having received or being eligible to receive a portion of the PSOB Death Benefit, or having a family member who received the PSOB Disability Benefit. Also considered are the applicant's age and the schools being attended. In addition, information to help BJA identify an individual is collected, such as Social Security number and contact numbers and e-mail addresses. The changes to the application form have been made in an effort to streamline the application process and eliminate requests for information that is either irrelevant or already being collected by other means.

Others: None.

(5) *An estimate of the total number of respondents and the amount of time needed for an average respondent to respond is as follows:* It is estimated that no more than 75 respondents will apply a year. Each application takes approximately 120 minutes to complete.

(6) *An estimate of the total public burden (in hours) associated with the collection:* Total Annual Reporting Burden: 75×120 minutes per application = 9,000 minutes/by 60 minutes per hour = 150 hours.

If additional information is required, please contact Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC., 20530.

March 1, 2010.

Lynn Bryant,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. 2010–4536 Filed 3–3–10; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Bemis Company, Inc., et al.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Hold Separate Stipulation and Order, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States* v. *Bemis Co. et al.,* Civil Action No. 1:10–cv–00295. On February 24, 2010, the United States filed a Complaint alleging that the proposed acquisition by Bemis Company, Inc. ("Bemis") of the Alcan Packaging Food Americas business of Rio Tinto plc would violate Section 7 of the Clayton Act, 15 U.S.C. 18, by substantially lessening competition in the markets for flexible-packaging rollstock for chunk and sliced natural cheese packaged for retail sale, flexible-packaging rollstock for shredded natural cheese packaged for retail sale, and flexible-packaging shrink bags for fresh meat. The proposed Final Judgment, filed the same time as the Complaint, requires Bemis to divest the assets of Alcan Packaging Food Americas related to those markets, including production plants and assets located in Menasha, Wisconsin and Catoosa, Oklahoma, as well as certain other tangible and intangible assets. The proposed Final Judgment also permits Bemis temporarily to occupy certain portions of the Menasha facility while unrelated operations are relocated and allows for short-term supply agreements between Bemis and the entity that acquires the divested assets in order to ensure that customers continue to receive a reliable supply of the affected products.

Copies of the Complaint, proposed Final Judgment and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street, NW., Suite 1010, Washington, DC 20530 (telephone: 202–514–2481), on the Department of Justice's Web site at *http://www.usdoj.gov/atr,* and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, Department of Justice,

Washington, DC 20530, (telephone: 202–307–0924).

J. Robert Kramer II,

Director of Operations and Civil Enforcement.

United States of America, Department of Justice, Antitrust Division, 450 5th Street, NW, Suite 8700, Washington, D.C. 20530, Plaintiff, v. *Bemis Company, Inc., One Neenah Center, Neenah, WI 54957* and *Rio Tinto plc, 2 Eastbourne Terrace, London, W2 6LG, United Kingdom* and *Alcan Corporation, 8770 West Bryn Mawr Avenue, Chicago, IL 60631,* Defendants.

Case No.: Case: 1:10–cv–00295, Assigned To: Kollar-Kotelly, Colleen, Assign. Date: February 24, 2010, Description: Antitrust, Judge:

Complaint

The United States of America ("United States"), acting under the direction of the Attorney General, brings this civil antitrust action against defendants Bemis Company, Inc. ("Bemis"), Rio Tinto plc ("Rio Tinto"), and Alcan Corporation ("Alcan") to enjoin Bemis's proposed acquisition from Rio Tinto of the Alcan Packaging Food Americas business and to obtain other equitable relief. The United States complains and alleges as follows:

I. Nature of This Action

1. Bemis announced that it has agreed to purchase the Alcan Packaging Food Americas business from Rio Tinto for $1.2 billion.

2. Bemis and Alcan are the two leading suppliers in the United States and Canada of flexible packaging products suitable for a variety of natural cheese products packaged for retail sale. Bemis and Alcan are also two of the three primary suppliers of shrink bags for fresh-meat packaging in the United States and Canada.

3. The proposed acquisition would eliminate competition between Bemis and Alcan, which for some customers are the two best sources of flexible packaging for certain natural cheese products. The proposed acquisition likely also would reduce competition substantially in the highly concentrated market for shrink bags for fresh-meat packaging. As a result, the proposed acquisition likely would substantially lessen competition in the development, production, and sale of flexible packaging and associated services for chunk, sliced, and shredded natural cheese packaged for retail sale and for fresh meat in the United States and Canada in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

II. The Defendants

4. Bemis is a Missouri corporation headquartered in Neenah, Wisconsin. In 2008, Bemis and its subsidiaries had total sales of approximately $3.8 billion, including approximately $2.1 billion of flexible packaging in the United States. Bemis's flexible packaging for cheese and meat is produced by its wholly owned, but separately incorporated, Curwood, Inc. division.

5. Rio Tinto is organized under the laws of and headquartered in the United Kingdom. Its 2008 sales totaled approximately $58 billion. Rio Tinto acquired Alcan in 2007.

6. Alcan is a wholly owned subsidiary of Rio Tinto. Alcan is a Delaware corporation headquartered in Chicago, Illinois. The Alcan Packaging Food Americas business produces and sells flexible packaging in the United States, Canada, and Latin America. In 2008, the Alcan Packaging Food Americas business sold approximately $1.5 billion of flexible packaging.

III. Jurisdiction and Venue

7. The United States brings this action under Section 15 of the Clayton Act, 15 U.S.C. 25, to prevent and restrain defendants from violating Section 7 of the Clayton Act, 15 U.S.C. 18.

8. Defendants themselves, or through wholly owned subsidiaries, produce and sell flexible packaging and associated services for natural cheese and fresh meat, among other products, in the flow of interstate commerce. Defendants' activities in the development, production, and sale of flexible packaging for natural cheese and fresh meat, among other products, substantially affect interstate commerce. This Court has subject-matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. 25 and 28 U.S.C. 1331, 1337(a) and 1345.

9. Defendants have consented to venue and personal jurisdiction in the District of Columbia. Venue is therefore proper in this District under Section 12 of the Clayton Act, 15 U.S.C. 22, and 28 U.S.C. 1391(c). Venue is also proper in the District of Columbia for defendant Rio Tinto under 28 U.S.C. 1391(d).

IV. Background

A. The Flexible-Packaging Industry

10. Flexible packaging is any package the shape of which can be readily changed. Flexible packaging for food encompasses a wide range of products, including bags and wrappings for cheeses and meats, snack bags, and cereal-box liners. Flexible packaging is distinguishable from rigid packaging, such as jars, cans, cups, trays, and hard plastic bottles.

11. Varying degrees of design and manufacturing sophistication are required to produce flexible packaging for different end uses. Some flexible packaging, such as single-layer packaging, is relatively simple to manufacture, and customers can choose from a number of producers for these types of flexible packaging. Flexible packaging for other end uses, such as natural cheese and fresh meat, however, has multiple layers, is subject to more rigorous performance standards, requires greater scientific knowledge and technical know-how to engineer, and requires that technical support be readily available, and, therefore, is more difficult to produce and commercialize successfully.

B. Procurement of Flexible Packaging for Natural Cheese and Fresh Meat

12. Producers of flexible packaging sell their packaging to producers of food that package their products for wholesale or retail sale. Customers typically have particular and unique specifications for their packaging. For example, customers use flexible packaging to differentiate their products from those of their rivals. Moreover, customers have different packaging equipment, and the flexible packaging must be specifically qualified to run on the particular customer's equipment.

13. Producers of flexible packaging must work closely with customers to ensure that their packaging material runs efficiently on their customers' machines, that they meet the promised lead times, and that they continuously find ways to cut the customer's costs. Producers must also engage in research and development to deliver better packaging products in order to compete effectively.

14. Customers of flexible packaging for certain forms of natural cheese and fresh meat can incur substantial costs to switch between different flexible-packaging producers. These costs result, in part, from having to modify existing packaging equipment to make it compatible with the new producer's films and the downtime associated with that modification. Customers also incur costs from testing and qualifying a new supplier.

15. Prices for flexible packaging for natural cheese and fresh meat are customer-specific and based on, among other things, an individual customer's unique requirements. The price charged to one customer likely will be different from the price charged to another customer.

16. Price competition in the relevant markets occurs in two ways. First, customers may issue a request for proposal, through which they invite potential suppliers to bid on supplying

packaging that meets the customers' specifications. Customers evaluate the competing bids on the basis of, among other things, compliance with their specifications, price, delivery times, and the services provided by each producer. Second, price competition may also occur less formally if a customer seeks or receives an offer from an alternative supplier and the incumbent is given a chance to respond.

V. Relevant Product Markets

A. Product Markets for Natural-Cheese Packaging

17. Natural cheese is sold in several different forms, including chunk cheese, sliced cheese, and shredded cheese.

18. The films used in flexible packaging for some natural-cheese products are sold in the form of rollstock, which is a continuous sheet of film that is cut for each package. Most natural cheese sold at retail is packaged using rollstock films. The particular flexible-packaging rollstock and the services associated with providing it to customers ("flexible-packaging rollstock") used for: (a) Chunk and sliced natural cheese packaged for retail sale; and (b) shredded natural cheese packaged for retail sale are distinct product markets.

19. Cheese-packaging customers demand a long shelf-life for natural cheese. The flexible-packaging rollstock for natural cheese must include a barrier layer that keeps out oxygen to prevent the cheese from spoiling. The packaging also must prevent moisture from leaking into or out of the package. Some cheeses emit gasses as they age; such cheeses require packaging that allows gasses to escape. In addition, the packaging film must be sufficiently transparent to present the cheese well to the consumer, but also avoid discoloration from fluorescent lights. The packaging also must resist abrasion and cracking during distribution and run smoothly and efficiently on the customer's filling machines. Finally, the packaging must be inert, so that the flavor of the cheese is not compromised by the plastic.

1. Flexible-Packaging Rollstock for Chunk and Sliced Natural Cheese Packaged for Retail Sale Is a Relevant Product Market

20. Chunk natural cheese is sold in bricks of specific sizes, typically eight, but ranging to thirty-two, ounces. Sliced natural cheese is typically sold in packages with roughly ten or more slices. Producers of chunk and sliced natural cheese generally use the same films for packaging.

21. Specialized rollstock films are designed specifically for packaging chunk and sliced natural cheese for retail sale. While some chunk and sliced natural cheeses for retail sale are packaged in other forms of packaging (e.g., shrink bags or rigid trays), these are more expensive to purchase than rollstock packaging and cannot be used on the same packaging equipment as rollstock. A small but significant increase in the price of flexible-packaging rollstock for chunk and sliced natural cheese packaged for retail sale likely would not cause customers faced with such an increase to substitute to other forms of packaging, or otherwise purchase sufficiently less of that product, so as to render the price increase unprofitable.

22. Therefore, flexible-packaging rollstock for chunk and sliced natural cheese packaged for retail sale is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act. In 2008, approximately $100 million in sales of this product were made in the United States and Canada.

2. Flexible-Packaging Rollstock for Shredded Natural Cheese Packaged for Retail Sale Is a Relevant Product Market

23. Shredded natural cheese packaged for retail sale typically is packaged in bags, which often come with an easy-open mechanism and an easy-close attachment. The easy-open mechanism is either laser-scored or mechanically scored, such that some of the package's layers are perforated (making the package easy to tear), while leaving the oxygen and moisture barriers intact (preventing contamination of the product). The scoring process presents significant challenges to flexible-packaging producers. The sealing process also is difficult because the bags typically are filled with cheese while in a vertical position and the release of cheese into the bags is continuous and fast.

24. Specialized films are designed specifically for shredded natural cheese packaged for retail sale. A small but significant increase in the price of flexible-packaging rollstock for shredded natural cheese packaged for retail sale likely would not cause customers faced with such an increase to substitute to other forms of packaging, or otherwise purchase sufficiently less of that product, so as to render the price increase unprofitable.

25. Therefore, flexible-packaging rollstock for shredded natural cheese packaged for retail sale is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act. In 2008, approximately $100 million in sales of this product were made in the United States.

B. Flexible-Packaging Shrink Bags for Fresh Meat Are a Relevant Product Market

26. Certain characteristics are common to most flexible-packaging films for fresh meat (i.e., beef, veal, pork, and lamb). First, most films for fresh meat contain a layer that prevents oxygen from coming into contact with the meat. Second, fresh meat films must prevent moisture from leaking out and contaminants from entering the packaging. Third, fresh meat films must run effectively on the customer's packaging equipment. Finally, the sealant must bond through fatty and oily substances.

27. The most common type of flexible-packaging film for fresh meat is a shrink bag, which is designed to shrink to the contours of the contents when heated, forming a tight seal. Shrink bags are particularly suitable for use with fresh meat, in particular for wholesale distribution of meat to be cut for retail sale in grocery stores. Shrink bags and the services associated with providing them to customers ("flexible-packaging shrink bags") used for fresh meat constitute a distinct product market. The shrink bag must be durable to survive distribution while maintaining its oxygen and moisture barriers and allowing the meat to retain its flavor. The bag also must meet shelf-life requirements of 30 days or more and, when used for retail packaging, have a high degree of transparency for optimal presentation.

28. A small but significant increase in the price of flexible-packaging shrink bags for fresh meat likely would not cause customers faced with such an increase to substitute to other forms of packaging, or otherwise purchase sufficiently less of that product, so as to render the price increase unprofitable.

29. Therefore, flexible-packaging shrink bags for fresh meat constitute a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act. In 2008, approximately $800 million in sales of this product were made in the United States.

C. The United States and Canada Is a Relevant Geographic Market

30. Producers of flexible-packaging rollstock for chunk, sliced, and shredded natural cheese packaged for retail sale and flexible-packaging shrink bags for fresh meat ship the packaging to customers throughout the United

States and Canada. Producers outside the United States and Canada are not good alternatives for customers in the United States and Canada. Customers using producers outside the United States and Canada would face longer lead times and an increased potential for supply-chain complications. Moreover, major customers demand that producers of flexible packaging provide frequent technical and operational service and support at the customer's premises and do not believe that foreign suppliers can provide the level of service and support they demand. A small but significant increase in the price of flexible-packaging rollstock for chunk, sliced, and shredded natural cheese packaged for retail sale and flexible-packaging shrink bags for fresh meat in the United States and Canada likely would not cause customers in the United States and Canada to turn to producers outside the United States and Canada in sufficient numbers so as to render such a price increase unprofitable.

31. Accordingly, the United States and Canada is a relevant geographic market for flexible-packaging rollstock for chunk, sliced, and shredded natural cheese packaged for retail sale and flexible-packaging shrink bags for fresh meat within the meaning of Section 7 of the Clayton Act.

VI. The Proposed Acquisition's Likely Anticompetitive Effects

A. Likely Anticompetitive Effects in the United States and Canada for Flexible-Packaging Rollstock for Chunk and Sliced Natural Cheese Packaged for Retail Sale

32. Based on their capabilities and sales history, Bemis and Alcan are two of only a few competitors that might successfully bid to supply a customer with flexible-packaging rollstock for chunk and sliced natural cheese packaged for retail sale. Currently, Bemis and Alcan account for approximately 37 and 54 percent, respectively, of sales in the United States and Canada for this product. If the proposed acquisition is not enjoined, Bemis and Alcan combined would account for approximately 91 percent of sales in the United States and Canada for this product. Using a measure of market concentration called the Herfindahl-Hirschman Index ("HHI") (explained in Appendix A), the HHI would increase by more than 3,900 points, resulting in a post-acquisition HHI of more than 8,000 points.

33. Market shares are best measured using revenues in the markets for the Relevant Products because suppliers with the capacity to produce similar goods outside of those markets cannot quickly and easily shift that capacity to supply customers with the Relevant Products. Thus, the mere possession of similar capacity does not make a supplier an "uncommitted entrant"; meeting the requirements of customers in a cost-efficient manner also requires specialized know-how, experience, qualification, and the ability to innovate.

34. Due to Bemis's and Alcan's collective overall expertise in meeting the needs of customers and other technical and commercial factors for flexible-packaging rollstock for chunk and sliced natural cheese packaged for retail sale, including, among other things, price, delivery times, service, and technical support, Bemis and Alcan frequently are perceived by each other, by other bidders, and by customers as being the two strongest competitors in that market.

35. Bemis's bidding behavior often has been constrained by the possibility of losing business to Alcan. By eliminating Alcan, Bemis would gain the incentive and likely ability to profitably increase its bid prices higher than it otherwise would without the acquisition. Customers have also benefitted from competition between Bemis and Alcan through higher quality, better supply-chain options (including delivery times and volume-purchase requirements), technical support, and numerous innovations. The combination of Bemis and Alcan would eliminate this other competition and future benefits to the customers.

36. The proposed acquisition, therefore, likely would substantially lessen competition in the United States and Canada for flexible-packaging rollstock for chunk and sliced natural cheese packaged for retail sale, which likely would lead to higher prices, lower quality, less favorable supply-chain options, reduced technical support, and less innovation, in violation of Section 7 of the Clayton Act.

B. Likely Anticompetitive Effects in the United States and Canada for Flexible-Packaging Rollstock for Shredded Natural Cheese Packaged for Retail Sale

37. Based on their capabilities and sales history, Bemis and Alcan are two of only a few credible competitors that might successfully bid to supply a customer with flexible packaging rollstock for shredded natural cheese packaged for retail sale. Currently, Bemis and Alcan account for approximately 27 and 49 percent, respectively, of sales in the United States and Canada for this product. If the proposed acquisition is not enjoined, Bemis and Alcan combined would account for approximately 76 percent of sales in the United States and Canada for this product. The HHI would increase by approximately 2,500 points, resulting in a post-acquisition HHI of more than 5,600 points.

38. Market shares are best measured using revenues in the markets for the Relevant Products because suppliers with the capacity to produce similar goods outside of those markets cannot quickly and easily shift that capacity to supply customers with the Relevant Products. Thus, the mere possession of similar capacity does not make a supplier an "uncommitted entrant"; meeting the requirements of customers in a cost-efficient manner also requires specialized know-how, experience, qualification, and the ability to innovate.

39. Due to Bemis's and Alcan's collective overall expertise in meeting the needs of customers and other technical and commercial factors for flexible-packaging rollstock for shredded natural cheese packaged for retail sale, including, among other things, price, delivery times, service, and technical support, Bemis and Alcan frequently are perceived by each other, by other bidders, and by customers as being the two strongest competitors in that market.

40. Bemis's bidding behavior often has been constrained by the possibility of losing business to Alcan. By eliminating Alcan, Bemis would gain the incentive and ability to profitably increase its bid prices higher than it otherwise would without the acquisition. Customers have also benefitted from competition between Bemis and Alcan through higher quality, better supply-chain options, better technical support, and numerous innovations. The combination of Bemis and Alcan would eliminate this other competition and future benefits to the customers.

41. The proposed acquisition, therefore, likely would substantially lessen competition in the United States and Canada for flexible-packaging rollstock for shredded natural cheese packaged for retail sale, which likely would lead to higher prices, lower quality, less favorable supply-chain options, reduced technical support, and less innovation, in violation of Section 7 of the Clayton Act.

C. Likely Anticompetitive Effects in the United States and Canada for Flexible-Packaging Shrink Bags for Fresh Meat

42. Currently, Bemis and Alcan account for approximately 20 and 8

percent, respectively, of the sales in the United States and Canada for flexible-packaging shrink bags for fresh meat. If the proposed acquisition is not enjoined, Bemis and Alcan combined would account for approximately 28 percent of sales of flexible-packaging shrink bags for fresh meat in the United States and Canada, and leave Bemis and one other firm with approximately 93 percent of sales. The HHI would increase by more than 300 points, resulting in a post-acquisition HHI of more than 5,000 points.

43. Market shares are best measured using revenues in the markets for the Relevant Products because suppliers with the capacity to produce similar goods outside of those markets cannot quickly and easily shift that capacity to supply customers with the Relevant Products. Thus, the mere possession of similar capacity does not make a supplier an "uncommitted entrant"; meeting the requirements of customers in a cost-efficient manner also requires specialized know-how, experience, qualification, and the ability to innovate.

44. Although the third supplier of flexible-packaging shrink bags for fresh meat is the dominant supplier, some customers desire two or more suppliers. As a result, Bemis and Alcan often find themselves competing to be the second supplier, and their price competition exerts pricing pressure also on the dominant firm. Unless the proposed acquisition is enjoined, that bidding dynamic would be eliminated because Bemis and Alcan no longer would bid against one another. In addition, Bemis's elimination of Alcan as an independent competitor would result in only two suppliers accounting for nearly all of the market. Such an increase in concentration likely would make coordination easier.

45. The proposed acquisition, therefore, likely would substantially lessen competition in the United States and Canada for flexible-packaging shrink bags for fresh meat, which likely would lead to higher prices, lower quality, less favorable supply-chain options, reduced technical support, and less innovation, in violation of Section 7 of the Clayton Act.

D. Entry Is Unlikely To Prevent Anticompetitive Harm

46. Some customers in the United States and Canada have attempted to procure suitable flexible-packaging rollstock for chunk, sliced, and shredded natural cheese packaged for retail sale from producers that do not currently produce packaging for these uses. Similarly, some customers in the United States and Canada have attempted to procure suitable flexible-packaging shrink bags for fresh meat from producers beyond Bemis and Alcan and the dominant producer. Most of those flexible-packaging producers have not been able cost-effectively to achieve the required specifications or quality requirements. These suppliers likely would not be able to meet customers' required specifications or quality requirements cost-effectively within a commercially reasonable period of time, nor would they likely be able to produce products that would run efficiently on their customers' packaging equipment.

47. New entry into the markets for flexible-packaging rollstock for chunk and sliced natural cheese packaged for retail sale, flexible-packaging rollstock for shredded natural cheese packaged for retail sale, and flexible-packaging shrink bags for fresh meat in the United States and Canada would be costly, difficult, and time consuming. A new supplier would need to construct production lines capable of producing films that meet the rigorous standards set forth by major buyers of such films. Construction of manufacturing facilities would require millions of dollars of capital investment and the entrant would have to be committed to research and development. In addition, the technical know-how necessary to design and successfully manufacture packaging that is able to run efficiently on customers' equipment cost-effectively is difficult to obtain.

48. Even after a new entrant has developed the capability to supply flexible-packaging rollstock for chunk, sliced, and shredded natural cheese packaged for retail sale and flexible-packaging shrink bags for fresh meat, the entrant must be qualified by potential customers, demonstrating that it is capable of manufacturing products that meet rigorous quality and performance standards. For example, because the qualifying process for natural cheese typically requires a shelf-life test, where sample products are wrapped in the candidate packaging and stored in retail-like conditions for extended periods of time, the process can take many months. Further, there is no guarantee that the attempted qualification will be successful, and the entrant may have to repeat the process multiple times. In such cases, the qualification process can take multiple years with no guarantee of success. Moreover, because customer specifications are unique, qualification with one customer does not guarantee qualification with another.

49. Entry of existing packaging firms is unlikely because the technical know how necessary to create the packaging for the relevant products is difficult to obtain. Also, a company would have to pass each customer's rigorous qualification tests. Entry of existing packaging firms into the markets for flexible-packaging rollstock for chunk and sliced natural cheese packaged for retail sale, flexible-packaging rollstock for shredded natural cheese packaged for retail sale, and flexible-packaging shrink bags for fresh meat, therefore, likely would not be timely, likely, and sufficient to defeat a small but significant increase in price in the relevant markets.

50. As a result of these barriers, entry by new firms or by existing packaging firms likely would not be timely, likely, and sufficient to prevent a likely exercise of market power by Bemis after the acquisition.

VII. The Proposed Acquisition Violates Section 7 of the Clayton Act

51. Bemis's proposed acquisition of the Alcan Packaging Food Americas business would be likely to substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, in the United States and Canada for: (1) Flexible-packaging rollstock for chunk and sliced natural cheese packaged for retail sale; (2) flexible-packaging rollstock for shredded natural cheese packaged for retail sale; and (3) flexible-packaging shrink bags for fresh meat.

52. Unless enjoined, the proposed acquisition likely would have the following anticompetitive effects, among others:

(a) Actual and potential competition between Bemis and Alcan in the relevant markets would be eliminated;

(b) Competition in the relevant markets likely would be substantially lessened; and

(c) For the relevant products, prices would likely increase, quality would likely decrease, supply-chain options would likely be less favorable, technical support would likely be reduced, and innovation would likely decline.

VIII. Requested Relief

53. The United States requests that this Court:

(a) Adjudge and decree Bemis's proposed acquisition of the Alcan Packaging Food Americas business to violate Section 7 of the Clayton Act, 15 U.S.C. 18;

(b) Enjoin defendants and all persons acting on their behalf from consummating the proposed acquisition of the Alcan Packaging Food Americas

business by Bemis, or from entering into or carrying out any other agreement, plan, or understanding the effect of which would be to combine Bemis with the Alcan Packaging Food Americas business;

(c) Award the United States its costs for this action; and

(d) Award the United States such other and further relief as the Court deems just and proper.

For Plaintiff United States of America:

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William F. Cavanaugh, Jr.,
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Dated: February 24, 2010.

Appendix A—Definition of HHI

The term "HHI" means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20%, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2{,}600$). The HHI takes into account the relative size distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relatively equal size and reaches its maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1,000 and 1,800 points are considered to be moderately concentrated, and markets in which the HHI is in excess of 1,800 points are considered to be highly concentrated. *See Horizontal Merger Guidelines* ¶ 1.51 (revised Apr. 8, 1997). Transactions that increase the HHI by more than 100 points in highly concentrated markets presumptively raise antitrust concerns under the *Horizontal Merger Guidelines* issued by the Department of Justice and the Federal Trade Commission. *See id.*

United States of America, Plaintiff, v. *Bemis Company, Inc.*, and *Rio Tinto PLC*, and *Alcan Corporation*, Defendants.

Case No.: 1:10-cv-00295
Judge: Kollar-Kotelly, Colleen
Deck Type: Antitrust
Date Stamp: February 24, 2010

Final Judgment

Whereas, Plaintiff United States of America ("United States") filed its Complaint on February 24, 2010, the United States and defendants Bemis Company, Inc., Rio Tinto plc, and Alcan Corporation, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

And whereas, defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

And whereas, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by defendants to assure that competition is not substantially lessened;

And whereas, the United States requires defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

And whereas, defendants have represented to the United States that the divestitures required below can and will be made and that defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

Now therefore, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, *it is ordered, adjudged, and decreed:*

I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against defendants under Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

II. Definitions

As used in this Final Judgment:

A. "Acquirer" or "Acquirers" means the entity or entities to whom defendants divest the Divestiture Assets.

B. "Bemis" means defendant Bemis Company, Inc., a Missouri corporation headquartered in Neenah, Wisconsin, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

C. "Rio Tinto" means defendant Rio Tinto plc, organized under the laws of and headquartered in the United Kingdom, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

D. "Alcan" means defendant Alcan Corporation, a Delaware corporation that is a wholly owned subsidiary of Rio Tinto headquartered in Chicago, Illinois, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

E. "Divestiture Assets" means:

(1) Alcan's facility located at 905 W. Verdigris Parkway, Catoosa, Oklahoma 74015 ("Catoosa facility");

(2) Alcan's facility located at 271 River Street, Menasha, Wisconsin 54952 ("Menasha facility"); provided, however, that the tangible assets used exclusively or primarily for the wax-coating operation located at the Menasha facility shall not be divested pursuant to this Final Judgment;

(3) The following tangible assets:

(a) All tangible assets (leased or owned) necessary to operate or used in or for the Catoosa facility and the Menasha facility, including, but not limited to, all real property and improvements, manufacturing equipment, product inventory, tooling and fixed assets, personal property, titles, interests, leases, input inventory, office furniture, materials, supplies, and other tangible property;

(b) All tangible assets (leased or owned) used exclusively or primarily for the research and development of any Alcan Relevant Product in the United States and/or Canada, including, but not limited to, materials, supplies, and other property; and

(c) All records and documents relating to any Alcan Relevant Product in the United States and/or Canada, including, but not limited to, licenses, permits, and authorizations issued by any governmental organization; contracts, teaming agreements, leases, commitments, certifications, and understandings, including, but not limited to, supply agreements; customer lists, contracts, accounts, and credit records; and repair and performance records.

(4) The following intangible assets:

(a) All intangible assets used exclusively or primarily in the design, development, production, marketing, servicing, distribution, and/or sale of

any Alcan Relevant Product in the United States and/or Canada, including, but not limited to, all patents, licenses and sub-licenses, intellectual property, copyrights, trade names or trademarks, including, but not limited to, "Halo," "Maraflex," "Clearshield," or any derivation thereof, service marks, service names, technical information, designs, trade dress, and trade secrets; computer software, databases, and related documentation; know-how, including, but not limited to, recipes, formulas, and machine settings; information relating to plans for, improvements to, or line extensions of, Alcan's Relevant Products; drawings, blueprints, designs, design protocols, specifications for materials, and specifications for parts and devices; marketing and sales data; quality assurance and control procedures; design tools and simulation capability; contractual rights; manuals and technical information provided by Alcan to its own employees, customers, suppliers, agents, or licensees; safety procedures for the handling of materials and substances; research information and data concerning historic and current research and development efforts, including, but not limited to, designs and experiments and the results of successful and unsuccessful designs and experiments; and

(b) With respect to any intangible assets that are not included in paragraph II(E)(4)(a), above, and that prior to the filing of the Complaint in this matter were used in connection with the design, development, production, marketing, servicing, distribution, and/or sale of both any Alcan Relevant Product and any other Alcan product, a non-exclusive, non-transferable license for such intangible assets to be used for the design, development, production, marketing, servicing, distribution, and/or sale of any of the Relevant Products or the operation or use of the Catoosa facility and/or the Menasha facility for the period of time that defendants have rights to such assets; provided, however, that any such license is transferable to any future purchaser of all or any relevant portion of the Divestiture Assets.

F. "Relevant Products" means any flexible-packaging rollstock used for chunk, sliced, and/or shredded natural cheeses packaged for retail sale and any flexible-packaging shrink bags used for fresh meat.

G. "Transaction" means Bemis's proposed acquisition of the Alcan Packaging Food Americas business.

III. Applicability

A. This Final Judgment applies to Bemis, Rio Tinto, and Alcan, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. If, prior to complying with Section IV and V of this Final Judgment, defendants sell or otherwise dispose of all or substantially all of their assets or of lesser business units that include the Divestiture Assets, they shall require the purchaser to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from the Acquirer or Acquirers of the assets divested pursuant to this Final Judgment.

IV. Divestitures

A. Bemis is ordered and directed, within ninety (90) calendar days after the filing of the Complaint in this matter, or five (5) calendar days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest the Divestiture Assets in a manner consistent with this Final Judgment to an Acquirer or Acquirers acceptable to the United States, in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed sixty (60) calendar days in total, and shall notify the Court in such circumstances. Bemis agrees to use its best efforts to divest the Divestiture Assets as expeditiously as possible.

B. In accomplishing the divestitures ordered by this Final Judgment, Bemis promptly shall make known, by usual and customary means, the availability of the Divestiture Assets. Bemis shall inform any person making inquiry regarding a possible purchase of the Divestiture Assets that they are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Bemis shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Assets customarily provided in a due diligence process, except such information or documents subject to the attorney-client privilege or work-product doctrine. Bemis shall make available such information to the United States at the same time that such information is made available to any other person.

C. Bemis shall provide the Acquirer or Acquirers and the United States information relating to the personnel employed at the Catoosa facility and the Menasha facility and the personnel otherwise involved in the design, development, production, marketing, servicing, distribution, and/or sale of Alcan's Relevant Products to enable the Acquirer or Acquirers to make offers of employment. Defendants will not interfere with any negotiations by the Acquirer or Acquirers to employ any person who is employed at the Catoosa facility or the Menasha facility or is otherwise involved in the design, development, production, marketing, servicing, distribution, and/or sale of Alcan's Relevant Products. Interference with respect to this paragraph includes, but is not limited to, offering to increase an employee's salary or benefits other than as a part of a company-wide increase in salary or benefits. In addition, for each employee who elects employment by the Acquirer or Acquirers, Bemis shall vest all unvested pension and other equity rights of that employee and provide all benefits to which the employee would have been entitled if terminated without cause.

D. Defendants shall waive all noncompete agreements for any current or former Alcan employee employed at the Catoosa facility, the Menasha facility, or otherwise employed in the design, development, production, marketing, servicing, distribution, and/or sale of any Alcan Relevant Product.

E. Bemis shall permit prospective Acquirers of the Divestiture Assets to have reasonable access to personnel and to make inspections of the physical facilities associated with the Divestiture Assets; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

F. Bemis shall warrant to the Acquirer or Acquirers that each asset will be operational on the date of sale.

G. Defendants shall not take any action that will impede in any way the permitting, operation, use, or divestiture of the Divestiture Assets.

H. Defendants shall warrant to the Acquirer or Acquirers that there are no material defects in the environmental, zoning or other permits pertaining to the operation of each asset, and that following the sale of the Divestiture Assets, defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Divestiture Assets.

I. Bemis shall take all steps necessary to accomplish the transfer of the leasehold and other rights of possession of the Catoosa facility to the Acquirer,

including, but not limited to, invoking and exercising all applicable early termination, early purchase, or other provisions contained in the agreements related to the Catoosa facility, and paying all necessary sums specified in such agreements.

J. Bemis shall warrant that it is divesting Alcan's entire business relating to each of the Relevant Products and will not manufacture any Alcan Relevant Product after the date the Divestiture Assets are divested until the expiration of this Final Judgment. Defendants shall not solicit business for any Relevant Product that is subject to an unexpired Alcan customer contract transferred to the Acquirer for a period of one (1) year from the date of the divestiture of such contract or the remaining term of the contract, whichever is shorter.

K. The Acquirer of the Menasha facility shall enter into an agreement with Bemis permitting Bemis to occupy the portions of the Menasha facility utilized for Alcan's wax-coating operations for a period of no longer than three (3) years after the date the Transaction is closed. By no later than three (3) months after the date the Transaction is closed, Bemis shall create physical barriers that segregate the wax-coating operations from the portions of the Menasha facility to be occupied by the Acquirer. Bemis's areas and operations at the Menasha facility shall be secured separately from those of the Acquirer so that the Acquirer's areas and operations cannot be accessed by Bemis and Bemis's areas and operations cannot be accessed by the Acquirer, other than for facility repair, support, and maintenance pursuant to a lease or other agreement. At the option of the Acquirer, the lease agreement may include a provision requiring Bemis to remove any or all physical barriers erected to segregate its areas and operations from the Acquirer's areas and operations pursuant to this paragraph.

L. At the option of the Acquirer of the Divestiture Assets relating to the "Maraflex" products, Bemis shall enter into a supply contract with that Acquirer for the "Maraflex" products sufficient to satisfy that Acquirer 's obligations under any customer contract for a period of up to one (1) year. The amount of "Maraflex" products produced by Bemis for the Acquirer pursuant to such a supply contract shall be limited to the total volume of "Maraflex" products produced by Alcan in 2009 plus one percent, unless otherwise mutually agreed by Bemis and the Acquirer. The terms and conditions of any contractual arrangement intended to satisfy this provision must be reasonably related to market conditions for these products. The United States, in its sole discretion, may approve an extension of the term of this supply contract for a period of up to two (2) years. If the Acquirer seeks an extension of the term of this supply contract, it shall so notify the United States in writing at least four (4) months prior to the date the supply contract expires. If the United States approves such an extension, it shall so notify Bemis in writing at least three (3) months prior to the date the supply contract expires.

M. At the option of the Acquirer of the Divestiture Assets relating to the "Maraflex" products, Bemis shall enter into a transition services agreement with that Acquirer sufficient to meet all or part of that Acquirer's needs for assistance in matters relating to the development, production, and/or service of the "Maraflex" products or technology for a period of at least six (6) months but no longer than three (3) years. The terms and conditions of any contractual arrangement intended to satisfy this provision must be reasonably related to the market value of the expertise of the personnel providing any needed assistance.

N. At the option of the Acquirer of the Menasha facility, Bemis shall enter into a supply contract with that Acquirer for any Relevant Product produced at Alcan's facility located at 901 Morrison Drive, Boscobel, Wisconsin 53805 (the "Boscobel facility"), sufficient to satisfy that Acquirer's obligations under any customer contract for a period of up to one (1) year. The amount of Relevant Products produced by Bemis for the Acquirer pursuant to such a supply contract shall be limited to the total volume of Relevant Products produced by Alcan at the Boscobel facility in 2009 plus one percent, unless otherwise mutually agreed by Bemis and the Acquirer. The terms and conditions of any contractual arrangement intended to satisfy this provision must be reasonably related to market conditions for these products. The United States, in its sole discretion, may approve an extension of the term of this supply contract for a period of up to one (1) year. If the Acquirer seeks an extension of the term of this supply contract, it shall so notify the United States in writing at least four (4) months prior to the date the supply contract expires. If the United States approves such an extension, it shall so notify Bemis in writing at least three (3) months prior to the date the supply contract expires.

O. At the option of Bemis, the Acquirer of the Catoosa facility shall enter into a supply contract for the "Clearshield" products sufficient to satisfy Alcan's or Bemis's obligations to Alcan affiliates Danaflex, Maua, and Envaril for a period of up to one (1) year. The amount of "Clearshield" products produced by the Acquirer for Bemis pursuant to such a supply contract shall be limited to the total volume of "Clearshield" products produced by Alcan for Danaflex, Maua, and Envaril in 2009 plus one percent, unless otherwise mutually agreed by Bemis and the Acquirer. The terms and conditions of any contractual arrangement intended to satisfy this provision must be reasonably related to market conditions for these products. The United States, in its sole discretion, may approve an extension of the term of this supply contract for a period of up to two (2) years. If Bemis seeks an extension of the term of this supply contract, it shall so notify the United States in writing at least four (4) months prior to the date the supply contract expires. If the United States approves such an extension, it shall so notify the Acquirer in writing at least three (3) months prior to the date the supply contract expires.

P. At the option of Bemis, the Acquirer or Acquirers shall enter into an agreement to provide Bemis with a non-exclusive, non-transferable license for the intangible assets described in paragraph II(E)(4)(a), above, that prior to the filing of the Complaint in this matter were used in connection with the design, development, production, marketing, servicing, distribution, and/or sale of both any Alcan Relevant Product and any other Alcan product; provided, however, that any such license is solely for use in connection with the design, development, production, marketing, servicing, distribution, and/or sale of products other than the Alcan Relevant Products. The terms and conditions of any contractual arrangement intended to satisfy this provision must be reasonably related to market conditions for such licenses.

Q. At the option of Bemis, the Acquirer of the Divestiture Assets relating to the "Clearshield" products shall enter into an agreement to provide Bemis with a non-exclusive, non-transferable license to enable Bemis to produce "Clearshield" products for sale outside the United States and Canada. The terms and conditions of any contractual arrangement intended to satisfy this provision must be reasonably related to market conditions for such licenses.

R. At the option of Bemis, the Acquirer of the Menasha facility shall enter into an agreement with Bemis to

provide Bemis with rotogravure printing services to be used in connection with Alcan's wax-coating operation located at the Menasha facility for a period of up to twelve (12) months. The terms and conditions of any contractual arrangement intended to satisfy this provision must be reasonably related to market conditions for these services.

S. In any instance where a third party has a right to a divested intangible asset pursuant to an agreement with any defendant, and where the agreement was entered into prior to the date of the filing of the Complaint in this matter, the Acquirer of that divested asset shall enter into an agreement with that third party to provide it with a right to that asset under terms and conditions sufficient to satisfy defendants' obligations under the original agreement.

T. Unless the United States otherwise consents in writing, the divestitures pursuant to Section IV, or by trustee appointed pursuant to Section V, of this Final Judgment, shall include the entire Divestiture Assets, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by the Acquirer or Acquirers as part of a viable, ongoing business engaged in the design, development, production, marketing, servicing, distribution, and sale of the Relevant Products. Divestiture of the Divestiture Assets may be made to one or more Acquirers, provided that in each instance it is demonstrated to the sole satisfaction of the United States that the Divestiture Assets will remain viable and the divestiture of such assets will remedy the competitive harm alleged in the Complaint. The divestitures, whether pursuant to Section IV or Section V of this Final Judgment:

(1) Shall be made to an Acquirer or Acquirers that, in the United States's sole judgment, has the intent and capability (including the necessary managerial, operational, technical and financial capability) of competing effectively as a supplier of the Relevant Products; and

(2) Shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between the Acquirer or Acquirers and defendants give defendants the ability unreasonably to raise the Acquirer's or Acquirers' costs, to lower the Acquirer's or Acquirers' efficiency, or otherwise to interfere in the ability of the Acquirer or Acquirers to compete effectively.

V. Appointment of Trustee

A. If Bemis has not divested the Divestiture Assets within the time period specified in Section IV(A), Bemis shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a trustee selected by the United States and approved by the Court to effect the divestiture of the Divestiture Assets.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell the Divestiture Assets. The trustee shall have the power and authority to accomplish the divestiture to an Acquirer or Acquirers acceptable to the United States at such price and on such terms as are then obtainable upon reasonable effort by the trustee, subject to the provisions of Sections IV, V, and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Section V(D) of this Final Judgment, the trustee may hire at the cost and expense of Bemis any investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee, reasonably necessary in the trustee's judgment to assist in the divestiture.

C. Defendants shall not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any such objections by defendants must be conveyed in writing to the United States and the trustee within ten (10) calendar days after the trustee has provided the notice required under Section VI.

D. The trustee shall serve at the cost and expense of Bemis, on such terms and conditions as the United States approves, and shall account for all monies derived from the sale of the assets sold by the trustee and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to defendants and the trust shall then be terminated. The compensation of the trustee and any professionals and agents retained by the trustee shall be reasonable in light of the value of the Divestiture Assets and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount.

E. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestitures. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities of the business to be divested, and defendants shall develop financial and other information relevant to such business as the trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information. Defendants shall take no action to interfere with or to impede the trustee's accomplishment of the divestitures.

F. After its appointment, the trustee shall file monthly reports with the United States and the Court setting forth the trustee's efforts to accomplish the divestitures ordered under this Final Judgment. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person. The trustee shall maintain full records of all efforts made to divest the Divestiture Assets.

G. If the trustee has not accomplished the divestitures ordered under this Final Judgment within six (6) months after his or her appointment, the trustee shall promptly file with the Court a report setting forth: (1) The trustee's efforts to accomplish the required divestitures; (2) the reasons, in the trustee's judgment, why the required divestitures have not been accomplished; and (3) the trustee's recommendations. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the United States, which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

VI. Notice of Proposed Divestiture

A. Within two (2) business days following execution of a definitive divestiture agreement, Bemis shall notify the United States of any proposed divestiture required by Section IV of

this Final Judgment. Within two (2) business days following execution of a definitive divestiture agreement, the trustee shall notify the United States and defendants of any proposed divestiture required by Section V of this Final Judgment. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from defendants, the proposed Acquirer or Acquirers, any other third party, or the trustee, if applicable, additional information concerning the proposed divestiture, the proposed Acquirer or Acquirers, and any other potential Acquirer. Defendants and the trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from defendants, the proposed Acquirer or Acquirers, any third party, and the trustee, whichever is later, the United States shall provide written notice to defendants and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to defendants' limited right to object to the sale under Section V(C) of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer or Acquirers or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by defendants under Section V(C), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII. Financing

Defendants shall not finance all or any part of any purchase made pursuant to Section IV or V of this Final Judgment.

VIII. Hold Separate

Until the divestitures required by this Final Judgment have been accomplished, defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestitures ordered by this Court.

IX. Affidavits

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestitures have been completed under Section IV or V, Bemis shall deliver to the United States an affidavit as to the fact and manner of its compliance with Section IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts Bemis has taken to solicit buyers for the Divestiture Assets, and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by Bemis, including limitations on information, shall be made within fourteen (14) calendar days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, Bemis shall deliver to the United States an affidavit that describes in reasonable detail all actions defendants have taken and all steps defendants have implemented on an ongoing basis to comply with Section VIII of this Final Judgment. Bemis shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in defendants' earlier affidavits filed pursuant to this Section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve and divest the Divestiture Assets until one year after such divestiture has been completed.

X. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States Department of Justice Antitrust Division, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendants, be permitted:

(1) Access during defendants' office hours to inspect and copy, or at the option of the United States, to require defendants to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of defendants, relating to any matters contained in this Final Judgment; and

(2) To interview, either informally or on the record, defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, defendants shall submit written reports or responses to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this Section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If, at the time information or documents are furnished by defendants to the United States, defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the United States shall give defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XI. Notification

Unless such transaction is otherwise subject to the reporting and waiting

period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. 18a (the "HSR Act"), Bemis, without providing advance notification to the Antitrust Division, shall not directly or indirectly acquire any assets of or any interest (including, but not limited to, any financial, security, loan, equity, or management interest) in any company in the business of designing, developing, producing, marketing, servicing, distributing, and/or selling any of the Relevant Products in the United States and/or Canada during the term of this Final Judgment.

Such notification shall be provided to the Antitrust Division in the same format as, and per the instructions relating to the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, except that the information requested in Items 5 through 9 of the instructions must be provided only about the Relevant Products. Notification shall be provided at least thirty (30) calendar days prior to acquiring any such interest, and shall include, beyond what may be required by the applicable instructions, the names of the principal representatives of the parties to the agreement who negotiated the agreement, and any management or strategic plans discussing the proposed transaction. If within the 30-day period after notification, representatives of the Antitrust Division make a written request for additional information, defendants shall not consummate the proposed transaction or agreement until thirty (30) calendar days after submitting all such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder. This Section shall be broadly construed and any ambiguity or uncertainty regarding the filing of notice under this Section shall be resolved in favor of filing notice.

XII. No Reacquisition

Defendants may not reacquire any part of the Divestiture Assets during the term of this Final Judgment.

XIII. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XIV. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry.

XV. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States's responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and responses to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: _____

Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. 16.

United States District Judge.

United States of America, Plaintiff, v. *Bemis Company, Inc.,* and *Rio Tinto PLC,* and *Alcan Corporation,* Defendants.

Case: 1:10–cv–00295
Assigned To: Kollar-Kotelly, Colleen
Assign. Date: 02/24/2010
Description: Antitrust
Judge:
Deck Type: Antitrust
Date Stamp:

Competitive Impact Statement

Plaintiff United States of America ("United States"), pursuant to section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of the Proceeding

Defendants Bemis Company, Inc. and Rio Tinto plc entered into a Sale and Purchase Agreement, dated July 5, 2009, pursuant to which Bemis agreed to acquire the Alcan Packaging Food Americas business from Rio Tinto for $1.2 billion.

The United States filed a civil antitrust Complaint against Bemis, Rio Tinto, and Alcan Corporation on February 24, 2010, seeking to enjoin Bemis's acquisition of the Alcan Packaging Food Americas business. The Complaint alleged that the acquisition likely would substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, in the United States and Canada, for the design, development, production, marketing, servicing, distribution, and sale of: (1) Flexible-packaging rollstock for chunk and sliced natural cheese packaged for retail sale; (2) flexible-packaging rollstock for shredded natural cheese packaged for retail sale; and (3) flexible-packaging shrink bags for fresh meat (hereinafter, collectively, the "Relevant Products"). That loss of competition likely would result in higher prices, decreased quality, less favorable supply-chain options, reduced technical support, and lesser innovation in the markets for the Relevant Products.

At the same time the Complaint was filed, the United States filed a Hold Separate Stipulation and Order ("Hold Separate") and a proposed Final Judgment, which are designed to eliminate the anticompetitive effects of Bemis's acquisition of the Alcan Packaging Food Americas business. Under the proposed Final Judgment, which is explained more fully below, Bemis is required to divest all of the intangible assets (i.e., intellectual property and know-how) related to the production of Alcan Relevant Products [1] in the United States and Canada and two of the plants involved in the production of the Alcan Relevant Products. Bemis is also required to divest all of the tangible assets necessary to operate the divested plants and all tangible assets used exclusively or primarily in the production of any Alcan Relevant Product in the United States or Canada.

The United States and defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the Final Judgment and to punish violations thereof.

II. Description of the Events Giving Rise to the Alleged Violations

A. The Defendants

Bemis is a worldwide provider of packaging materials, including flexible packaging for natural cheese and fresh meat. In 2008, Bemis and its subsidiaries had total sales of approximately $3.8 billion, including approximately $2.1 billion in sales of flexible packaging in the United States.

Rio Tinto is an international mining company headquartered in the United

[1] The term "Alcan Relevant Products" refers specifically to those Relevant Products produced by Alcan, rather than to Relevant Products produced by Bemis or others.

Kingdom, with approximately $58 billion in sales in 2008. Alcan is a wholly owned subsidiary of Rio Tinto. The Alcan Packaging Food Americas business produces and sells flexible packaging in the United States, Canada, and Latin America. In 2008, the Alcan Packaging Food Americas business sold approximately $1.5 billion of flexible packaging.

B. The Competitive Effects of the Acquisition in the Markets for Flexible Packaging for Natural Cheese and Fresh Meat

Flexible packaging is any package the shape of which can be readily changed. Flexible packaging for food encompasses a wide range of products, including bags and wrappings for cheeses and meats, snack bags, and cereal-box liners. Flexible packaging is distinguishable from rigid packaging, such as jars, cans, cups, trays, and hard plastic bottles.

Varying degrees of design and manufacturing sophistication are required to produce flexible packaging for different end uses. Some flexible packaging, such as single-layer packaging, is relatively simple to manufacture, and customers can choose from a number of producers for these types of flexible packaging. Flexible packaging for other end uses, such as natural cheese and fresh meat, however, has multiple layers, is subject to more rigorous performance standards, requires greater scientific knowledge and technical know-how to engineer, and requires that technical support be readily available, and, therefore, is more difficult to produce and commercialize successfully.

Bemis and Alcan are the two leading suppliers in the United States and Canada of flexible packaging products suitable for a variety of natural cheese products packaged for retail sale. Bemis and Alcan are also two of the three primary suppliers of shrink bags for fresh-meat packaging in the United States and Canada.

1. Relevant Product Markets

a. Natural-Cheese Packaging

Natural cheese is sold in several forms, including chunk cheese, sliced cheese, and shredded cheese. The films used in flexible packaging for some natural cheese products are sold in the form of rollstock, which is a continuous sheet of film that is cut for each package. Most natural cheese sold at retail is packaged using rollstock films.

Cheese packaging customers demand a long shelf-life for natural cheese. The flexible-packaging rollstock for natural cheese must include a barrier layer that keeps out oxygen to prevent the cheese from spoiling. The packaging must also prevent moisture from leaking into or out of the package. Some cheeses emit gasses as they age; such cheeses require packaging that allows gasses to escape. In addition, the packaging film must be sufficiently transparent to present the cheese well to the consumer, but also avoid discoloration from fluorescent lights. The packaging must also resist abrasion and cracking during distribution and run smoothly and efficiently on the customer's filling machines. Finally, the packaging must be inert, so that the flavor of the cheese is not compromised by the plastic.

(i) Flexible-Packaging Rollstock for Chunk and Sliced Natural Cheese

Chunk natural cheese is sold in bricks of specific sizes, typically eight, but ranging to thirty-two, ounces. Sliced natural cheese is typically sold in packages with roughly ten or more slices. Producers of chunk and sliced natural cheese generally use the same films for packaging. Specialized rollstock films are designed specifically for packaging chunk and sliced natural cheese for retail sale. While some chunk and sliced natural cheeses for retail sale are packaged in other forms of packaging (e.g., shrink bags or rigid trays), these are more expensive to purchase than rollstock packaging and cannot be used on the same packaging equipment as rollstock. A small but significant increase in the price of flexible-packaging rollstock for chunk and sliced natural cheese packaged for retail sale likely would not cause customers faced with such an increase to substitute other forms of packaging, or otherwise purchase sufficiently less of the product, so as to render the price increase unprofitable. Accordingly, the United States has alleged that flexible-packaging rollstock for chunk and sliced natural cheese packaged for retail sale is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

(ii) Flexible-Packaging Rollstock for Shredded Natural Cheese Packaged for Retail Sale

Shredded natural cheese packaged for retail sale typically is packaged in bags, which often come with an easy-open mechanism and an easy-close attachment. The easy-open mechanism is either laser scored or mechanically scored, such that some of the package's layers are perforated (making the package easy to tear), while leaving the oxygen and moisture barriers intact (preventing contamination of the product). The scoring process presents significant challenges to flexible-packaging producers. The sealing process also is difficult because the bags typically are filled with cheese while in a vertical position and the release of cheese into the bags is continuous and fast.

Specialized films are designed specifically for shredded natural cheese packaged for retail sale. A small but significant increase in the price of flexible-packaging rollstock for shredded natural cheese packaged for retail sale likely would not cause customers faced with such an increase to switch to other forms of packaging, or otherwise purchase sufficiently less of the product, so as to render the price increase unprofitable. Accordingly, the United States has alleged that flexible-packaging rollstock for shredded natural cheese packaged for retail sale is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

b. Flexible-Packaging Shrink Bags for Fresh Meat

Several characteristics are common to most flexible packaging films for fresh meat (i.e., beef, veal, pork, and lamb). First, most films for fresh meat contain a layer that prevents oxygen from coming into contact with the meat. Second, fresh meat films must prevent moisture from leaking out and contaminants from entering the packaging. Third, fresh meat films must run effectively on the customer's packaging equipment. Finally, the sealant must bond through fatty and oily substances.

The most common type of flexible packaging film for fresh meat is a shrink bag, which is designed to shrink to the contours of the contents when heated, forming a tight seal. Shrink bags are particularly suitable for use with fresh meat, in particular for wholesale distribution of meat to be cut for retail sale in grocery stores. Shrink bags used for fresh meat must be durable enough to survive the rigors of distribution while maintaining its oxygen and moisture barriers and allowing the meat to retain its flavor. The bag must also meet shelf-life requirements of 30 days or more and, when used for retail packaging, have a high degree of transparency for optimal presentation.

A small but significant increase in the price of flexible-packaging shrink bags for fresh meat likely would not cause customers faced with such an increase to substitute to other forms of packaging, or otherwise purchase sufficiently less of the product, so as to render the price increase unprofitable.

Accordingly, the United States has alleged that flexible-packaging shrink bags for fresh meat constitute a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

i. Relevant Geographic Market

Producers of the Relevant Products ship the products to customers throughout the United States and Canada. Producers outside the United States and Canada are not good alternatives for customers in the United States and Canada, and producers outside the United States and Canada have not been able to obtain significant business from customers in the United States and Canada. Customers using producers outside the United States and Canada would face longer lead times and an increased potential for supply-chain complications. Moreover, major customers demand that producers of flexible packaging provide frequent technical and operational service and support at the customer's premises and do not believe that foreign suppliers can provide the level of service and support they demand. A small but significant increase in the price of the Relevant Products in the United States and Canada would not cause a sufficient number of customers in the United States and Canada to turn to manufacturers of the Relevant Products outside the United States and Canada so as to make such a price increase unprofitable. Accordingly, the United States has alleged that the United States and Canada comprise a relevant geographic market within the meaning of Section 7 of the Clayton Act.

3. Anticompetitive Effects

a. Flexible-Packaging Rollstock for Chunk and Sliced Natural Cheese Packaged for Retail Sale

Bemis and Alcan dominate sales of flexible-packaging rollstock for chunk and sliced natural cheese packaged for retail sale. Due to Bemis's and Alcan's collective overall expertise in meeting the needs of customers and other technical and commercial factors for flexible-packaging rollstock for chunk and sliced natural cheese packaged for retail sale, including, among other things, price, delivery times, service, and technical support, Bemis and Alcan frequently are perceived by each other, by other bidders, and by customers as being the two strongest competitors in that market. Currently, Bemis and Alcan account for approximately 37 and 54 percent, respectively, of sales in the United States and Canada for this product. Absent the divestitures, Bemis and Alcan combined would account for approximately 91 percent of sales in the United States and Canada for this product.

Market shares are best measured using revenues in the markets for the Relevant Products because suppliers with the capacity to produce similar goods outside of those markets cannot quickly and easily shift that capacity to supply customers with the Relevant Products. Thus, the mere possession of similar capacity does not make a supplier an "uncommitted entrant" as that term is used in the *Horizontal Merger Guidelines;* meeting the requirements of customers in a cost-efficient manner also requires specialized know-how, experience, qualification, and the ability to innovate.

Bemis's bidding behavior often has been constrained by the threat of losing business to Alcan. By eliminating Alcan, Bemis would gain the incentive and likely ability to profitably increase its bid prices higher than it otherwise would without the acquisition. Customers have also benefitted from competition between Bemis and Alcan through higher quality, better supply-chain options (including delivery times and volume-purchase requirements), technical support, and numerous innovations. The combination of Bemis and Alcan would eliminate this other competition and future benefits to the customers.

The proposed acquisition, therefore, likely would substantially lessen competition in the United States and Canada for flexible-packaging rollstock for chunk and sliced natural cheese packaged for retail sale, which likely would lead to higher prices, lower quality, less favorable supply-chain options, reduced technical support, and less innovation, in violation of Section 7 of the Clayton Act.

b. Flexible-Packaging Rollstock for Shredded Natural Cheese Packaged for Retail Sale

Bemis and Alcan are two of only a few credible competitors that might successfully bid to supply a customer with flexible packaging rollstock for shredded natural cheese packaged for retail sale. Although other flexible packaging suppliers market competing products, customers have stated that Bemis's and Alcan's products are technologically superior to other available packaging and have uniquely effective features (e.g., easy-open and reclose mechanisms). Bemis and Alcan have also massed a collective expertise in meeting the needs of customers with respect to price, delivery times, service, technical support, scale, breadth of product offering, and new product development that other competitors have not been able to match. Therefore, Bemis and Alcan frequently are perceived by each other, by other bidders, and by customers as being the two strongest competitors in that market. Currently, Bemis and Alcan account for approximately 27 and 49 percent, respectively, of sales in the United States and Canada for this product. Absent the divestitures, Bemis and Alcan combined would account for approximately 76 percent of sales in the United States and Canada for this product.

Market shares are best measured using revenues in the markets for the Relevant Products because suppliers with the capacity to produce similar goods outside of those markets cannot quickly and easily shift that capacity to supply customers with the Relevant Products. Thus, the mere possession of similar capacity does not make a supplier an "uncommitted entrant" as that term is used in the *Horizontal Merger Guidelines;* meeting the requirements of customers in a cost-efficient manner also requires specialized know-how, experience, qualification, and the ability to innovate.

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The proposed acquisition, therefore, likely would substantially lessen competition in the United States and Canada for flexible-packaging rollstock for shredded natural cheese packaged for retail sale, which likely would lead to higher prices, lower quality, less favorable supply-chain options, reduced technical support, and less innovation, in violation of Section 7 of the Clayton Act.

c. Flexible-Packaging Shrink Bags for Fresh Meat

Currently, Bemis and Alcan account for approximately 20 and 8 percent, respectively, of the sales in the United States and Canada for flexible-packaging shrink bags for fresh meat. If the proposed acquisition is not enjoined, Bemis and Alcan combined would account for approximately 28 percent of

sales of flexible-packaging shrink bags for fresh meat in the United States and Canada, and leave Bemis and one other firm with over 90 percent of sales.

Market shares are best measured using revenues in the markets for the Relevant Products because suppliers with the capacity to produce similar goods outside of those markets cannot quickly and easily shift that capacity to supply customers with the Relevant Products. Thus, the mere possession of similar capacity does not make a supplier an "uncommitted entrant" as that term is used in the *Horizontal Merger Guidelines;* meeting the requirements of customers in a cost-efficient manner also requires specialized know-how, experience, qualification, and the ability to innovate.

Although the third supplier of flexible-packaging shrink bags for fresh meat is the dominant supplier, some customers desire two or more suppliers. As a result, Bemis and Alcan often find themselves competing to be the second supplier, and their price competition exerts pricing pressure also on the dominant firm. Unless the proposed acquisition is enjoined, that bidding dynamic would be eliminated because Bemis and Alcan no longer would bid against one another. In addition, Bemis's elimination of Alcan as an independent competitor would result in only two suppliers accounting for nearly all of the market. Such an increase in concentration likely would make coordination more likely.

The proposed acquisition, therefore, likely would substantially lessen competition in the United States and Canada for flexible-packaging shrink bags for fresh meat, which likely would lead to higher prices, lower quality, less favorable supply-chain options, reduced technical support, and less innovation, in violation of Section 7 of the Clayton Act.

d. Entry

Some customers in the United States and Canada have attempted to procure suitable flexible-packaging rollstock for chunk, sliced, and shredded natural cheese packaged for retail sale from producers that do not currently produce packaging for these uses. Similarly, some customers in the United States and Canada have attempted to procure suitable flexible-packaging shrink bags for fresh meat from producers beyond Bemis and Alcan and the dominant producer. Most of those flexible-packaging producers have not been able cost-effectively to achieve the required specifications or quality requirements. These suppliers likely would not be able to meet customers' required specifications or quality requirements cost-effectively within a commercially reasonable period of time, nor would they likely be able to produce Relevant Products that would run efficiently on their customers' packaging equipment. Indeed, many customers who have looked for alternative suppliers have not been able to find credible competitors other than Bemis, Alcan, and, in the case of flexible-packaging shrink bags for fresh meat, the aforementioned dominant producer.

New entry into the markets for Relevant Products in the United States and Canada would be costly, difficult, and time consuming. A new supplier would need to construct production lines capable of producing films that meet the rigorous standards set forth by major buyers of such films. Construction of manufacturing facilities would require millions of dollars of capital investment, and the entrant would have to be committed to research and development. In addition, the technical know-how necessary to design and successfully manufacture packaging that is able to run efficiently on customers' equipment cost-effectively is difficult to obtain.

Even after a new entrant has developed the capability to supply the Relevant Products, the entrant must be qualified by potential customers, demonstrating that it is capable of manufacturing products that meet rigorous quality and performance standards. For example, because the qualifying process for natural cheese typically requires a shelf-life test, where sample products are wrapped in the candidate packaging and stored in retail-like conditions for extended periods of time, the process can take many months. Further, there is no guarantee that the attempted qualification will be successful, and the potential entrants may have to repeat the process multiple times. In some cases, the qualification process has taken multiple years and in other cases has failed repeatedly. Moreover, because customer specifications are unique, qualification with one customer does not guarantee qualification with another.

Entry of existing packaging firms that do not currently produce Relevant Products is also unlikely because the technical know-how necessary to create the Relevant Products is difficult to obtain. Also, a company would have to pass each customer's rigorous qualification tests. Entry by new firms or by existing packaging firms into the markets for Relevant Products, therefore, likely would not be timely, likely, and sufficient to defeat a small but significant post-acquisition increase in price in the relevant markets.

III. Explanation of the Proposed Final Judgment

The divestitures required by the proposed Final Judgment will eliminate the anticompetitive effects that would otherwise likely result from Bemis's acquisition of the Alcan Packaging Food Americas business. These divestitures will preserve competition in the markets for the Relevant Products by creating an additional independent, economically viable competitor to Bemis in the United States and Canada for each of the Relevant Products.

The Final Judgment requires the divestiture of the entire business that currently produces the Alcan Relevant Products, which includes all of the intangible and non-plant tangible assets associated with those products, as well as two of the four plants currently producing those products. The divestiture of the intangible assets associated with the Alcan Relevant Products is critically important, as it is difficult to obtain the know-how necessary to design and successfully manufacture packaging that is able to run efficiently on customers' equipment. The divestiture package must also include plants that are already successful in producing the Relevant Products, as the know-how required to create competitive packaging includes specialized knowledge of the equipment used in producers' and customers' plants. The collective knowledge and experience of the plant management and employees will enable an Acquirer to compete successfully with Bemis for the manufacture and sale of the Relevant Products. Divestiture of all the plants currently producing the Alcan Relevant Products is not necessary to remedy the competitive issues presented by the Transaction, however; once a critical base of knowledge and experience regarding the production of the Relevant Products is attained, an Acquirer will be able to create or expand its own physical facilities to accommodate its business.

To this end, the divestiture assets include: (1) All tangible assets used exclusively or primarily for the research and development of any Alcan Relevant Product in the United States or Canada; (2) all records and documents relating to any Alcan Relevant Product in the United States or Canada; (3) all intangible assets used exclusively or primarily in the design, development, production, marketing, servicing, distribution, or sale of any Alcan Relevant Product in the United States or Canada; and (4) with respect to any

intangible assets not included in (3), above, and that prior to the filing of the Complaint in this matter were used in connection with the design, development, production, marketing, servicing, distribution, or sale of both any Alcan Relevant Product and any other Alcan product, a non-exclusive, non-transferable license for such intangible assets to be used for the design, development, marketing, servicing, distribution, or sale of any of the Relevant Products or the operation or use of the plants to be divested. These assets are to be divested regardless of whether they are currently used at the plants to be divested.

The proposed Final Judgment also requires the divestiture of two of the four plants currently manufacturing the Alcan Relevant Products. The first of these plants is the Alcan facility located at 905 W. Verdigris Parkway, Catoosa, Oklahoma (the "Catoosa facility"), which exclusively produces flexible-packaging shrink bags for fresh meat. The second plant is the Alcan facility located at 271 River Street, Menasha, Wisconsin (the "Menasha facility"), which produces both flexible-packaging rollstock for chunk and sliced natural cheese packaged for retail sale and flexible-packaging rollstock for shredded natural cheese packaged for retail sale. The Menasha facility also contains a wax-coating operation that is not associated with the Relevant Products and will be moved by Bemis to another of its plants.

The other two plants currently producing Alcan Relevant Products are the Alcan facility located at 901 Morrison Drive, Boscobel, Wisconsin (the "Boscobel facility") and the Alcan facility located at 1500 East Aurora Avenue, Des Moines, Iowa (the "Des Moines facility"). The Boscobel facility produces flexible-packaging rollstock for shredded natural cheese packaged for retail sale and packaging for processed meat (which is not a Relevant Product), while the Des Moines facility produces flexible packaging shrink bags for fresh meat and packaging for processed meat (which is not a Relevant Product). The Boscobel and Des Moines facilities produce such a substantial quantity of non-Relevant Products that a divestiture of those plants likely would require either that the plant be split, with both Bemis and the Acquirer occupying the plant for a significant period of time, or that a significant amount of business involving non-Relevant Products be transferred to the Acquirer.

By contrast, the Catoosa facility exclusively produces Relevant Products, and the Menasha facility, while also containing a non-relevant wax-coating operation, is uniquely situated because the wax-coating operation is largely confined to a discrete area of the plant and can be moved by Bemis to another facility with minimal disturbance to the Acquirer. The proposed Final Judgment requires, therefore, divestiture of the Catoosa facility and all related assets, and of the Menasha facility and all related assets, with the exception of the wax-coating operation.

The only near-term issue created by the fact that Bemis will be divesting only two of the plants currently producing the Relevant Products is that the Acquirer(s) may not immediately have the capacity to produce the quantities of Relevant Products currently demanded by customers. Thus, supply and transition services agreements are contemplated in the proposed Final Judgment to allow the Acquirer(s) time to build or adapt its own facilities to accommodate the new production.

First, because the Alcan shrink bag product known as "Maraflex" is not produced at either the Menasha facility or the Catoosa facility, supply and transition services agreements may be necessary to ensure that the Acquirer will be able immediately to provide Maraflex products to customers. Therefore, the proposed Final Judgment provides that, at the option of the Acquirer of the assets relating to the Maraflex products, Bemis shall enter into a supply contract with that Acquirer for Maraflex products sufficient to satisfy that Acquirer's obligations under any customer contract for a period of up to one (1) year. The United States, in its sole discretion, may approve an extension of the term for a period of up to two (2) additional years. In addition, at the option of the Acquirer of the assets relating to Maraflex products, Bemis shall enter into a transition services agreement with that Acquirer sufficient to meet all or part of that Acquirer's needs for assistance in matters relating to the development, production, and service of the Maraflex products or technology for a period of at least six (6) months, but no longer than three (3) years.

Second, the proposed Final Judgment provides for a supply agreement relating to the provision of flexible-packaging rollstock for shredded natural cheese packaged for retail sale. Currently, flexible-packaging rollstock for shredded natural cheese is produced in the Menasha facility and the Boscobel facility. While the Menasha facility will be divested to an Acquirer, the Boscobel facility will be retained by Bemis. As a consequence, an Acquirer's ability immediately to produce flexible-packaging rollstock for shredded natural cheese may not be sufficient to satisfy the Acquirer's existing supply obligations or to allow the Acquirer to expand the business in competition with Bemis. Therefore, the proposed Final Judgment provides that, at the option of the Acquirer of the Menasha facility, Bemis shall enter into a supply contract with that Acquirer for any Relevant Product produced at the Boscobel facility, sufficient to satisfy that Acquirer's obligations under any customer contract for a period of up to one (1) year. The United States, in its sole discretion, may approve an extension of the term of this supply contract for a period of up to one (1) additional year.

Third, because Bemis will retain the wax-coating operation currently housed in the Menasha facility and move it to another of its plants after the Transaction is closed, the proposed Final Judgment requires that the Acquirer of the Menasha facility enter into an agreement with Bemis permitting Bemis to occupy the portions of the Menasha facility utilized for the wax-coating operation for a period of no longer than three (3) years after the date the Transaction is closed. Also, at the option of Bemis, the Acquirer of the Menasha facility will be required to enter into an agreement with Bemis to provide Bemis with rotogravure printing services for the wax-coating operation at the Menasha facility for a period of up to twelve (12) months.

Finally, the proposed Final Judgment provides for a supply agreement relating to "Clearshield," which is another Alcan shrink bag product. Clearshield is produced exclusively at the Catoosa facility, which is to be divested. However, as a part of the Transaction, Bemis will be acquiring an obligation to supply Clearshield to certain of Alcan's South American and New Zealand affiliates. In order to allow Bemis to meet those obligations, the proposed Final Judgment provides that, at the option of Bemis, the Acquirer of the Catoosa facility shall enter into a supply contract for the Clearshield products sufficient to satisfy Alcan's or Bemis's obligations to Alcan's South American and New Zealand affiliates for a period of up to one (1) year. The United States, in its sole discretion, may approve an extension of the term of this supply contract for a period of up to two (2) years. In addition, to allow Bemis to continue to supply the Clearshield products to those affiliates in the future, the proposed Final Judgment provides that, at the option of Bemis, the Acquirer of the assets relating to the

Clearshield products shall enter into an agreement to provide Bemis with a non-exclusive, non-transferable license to enable Bemis to produce the Clearshield products for sale outside the United States and Canada. These agreements, along with the divestiture of the assets described previously, will ensure that the Acquirer(s) will be able to immediately and fully compete with Bemis for the production and sale of Relevant Products.

The proposed Final Judgment also provides that, at the option of Bemis, the Acquirer(s) must enter into an agreement to provide Bemis with a non-exclusive, non-transferable license for the intangible assets used primarily in the design, development, production, marketing, servicing, distribution, or sale of any Alcan Relevant Product in the United States or Canada that, prior to the filing of the Complaint in this matter, were also used in connection with any other Alcan product. Any such license, however, is to be granted for use solely in connection with products other than the Alcan Relevant Products. Bemis will have no rights to the intangible assets used exclusively in the design, development, production, marketing, servicing, distribution, or sale of any Alcan Relevant Product in the United States or Canada.

In addition, because certain of the intangible assets to be divested currently are encumbered by existing third-party rights, the proposed Final Judgment provides that the Acquirer of any asset thus encumbered must enter into an agreement with the affected third party to provide it with a right to that asset under terms and conditions sufficient to satisfy defendants' obligations to that third party.

Bemis is also required to provide the Acquirer(s) of the divestiture assets information relating to personnel involved in the design, development, production, marketing, servicing, distribution, or sale of the Alcan Relevant Products to enable them to make offers of employment, and prevents Bemis, Rio Tinto or Alcan from interfering with any negotiations by the Acquirer(s) to employ any employee whose primary responsibility is the design, development, production, marketing, servicing, distribution, or sale of the Alcan Relevant Products. The proposed Final Judgment further requires Bemis, Rio Tinto, and Alcan to waive all noncompete agreements for any current or former Alcan employee involved in the design, development, production, marketing, servicing, distribution, or sale of any Alcan Relevant Product.

In addition, Bemis may not solicit business for any Relevant Product that is subject to an unexpired Alcan customer contract transferred to an Acquirer for a period of one (1) year from the date of the divestiture or the remaining term of the contract, whichever is shorter. This provision is necessary to ensure that the Acquirer has the full benefit of the transferred contracts and the time to demonstrate its ability to independently produce the Relevant Products. This provision does not prevent a customer from seeking alternative suppliers at any time that it chooses, subject to the terms and conditions of its own contract.

The assets required to be divested must be divested in such a way as to satisfy the United States in its sole discretion that these assets can and will be operated by the Acquirer(s) as viable, ongoing businesses that can compete effectively in the design, development, production, marketing, servicing, distribution, or sale of the Alcan Relevant Products in the United States and Canada. These assets may be divested to one or more Acquirers, provided that the asset listed in paragraphs II(E)(2) of the proposed Final Judgment (the Menasha facility) is divested to the same purchaser as any tangible or intangible assets related to the design, development, production, marketing, servicing, distribution, or sale of the Alcan Relevant Products produced at the Boscobel facility. Defendants must take all reasonable steps necessary to accomplish the divestitures quickly and shall cooperate with prospective purchasers.

In the event that defendants do not accomplish the divestiture within ninety (90) days after the filing of the Complaint, or five (5) days after notice of the entry of the Final Judgment of the Court, whichever is later, the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that Bemis will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price and terms obtained and the speed with which the divestiture is accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. At the end of six (6) months, if the divestiture has not been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects that likely would result if Bemis acquired the Alcan Packaging Food Americas business because the Acquirer(s) will have the ability to design, develop, produce, market, service, distribute, and sell the Alcan Relevant Products in the United States and Canada, in competition with Bemis.

IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against defendants.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register,** or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the **Federal**

Register. Written comments should be submitted to: Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, United States Department of Justice, 450 Fifth Street, NW., Suite 8700, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions preventing Bemis's acquisition of the Alcan Packaging Food Americas business. The United States is satisfied, however, that the divestiture of the assets described in the proposed Final Judgment will preserve competition for the design, development, production, marketing, servicing, distribution, and sale of the Relevant Products in the United States and Canada. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. Standard of Review Under the APPA for the Proposed Final Judgment

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. 16(e)(1). In making that determination in accordance with the statute, the court is required to consider:

(A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) The impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A)–(B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States* v. *InBev N.V./S.A.,* 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08–1965 (JR), at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.").

As the United States Court of Appeals for the District of Columbia has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States* v. *BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft,* 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

[T]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a proposed settlement is in the public interest, the court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also Microsoft,* 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' " *United States* v. *Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983); *see also United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). Therefore, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns,* 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft,* 56 F.3d at 1459; *see also InBev,* 2009 U.S.

[2] Cf. BNS, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft,* 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' ").

Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft,* 56 F.3d at 1459–60. As this Court confirmed in *SBC Communications,* courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." 489 F. Supp. 2d at 15.

In its 2004 amendments to the Tunney Act,[3] Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, stating: "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. 16(e)(2). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns,* 489 F. Supp. 2d at 11.[4]

[3] The 2004 amendments substituted the word "shall" for "may" when directing the courts to consider the enumerated factors and amended the list of factors to focus on competitive considerations and address potentially ambiguous judgment terms. Compare 15 U.S.C. 16(e) (2004), with 15 U.S.C. 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

[4] *See United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States* v. *Mid-Am. Dairymen, Inc.,* 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93–298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: February 24, 2010.

Respectfully submitted.

Rachel J. Adcox,
U.S. Department of Justice, Antitrust Division, Litigation II Section, 450 Fifth Street, NW., Suite 8700, Washington, DC 20530, (202) 305–2738.

Certificate of Service

I, Rachel J. Adcox, hereby certify that on February 24, 2010, I caused a copy of the foregoing Competitive Impact Statement to be served upon defendants Bemis Company, Inc., Rio Tinto plc, and Alcan Corporation by mailing the documents electronically to the duly authorized legal representatives of defendants as follows:

Counsel for Defendant Bemis Company, Inc.:
Stephen M. Axinn, Esq., John D. Harkrider, Esq., Axinn, Veltrop & Harkrider LLP, 114 West 47th Street, New York, NY 10036, (212) 728–2200, *sma@avhlaw.com, jdh@avhlaw.com.*

Counsel for Defendants Rio Tinto plc and Alcan Corporation:
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Rachel J. Adcox, Esq.,
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[FR Doc. 2010–4550 Filed 3–3–10; 8:45 am]
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DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Keyspan Corporation; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Stipulation and Competitive Impact Statement have been filed with the United States District Court for the Southern District of New York in *United States of America* v. *KeySpan Corp.,* Civil Case No. 10–CIV–1415. On February 22, 2010, the United States filed a Complaint alleging that KeySpan Corporation ("KeySpan") entered into an agreement with a financial services company, the likely effect of which was to increase prices in the New York City (NYISO Zone J) Capacity Market, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The proposed Final Judgment, filed the same time as the Complaint, requires KeySpan to pay the government $12 million dollars.

Copies of the Complaint, proposed Final Judgment and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street, NW., Suite 1010, Washington, DC 20530 (telephone: 202–514–2481), on the Department of Justice's Web site at *http://www.justice.gov/atr,* and at the Office of the Clerk of the United States District Court for the Southern District of New York. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to Donna N. Kooperstein, Chief, Transportation, Energy, and Agriculture Section, Antitrust Division, U.S. Department of Justice, 450 Fifth Street, NW., Suite 8000, Washington, DC 20530 (telephone: 202–307–6349).

Patricia A. Brink,
Deputy Director of Operations and Civil Enforcement.

United States District Court for the Southern District of New York

Civil Action No.: 10–cv–1415 (WHP)

ECF CASE

United States of America, U.S. Department of Justice, Antitrust Division, 450 5th Street, NW., Suite 8000, Washington, DC 20530, Plaintiff, v. *Keyspan Corporation, 1 Metrotech Center, Brooklyn, NY 11201,* Defendant.

Received: February 22, 2010

Complaint

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil antitrust action under Section 4 of the Sherman Act, as amended, 15 U.S.C.

4, to obtain equitable and other relief from defendant's violation of Section 1 of the Sherman Act, as amended, 15 U.S.C. 1.

On January 18, 2006, KeySpan Corporation ("KeySpan") and a financial services company executed an agreement (the "Keyspan Swap") that ensured that KeySpan would withhold substantial output from the New York City electricity generating capacity market, a market that was created to ensure the supply of sufficient generation capacity for New York City consumers of electricity. The likely effect of the Keyspan Swap was to increase capacity prices for the retail electricity suppliers who must purchase capacity, and, in turn, to increase the prices consumers pay for electricity.

I. Introduction

1. Between 2003 and 2006, KeySpan, the largest seller of electricity generating capacity ("installed capacity") in the New York City market, earned substantial revenues due to tight supply conditions. Because purchasers of capacity required almost all of KeySpan's output to meet expected demand, KeySpan's ability to set price levels was limited only by a regulatory ceiling (called a "bid cap"). Indeed, the market price for capacity was consistently at or near KeySpan's bid cap, with KeySpan sacrificing sales on only a small fraction of its capacity.

2. But market conditions were about to change. Two large, new electricity generation plants were slated to come on line in 2006 (with no exit expected until at least 2009), breaking the capacity shortage that had kept prices at the capped levels.

3. KeySpan could prevent the new capacity from lowering prices by withholding a substantial amount of its own capacity from the market. This "bid the cap" strategy would keep market prices high, but at a significant cost—the sacrificed sales would reduce KeySpan's revenues by as much as $90 million a year. Alternatively, KeySpan could compete with its rivals for sales by bidding more capacity at lower prices. This "competitive strategy" could earn KeySpan more than bidding its cap, but it carried a risk—KeySpan's competitors could undercut its price and take sales away, making the strategy less profitable than "bidding the cap."

4. KeySpan searched for a way to avoid both the revenue decline from bidding its cap and the revenue risks of competitive bidding. It decided to enter an agreement that gave it a financial interest in the capacity of Astoria—KeySpan's largest competitor. By providing KeySpan revenues on a larger base of sales, such an agreement would make a "bid the cap" strategy more profitable than a successful competitive bid strategy. Rather than directly approach its competitor, KeySpan turned to a financial services company to act as the counterparty to the agreement—the KeySpan Swap—recognizing that the financial services company would, and in fact did, enter an offsetting agreement with Astoria (the "Astoria Hedge").

5. With KeySpan deriving revenues from both its own and Astoria's capacity, the KeySpan Swap removed any incentive for KeySpan to bid competitively, locking it into bidding its cap. Capacity prices remained as high as if no entry had occurred.

II. Defendant

6. KeySpan Corporation is a New York corporation with its principal place of business in New York City. During the relevant period of the allegations in this Complaint, KeySpan owned approximately 2,400 megawatts of electricity generating capacity at its Ravenswood electrical generation facility, which is located in New York City. KeySpan had revenues of approximately $850 million in 2006 and $700 million in 2007 from the sale of energy and capacity at its Ravenswood facility.

III. Jurisdiction and Venue

7. The United States files this complaint under Section 4 of the Sherman Act, 15 U.S.C. 4, seeking equitable relief from defendant's violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

8. This court has jurisdiction over this matter pursuant to 15 U.S.C. 4 and 28 U.S.C. 1331 and 1337.

9. Defendant waives any objection to venue and personal jurisdiction in this judicial district for the purpose of this Complaint.

10. Defendant engaged in interstate commerce during the relevant period of the allegations in this Complaint; KeySpan's electric generating units interconnected with generating units across the country, and KeySpan regularly sold electricity to customers outside New York.

11. One generation facility located in New Jersey supplies capacity to the New York City installed capacity market.

IV. The New York City Installed Capacity Market

12. Sellers of retail electricity must purchase a product from generators known as "installed capacity." Installed capacity is a product created by the New York Independent System Operator ("NYISO") to ensure that sufficient generation capacity exists to meet expected electricity needs. Companies selling electricity to consumers in New York City are required to make installed capacity payments that relate to their expected peak demand plus a share of reserve capacity (to cover extra facilities needed in case a generating facility breaks down). These payments assure that retail electric companies do not sell more electricity than the system can deliver and also encourage electric generating companies to build new facilities as needed.

13. The price for installed capacity has been set through auctions administered by the NYISO. The rules under which these auctions are conducted have changed from time to time. Unless otherwise noted, the description of the installed capacity market in the following paragraphs relates to the period May 2003 through March 2008.

14. Because transmission constraints limit the amount of energy that can be imported into the New York City area from the power grid, the NYISO requires retail providers of electricity to customers in New York City to purchase 80% of their capacity from generators in that region. The NYISO operates separate capacity auctions for the New York City region (also known as "In-City" and "Zone J"). The NYISO organizes the auctions to serve two distinct seasonal periods, summer (May through October) and winter (November through April). For each season, the NYISO conducts seasonal, monthly and spot auctions in which capacity can be acquired for all or some of the seasonal period.

15. In each of the types of auctions, capacity suppliers offer price and quantity bids. Supplier bids are "stacked" from lowest-priced to highest, and compared to the total amount of demand being satisfied in the auction. The offering price of the last bid in the "stack" needed to meet requisite demand establishes the market price for all capacity bid into that auction. Capacity bid at higher than this price is unsold, as is any excess capacity bid at what becomes the market price.

16. The New York City Installed Capacity ("NYC Capacity") Market constitutes a relevant geographic and product market.

17. The NYC Capacity Market is highly concentrated, with three firms—KeySpan, NRG Energy, Inc. ("NRG") and Astoria Generating Company (a joint venture of Madison Dearborn Partners, LLC and US Power Generating Company, which purchased the Astoria generating assets from Reliant Energy,

Inc. in February 2006)—controlling a substantial portion of generating capacity in the market. Because purchasers of capacity require at least some of each of these three suppliers' output to meet expected demand, the firms are subject to a bid and price cap for nearly all of their generating capacity in New York City and are not allowed to sell that capacity outside of the NYISO auction process. The NYISO-set bid cap for KeySpan is the highest of the three firms, followed by NRG and Astoria.

18. KeySpan possessed market power in the NYC Capacity Market.

19. It is difficult and time-consuming to build or expand generating facilities within the NYC Capacity Market given limited undeveloped space for building or expanding generating facilities and extensive regulatory obligations.

V. Keyspan's Plan To Avoid Competition

20. From June 2003 through December 2005, KeySpan set the market price in the New York City spot auction by bidding its capacity at its cap. Given extremely tight supply and demand conditions, KeySpan needed to withhold only a small amount of capacity to ensure that the market cleared at its cap.

21. KeySpan anticipated that the tight supply and demand conditions in the NYC Capacity Market would change in 2006, due to the entry of approximately 1000 MW of new generation. Because of the addition of this new capacity, KeySpan would have to withhold significantly more capacity from the market and would earn substantially lower revenues if it continued to bid all of its capacity at its bid cap. KeySpan anticipated that demand growth and retirement of old generation units would restore tight supply and demand conditions in 2009.

22. KeySpan could no longer be confident that "bidding the cap" would remain its best strategy during the 2006–2009 period. It considered various competitive bidding strategies under which KeySpan would compete with its rivals for sales by bidding more capacity at lower prices. These strategies could potentially produce much higher returns for KeySpan but carried the risk that competitors would undercut its price and take sales away, making the strategy less profitable than "bidding the cap."

23. KeySpan also considered acquiring Astoria's generating assets, which were for sale. This would have solved the problem that new entry posed for KeySpan's revenue stream, as Astoria's capacity would have provided KeySpan with sufficient additional revenues to make continuing to "bid the cap" its best strategy. KeySpan consulted with a financial services company about acquiring the assets. But KeySpan soon concluded that its acquisition of its largest competitor would raise serious market power issues.

24. Instead of purchasing the Astoria assets, KeySpan decided to acquire a financial interest in substantially all of Astoria's capacity. KeySpan would pay Astoria's owner a fixed revenue stream in return for the revenues generated from Astoria's capacity sales in the auctions.

25. KeySpan did not approach Astoria directly and instead sought a counterparty to enter into a financial agreement providing KeySpan with payments derived from the market clearing price for an amount of capacity essentially equivalent to what Astoria owned. KeySpan recognized the counterparty would need simultaneously to enter into an agreement with another capacity supplier that would offset the counterparty's payments to KeySpan, and KeySpan knew that Astoria was the only supplier with sufficient capacity to do so. KeySpan turned to the same financial services company that it had consulted about the potential acquisition of Astoria's assets. The financial services company agreed to serve as the counterparty but, as expected, informed KeySpan that the agreement was contingent on the financial services company also entering into an offsetting agreement with the owner of the Astoria generating assets.

VI. The Agreements

26. On or about January 9, 2006, KeySpan and the financial services company finalized the terms of the KeySpan Swap. Under the agreement, if the market price for capacity was above $7.57 per kW-month, the financial services company would pay KeySpan the difference between the market price and $7.57 times 1800 MW; if the market price was below $7.57, KeySpan would pay the financial services company the difference times 1800 MW.

27. The KeySpan Swap was executed on January 18, 2006. The term of the KeySpan Swap ran from May 2006 through April 2009.

28. On or about January 9, 2006, the financial services company and Astoria finalized the terms of the Astoria Hedge. Under that agreement, if the market price for capacity was above $7.07 per kW-month, Astoria would pay the financial services company the difference times 1800 MW; if the market price was below $7.07, Astoria would be paid the difference times 1800 MW.

29. The Astoria Hedge was executed on January 11, 2006. The term of the Astoria Hedge ran from May 2006 through April 2009, matching the duration of the KeySpan Swap.

VII. The Competitive Effect of the Keyspan Swap

30. The clear tendency of the KeySpan Swap was to alter KeySpan's bidding in the NYC Capacity Market auctions.

31. Without the Swap, KeySpan likely would have chosen from a range of potentially profitable competitive strategies in response to the entry of new capacity. Had it done so, the price of capacity would have declined. By transferring a financial interest in Astoria's capacity to KeySpan, however, the Swap effectively eliminated KeySpan's incentive to compete for sales in the same way a purchase of Astoria or a direct agreement between KeySpan and Astoria would have done. By providing KeySpan revenues from Astoria's capacity, in addition to Keyspan's own revenues, the Swap made bidding the cap KeySpan's most profitable strategy regardless of its rivals' bids.

32. After the KeySpan Swap went into effect in May 2006, KeySpan consistently bid its capacity at its cap even though a significant portion of its capacity went unsold. Despite the addition of significant new generating capacity in New York City, the market price of capacity did not decline.

33. In August 2007, the State of New York conditioned the sale of KeySpan to a new owner on the divestiture of KeySpan's Ravenswood generating assets and required KeySpan to bid its New York City capacity at zero from March 2008 until the divestiture was completed. Since March 2008, the market price for capacity has declined.

34. But for the KeySpan Swap, installed capacity likely would have been procured at a lower price in New York City from May 2006 through February 2008.

35. The KeySpan Swap produced no countervailing efficiencies.

VIII. Violation Alleged

36. Plaintiff incorporates the allegations of paragraphs 1 through 35 above.

37. KeySpan entered into an agreement the likely effect of which has been to increase prices in the NYC Capacity Market, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

IX. Prayer for Relief

Wherefore, Plaintiff prays:

1. That the Court adjudge and decree that the KeySpan Swap agreement constitutes an illegal restraint in the sale of installed capacity in the New York City market in violation of Section 1 of the Sherman Act;

2. That plaintiff shall have such other relief, including equitable monetary relief, as the nature of this case may require and as is just and proper to prevent the recurrence of the alleged violation and to dissipate the anticompetitive effects of the violation; and

3. That plaintiff recover the costs of this action.

Dated this 22nd day of February 2010.

Respectfully Submitted,

Christine A. Varney,
Assistant Attorney General.

Molly S. Boast,
Deputy Assistant Attorney General.

William F. Cavanaugh, Jr.,
Deputy Assistant Attorney General.

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U.S. Department of Justice, Antitrust Division, Transportation, Energy & Agriculture Section, 450 5th Street, NW., Suite 8000, Washington, DC 20530, Telephone: (202) 353–1560, Facismilie (202) 616–2441, jade.eaton@usdoj.gov.

United States District Court for the Southern District of New York

ECF Case

Civil Action No. 10–cv–1415 (WHP)

United States of America, Plaintiff, v. *Keyspan Corporation,* Defendant.

Received: February 22, 2010

Final Judgment

Whereas plaintiff United States of America filed its Complaint alleging that Defendant KeySpan Corporation ("KeySpan") violated Section 1 of the Sherman Act, 15 U.S.C. 1, and plaintiff and KeySpan, through their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, for settlement purposes only, and without this Final Judgment constituting any evidence against or an admission by KeySpan with respect to any allegation contained in the Complaint:

Now, therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties hereto, it is hereby ordered, adjudged, and decreed:

1. Jurisdiction

This Court has jurisdiction of the subject matter herein and of each of the parties consenting hereto. The Complaint states a claim upon which relief may be granted against KeySpan under Sections 1 and 4 of the Sherman Act, 15 U.S.C. 1 and 4.

2. Applicability

This Final Judgment applies to KeySpan and each of its successors, assigns, and to all other persons in active concert or participation with it who shall have received actual notice of the Settlement Agreement and Order by personal service or otherwise.

3. Relief

A. Within thirty (30) days of the entry of this Final Judgment, KeySpan shall pay to the United States the sum of twelve million dollars ($12,000,000.00).

B. The payment specified above shall be made by wire transfer. Before making the transfer, KeySpan shall contact Janie Ingalls, of the Antitrust Division's Antitrust Documents Group, at (202) 514–2481 for wire transfer instructions.

C. In the event of a default in payment, interest at the rate of eighteen (18) percent per annum shall accrue thereon from the date of default to the date of payment.

4. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

5. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and plaintiff's responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Dated:

United States District Judge.

United States District Court for the Southern District of New York

ECF Case

Civil Action No. 10–cv–1415 (WHP)

United States of America, Plaintiff, v. *Keyspan Corporation,* Defendant.

Filed 02/23/2010

Competitive Impact Statement

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of the Proceedings

The United States brought this lawsuit against Defendant KeySpan Corporation ("KeySpan") on February 22, 2010, to remedy a violation of Section 1 of the Sherman Act, 15 U.S.C. 1. On January 18, 2006, KeySpan entered into an agreement in the form of a financial derivative (the "KeySpan Swap") essentially transferring to KeySpan, the largest supplier of electricity generating capacity in the New York City market, the capacity of its largest competitor. The KeySpan Swap ensured that KeySpan would withhold substantial output from the capacity market, a market that was created to ensure the supply of sufficient generation capacity for the millions of New York City consumers of electricity. The likely effect of this agreement was to increase capacity prices for the retail electricity suppliers who must purchase capacity, and, in turn, to increase the prices consumers pay for electricity.

The proposed Final Judgment remedies this violation by requiring KeySpan to disgorge profits obtained through the anticompetitive agreement. Under the terms of the proposed Final Judgment, KeySpan will surrender $12 million to the Treasury of the United States. Disgorgement will deter KeySpan and others from future violations of the antitrust laws.

The United States and KeySpan have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that this Court would retain jurisdiction to construe, modify, and enforce the

proposed Final Judgment and to punish violations thereof.

II. Description of the Events Giving Rise to the Alleged Violation of the Antitrust Laws

A. The Defendant

KeySpan Corporation is a New York corporation with its principal place of business in New York City. During the relevant period of the allegations in this Complaint, KeySpan owned approximately 2400 megawatts of electricity generating capacity at its Ravenswood electrical generation facility, which is located in New York City. KeySpan had revenues of approximately $850 million in 2006 and $700 million in 2007 from the sale of energy and capacity at its Ravenswood facility.

B. The Market

In the state of New York, sellers of retail electricity must purchase a product from generators known as installed capacity ("capacity").[1] Electricity retailers are required to purchase capacity in an amount equal to their expected peak energy demand plus a share of reserve capacity. These payments assure that retail electric companies do not use more electricity than the system can deliver and encourage electric generating companies to build new facilities as needed. Because transmission constraints limit the amount of energy that can be imported into the New York City area from the power grid, the New York Independent System Operator ("NYISO") requires retail providers of electricity to customers in New York City to purchase 80% of their capacity from generators in that region. Thus, the New York City Installed Capacity ("NYC Capacity") Market constitutes a relevant geographic and product market.

The price for installed capacity has been set through auctions administered by the NYISO. The NYISO organizes the auctions to serve two distinct seasonal periods, summer (May though October) and winter (November through April). For each season, the NYISO conducts seasonal, monthly, and spot auctions in which capacity can be acquired for all or some of the seasonal period. Capacity suppliers offer price and quantity bids in each of these three auctions. Supplier bids are "stacked" from lowest-priced to highest. The stack is then compared to the amount of demand. The offering price of the last bid in the "stack" needed to meet requisite demand establishes the market price for all capacity sold into that auction. Any capacity bid at higher than this price is unsold, as is any excess capacity bid at what becomes the market price.

The NYC Capacity Market was highly concentrated during the relevant period, with three firms—Astoria, NRG Energy, Inc., and KeySpan—controlling a substantial portion of the market's generating capacity. These three were designated as pivotal suppliers by the Federal Energy Regulatory Commission, meaning that at least some of each of these three suppliers' output was required to satisfy demand. The three firms were subject to bid and price caps—KeySpan's being the highest—for nearly all of their generating capacity in New York City and were not allowed to sell their capacity outside of the NYISO auction process.

C. The Alleged Violation

1. KeySpan Assesses Plans for Changed Market Conditions

From June 2003 through December 2005, almost all installed capacity in the market was needed to meet demand. With these tight market conditions, KeySpan could sell almost all of its capacity into the market, even while bidding at its cap. KeySpan did so, and the market cleared at the price established by the cap, with only a small fraction of KeySpan's capacity remaining unsold.

KeySpan anticipated that the tight supply and demand conditions in the NYC Capacity Market would end in 2006 due to the entry into the market of approximately 1000 MW of generation capacity, and would not return until 2009 with the retirement of old generation units and demand growth.

KeySpan could no longer be confident that "bid the cap" would remain its best strategy during the 2006–2009 period. The "bid the cap" strategy would keep market prices high, but at a significant cost. KeySpan would have to withhold a significant additional amount of capacity to account for the new entry. The additional withholding would reduce KeySpan's revenues by as much as $90 million a year. Alternatively, KeySpan could compete with its rivals for sales by bidding more capacity at lower prices. KeySpan considered various competitive bidding strategies. These could potentially produce much higher returns for KeySpan than bidding the cap but carried the risk that competitors would undercut its price and take sales away, making the strategy potentially less profitable than bidding the cap.

KeySpan also considered acquiring Astoria's generating assets, which were for sale. This would have solved the problem that new entry posed for KeySpan's revenue stream, as Astoria's capacity would have provided KeySpan with sufficient additional revenues to make continuing to bid its cap its best strategy. KeySpan consulted with a financial services company about acquiring the assets, but soon concluded that its acquisition of its largest competitor would raise market power issues.

2. KeySpan Pursues an Anticompetitive and Unlawful Agreement

Instead of purchasing the Astoria assets, KeySpan decided to acquire a financial interest in Astoria's capacity. KeySpan would pay Astoria's owner a fixed revenue stream in return for the revenues generated from Astoria's capacity sales in the auctions. The competitive effect of doing so would be similar to that of actually purchasing Astoria's capacity.

KeySpan did not approach Astoria directly and instead sought a counterparty to enter into a financial agreement providing KeySpan with payments derived from the market clearing price for an amount of capacity essentially equivalent to what Astoria owned. KeySpan recognized the counterparty would need simultaneously to enter into an agreement with another capacity supplier that would offset the counterparty's payments to Keyspan, and KeySpan knew that Astoria was the only supplier with sufficient capacity to do so. KeySpan turned to the same financial services company that it had consulted about the potential acquisition of Astoria's assets. The financial services company agreed to serve as the counterparty, but, as expected, informed KeySpan that the agreement was contingent on the financial services company also entering into an offsetting agreement with the owner of the Astoria generating assets (the "Astoria Hedge").

On or about January 9, 2006, KeySpan and the financial services company finalized the terms of the KeySpan Swap. Under the agreement, if the market price for capacity was above $7.57 per kW-month, the financial services company would pay KeySpan the difference between the market price and $7.57 times 1800 MW; if the market price was below $7.57, KeySpan would pay the financial services company the difference times 1800 MW. The KeySpan Swap was executed on January 18, 2006. The term of the KeySpan

[1] Except where noted otherwise, this description pertains to the market conditions that existed from May 2003 through March 2008.

Swap ran from May 2006 through April 2009.

On or about January 9, 2006, the financial services company and Astoria finalized terms to the Astoria Hedge. Under that agreement, if the market price for capacity was above $7.07 per kW-month, Astoria would pay the financial services company the difference times 1800 MW; if the market price was below $7.07, Astoria would be paid the difference times 1800 MW. The Astoria Hedge was executed on January 11, 2006. The term of the Astoria Hedge ran from May 2006 through April 2009, matching the duration of the KeySpan Swap.

3. The Effect of the KeySpan Swap

The clear tendency of the KeySpan Swap was to alter KeySpan's bidding in the NYC Capacity Market auctions.

Without the swap, KeySpan likely would have chosen from a range of potentially profitable competitive strategies in response to the entry of new capacity and, had it done so, the price of capacity would have declined. The swap, however, effectively eliminated KeySpan's incentive to compete for sales. By adding revenues from Astoria's capacity to KeySpan's own, the KeySpan Swap made bidding the cap KeySpan's most profitable strategy regardless of its rivals' bids.

After the KeySpan Swap went into effect in May 2006, KeySpan consistently bid its capacity into the capacity auctions at its cap even though a significant portion of its capacity went unsold. Despite the addition of significant new generating capacity in New York City, the market price of capacity did not decline.

By transferring a financial interest in Astoria's capacity to KeySpan, the Swap effectively eliminated KeySpan's incentive to compete for sales in the same way a purchase of Astoria or a direct agreement between KeySpan and Astoria would have done. But for the Swap, installed capacity likely would have been procured at a lower price in New York City from May 2006 through February 2008.[2] The Swap produced no countervailing efficiencies.

III. Explanation of the Proposed Final Judgment

The proposed Final Judgment requires KeySpan to disgorge profits gained as a result of its unlawful agreement restraining trade. KeySpan is to surrender $12 million to the Treasury of the United States.

A. Disgorgement Is Available Under the Sherman Act

Although the Antitrust Division has not previously sought disgorgement as a remedy under the Sherman Act, district courts have the authority to order such equitable relief. The Supreme Court has held that "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946); *Mitchell* v. *Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 291 (1960). Nothing in the Sherman Act negates this inherent authority. Section 4 of the Sherman Act invests district courts with broad equitable power to "prevent and restrain" violations of the antitrust laws and provides that such violations may be "enjoined or otherwise prohibited." 15 U.S.C. 4. *See International Boxing Club* v. *United States*, 358 U.S. 242, 253 (1959) (relief should "deprive 'the antitrust defendants of the benefits of their conspiracy,'" quoting *Schine Chain Theatres* v. *United States*, 334 U.S. 110, 128 (1948)); *United States* v. *U.S. Steel Corp.*, 251 U.S. 417, 452 (1920) (Sherman Act's "command is necessarily submissive to the conditions which may exist and the usual powers of a court of equity to adapt its remedies to those conditions"). The Second Circuit has held that disgorgement is among a district court's inherent equitable powers, and is a "well-established remedy * * * to prevent wrongdoers from unjustly enriching themselves through violations, which has the effect of deterring subsequent fraud." *SEC* v. *Cavanagh*, 445 F.3d 105, 116–17 (2d Cir. 2006). *See* also *SEC* v. *Fischbach*, 133 F.3d 170, 175 (2d Cir. 1997); *SEC* v. *Commonwealth Chem. Secs., Inc.*, 574 F.2d 90, 102 (2d Cir. 1978) (Friendly, J.).[3]

B. Disgorgement Is Appropriate in This Case

Disgorgement is necessary to protect the public interest by depriving KeySpan of the fruits of its ill-gotten gains and deterring KeySpan and others from engaging in similar anticompetitive conduct in the future. Absent disgorgement, KeySpan would be likely to retain all the benefits of its anticompetitive conduct. A private lawsuit for damages against KeySpan would face significant obstacles imposed by the filed rate doctrine. *See Keogh* v. *Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922). The filed rate doctrine also makes it unlikely that disgorgement will lead to duplicative monetary remedies.

Furthermore, no other remedy would be as effective to fulfill the remedial goals of the Sherman Act to "prevent and restrain" antitrust violations. Injunctive relief would not be meaningful, given the facts in this case. The specific agreement at issue—the KeySpan Swap—has, by its terms, expired and the anticompetitive conduct is unlikely to reoccur as KeySpan no longer owns the Ravenswood generation assets.

Disgorgement here will also serve to restrain KeySpan and others from participating in similar anticompetitive conduct. Requiring KeySpan to disgorge a portion of its ill-gotten gains from its recent illegal behavior is the only effective way of achieving relief against KeySpan, while sending a strong message to those considering similar anticompetitive conduct.

IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no *prima facie* effect in

[2] The effects of the swap continued until March 2008, at which time changes in regulatory conditions eliminated KeySpan's ability to affect the market price. KeySpan was sold to another company in August 2007. The State of New York conditioned its approval of the acquisition on the divestiture of KeySpan's Ravenswood generating assets and required KeySpan to bid its New York City capacity at zero from March 2008 until the divestiture was completed. Since then, the market price for capacity has declined.

[3] The Second Circuit has also permitted disgorgement under civil RICO, which confers jurisdiction to "prevent and restrain violations," 18 U.S.C. 1964(a). *See United States* v. *Carson,* 52 F.3d 1173, 1181 (2d Cir. 1995) ("As a general rule, disgorgement is among the equitable powers available to the district court by virtue of * * * § 1964"). The DC Circuit, however, has held that disgorgement categorically is unavailable under civil RICO. *See United States* v. *Philip Morris*, 396 F.3d 1190, 1192, 1202 (DC Cir. 2005) (interlocutory appeal) (Philip Morris I); *United States* v. *Philip Morris*, 566 F.3d 1095, 1108 (DC Cir. 2009) (appeal after final judgment) *(Philip Morris II*). The Supreme Court denied the government's petition to review the interlocutory decision in *Philip Morris I*, 126 S. Ct. 478 (2005), but on February 19, 2010, the United States asked the Supreme Court to review *Philip Morris II.* In *United States* v. *Loew's, Inc.*, 189 F. Supp. 373 (S.D.N.Y. 1960), this Court declined to order defendants to renegotiate contracts with third parties, or to refund money to third parties under those renegotiated contracts. *Id.* at 398–99 & n.13.

any subsequent private lawsuit that may be brought against KeySpan.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and the defendant have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the **Federal Register**.

Written comments should be submitted to: Donna N. Kooperstein, Chief, Transportation, Energy & Agriculture Section, Antitrust Division, United States Department of Justice, 450 Fifth Street, NW., Suite 8000, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendant. The United States is satisfied, however, that the disgorgement of profits is an appropriate remedy in this matter. A disgorgement remedy should deter Keyspan and others from engaging in similar conduct. Given the facts of this case, the proposed Final Judgment would protect competition as effectively as would any other equitable remedy available through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. Standard of Review Under the APPA for Proposed Final Judgment

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) The impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the United States is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States* v. *Microsoft Corp.*, 56 F.3d 1448, 1461 (DC Cir. 1995); *see generally United States* v. *SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States* v. *InBev N.V./S.A.*, 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08–1965 (JR), at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable").[4]

Under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States' complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States* v. *BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[5] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States* v. *Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

[4] The 2004 amendments substituted "shall" for "may" in directing relevant factors for a court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004), *with* 15 U.S.C. 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

[5] *Cf. BNS,* 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' ").

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States* v. *Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983); *see also United States* v. *Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged."). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d. at 1459–60. Courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. 16(e)(2). This language effectuates what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[6]

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that the United States considered in formulating the proposed Final Judgment.

Dated: February 22, 2010.

Respectfully submitted,

For Plaintiff The United States of America

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[FR Doc. 2010–4545 Filed 3–3–10; 8:45 am]

BILLING CODE 4410–11–P

[6] *See United States* v. *Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States* v. *Mid-Am. Dairymen, Inc.*, 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93–298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2010–0007]

Definition and Requirements for a Nationally Recognized Testing Laboratory (NRTL); 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 comment.

SUMMARY: OSHA requests comment concerning its proposed extension of the information collection requirements specified by its Regulation on the Definition and Requirements for a Nationally Recognized Testing Laboratory (29 CFR 1910.7). The Regulation specifies procedures that organizations must follow to apply for, and to maintain, OSHA's recognition to test and certify equipment, products, or material.

DATES: Comments must be submitted (postmarked, sent, or received) by May 3, 2010.

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 three copies of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2010–0007, 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 for the Information Collection Request (ICR) (OSHA–2010–0007). 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 contact Todd Owen at the address below to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: 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 (PRA–95) (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 Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the Act or for developing information regarding the causes and prevention of occupational injuries, illnesses and accidents (29 U.S.C. 657).

A number of standards issued by OSHA contain requirements for equipment, products, or materials. These standards often specify that employers use only equipment, products, or material tested or approved by a nationally recognized testing laboratory (NRTL); this requirement ensures that employers use safe and effective equipment, products, or materials in complying with the standards. Accordingly, OSHA promulgated the regulation titled "Definition and Requirements for a Nationally Recognized Testing Laboratory" (the Regulation). The Regulation specifies procedures that organizations must follow to apply for, and to maintain, OSHA's recognition to test and certify equipment, products, or material for this purpose.

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 collection of information requirements specified by the Standard on the Definition and Requirements for a Nationally Recognized Testing Laboratory. The Agency is requesting to retain its current burden hour estimate of 1,340 hours. The Agency will summarize the comments submitted in response to this notice, and will include this summary in its request to OMB to extend the approval of these information collection requirements.

Type of Review: Extension of a currently approved information collection.

Title: Definition and Requirements for a Nationally Recognized Testing Laboratory (29 CFR 1910.7).

OMB Control Number: 1218–0147.

Affected Public: Business or other for-profits.

Number of Respondents: 67.

Frequency of Recordkeeping: On occasion.

Total Responses: 67.

Average Time Per Response: 160 hours for an organization to prepare initial recognition applications to 16 hours for an annual site visit.

Estimated Total Burden Hours: 1,340.

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–2010–0007). 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 date 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, MPH, 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. 5–2007 (72 FR 31160).

Signed at Washington, DC, this 26th day of February 2010.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2010–4555 Filed 3–3–10; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Employment and Training Administration

Labor Surplus Area Classification Under Executive Orders 12073 and 10582

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The purpose of this notice is to update the 2010 Labor Surplus Areas annual list published in the **Federal Register**, Vol. 74, No. 209, Friday, October 30, 2009, pages 56217–56239.

DATES: *Effective Date:* The update of the annual list of labor surplus areas is effective immediately for all states, the District of Columbia, and Puerto Rico.

FOR FURTHER INFORMATION CONTACT: Samuel Wright, Office of Workforce Investment, Employment and Training Administration, 200 Constitution Avenue, NW., Room S–4231, Washington, DC 20210. *Telephone:* (202) 693–2870 (This is not a toll-free number).

SUPPLEMENTARY INFORMATION: For supplementary, eligibility, classification procedures and petition for exceptional circumstances procedure information refer to the original 2010 Labor Surplus Area list at *http://edocket.access.gpo.gov/2009/pdf/E9-26165.pdf.*

Signed at Washington, DC, this 25th day of February 2010.

Jane Oates,

Assistant Secretary for Employment and Training Administration.

[FR Doc. 2010–4465 Filed 3–3–10; 8:45 am]

BILLING CODE 4510–FT–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–416; NRC–2010–0082]

Entergy Operations, Inc.; Grand Gulf Nuclear Station, Unit 1; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an exemption, pursuant to Title 10 of the Code of Federal Regulations (10 CFR) section 73.5, "Specific exemptions," from the implementation date for certain new requirements of 10 CFR part 73, "Physical protection of plants and materials," for Facility Operating License No. DPR–46, issued to Entergy Operations, Inc. (Entergy, the licensee), for operation of the Grand Gulf Nuclear Station, Unit 1 (GGNS), located in Claiborne County, Mississippi. Therefore, as required by 10 CFR 51.21, the NRC performed an environmental assessment. Based on the results of the environmental assessment, the NRC is issuing a finding of no significant impact.

Environmental Assessment

Identification of the Proposed Action

The proposed action would exempt Entergy from the required implementation date of March 31, 2010, for several new requirements of 10 CFR part 73. Specifically, Entergy would be granted an exemption from being in full compliance with certain new requirements contained in 10 CFR 73.55 by the March 31, 2010, deadline. Entergy has proposed an alternate full compliance implementation date of March 31, 2011, 1 year beyond the date required by 10 CFR part 73. The proposed action, an extension of the schedule for completion of certain actions required by the revised 10 CFR part 73, does not involve any physical changes to the reactor, fuel, plant structures, support structures, water, or land at the Entergy site.

The proposed action is in accordance with the licensee's application dated January 14, 2010, as supplemented by letters dated January 18 and February 4, 2010.

The Need for the Proposed Action

The proposed action is needed to provide the licensee with additional time to perform the required upgrades to the Entergy security system due to resource and logistical impacts of the spring 2010 refueling outage and other factors, such as limited vendor resources.

Environmental Impacts of the Proposed Action

The NRC has completed its environmental assessment of the proposed exemption. The staff has concluded that the proposed action to extend the implementation deadline would not significantly affect plant safety and would not have a significant adverse effect on the probability of an accident occurring.

The proposed action would not result in an increased radiological hazard beyond those previously analyzed in the environmental assessment and finding of no significant impact made by the Commission in promulgating its revisions to 10 CFR part 73 as discussed in a **Federal Register** notice dated March 27, 2009 (74 FR 13926). There will be no change to radioactive effluents that affect radiation exposures to plant workers and members of the public. Therefore, no changes or different types of radiological impacts are expected as a result of the proposed exemption.

The proposed action does not result in changes to land use or water use, or result in changes to the quality or quantity of non-radiological effluents. No changes to the National Pollution Discharge Elimination System permit are needed. No effects on the aquatic or terrestrial habitat in the vicinity of the plant, or to threatened, endangered, or protected species under the Endangered Species Act, or impacts to essential fish habitat covered by the Magnuson-Steven's Act are expected. There are no impacts to the air or ambient air quality.

There are no impacts to historical and cultural resources. There would be no impact to socioeconomic resources. Therefore, no changes to or different types of non-radiological environmental impacts are expected as a result of the proposed exemption.

Accordingly, the NRC concludes that there are no significant environmental impacts associated with the proposed action. In addition, in promulgating its revisions to 10 CFR part 73, the Commission prepared an environmental assessment and published a finding of no significant impact [Part 73, Power Reactor Security Requirements, 74 FR 13926 (March 27, 2009)].

The NRC staff's safety evaluation will be provided in the exemption that will be issued as part of the letter to the licensee approving the exemption to the regulation, if granted.

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to the proposed actions, the NRC staff considered denial

of the proposed action (*i.e.,* the "no-action" alternative). Denial of the exemption request would result in no change in current environmental impacts. If the proposed action was denied, the licensee would have to comply with the March 31, 2010, implementation deadline. The environmental impacts of the proposed exemption and the "no-action" alternative are similar.

Alternative Use of Resources

The action does not involve the use of any different resources than those considered in the Final Environmental Statement for GGNS dated September 1981.

Agencies and Persons Consulted

In accordance with its stated policy, on January 19, 2010, the NRC staff consulted with the Mississippi State official, Mr. B. Smith of the Division of Radiological Health, regarding the environmental impact of the proposed action. The State official had no comments.

Finding of No Significant Impact

On the basis of the environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's letter dated January 14, 2010, as supplemented by letters dated January 18 and February 4, 2010. Portions of the January 14 and February 4, 2010, documents contain security-related information and, accordingly, are not available to the public. A redacted version of the licensee's January 14, 2010, exemption request is provided in the licensee's letter dated January 18, 2010. Other parts of the document may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O–1F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at 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 by telephone at 1–800–397–4209 or 301–415–4737, or send an e-mail to *pdr.resource@nrc.gov.*

Dated at Rockville, Maryland, this 25th day of February 2010.

For the Nuclear Regulatory Commission.

Balwant K. Singal,

Senior Project Manager, Plant Licensing Branch IV, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2010–4524 Filed 3–3–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–272, 50–311 and 50–354; NRC–2010–0043]

PSEG Nuclear LLC, Hope Creek Generating Station and Salem Nuclear Generating Station, Unit Nos. 1 and 2; Exemption

1.0 Background

PSEG Nuclear LLC (PSEG or the licensee) is the holder of Facility Operating License Nos. DPR–70, DPR–75, and NPF–57, which authorize operation of the Salem Nuclear Generating Station, Unit Nos. 1 and 2 (Salem), and Hope Creek Generating Station (HCGS). The licenses provide, among other things, that the facility is subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (NRC, the Commission) now or hereafter in effect.

The facilities consist of two pressurized-water reactors, Salem Unit Nos. 1 and 2, and a boiling-water reactor, HCGS, located in Salem County, New Jersey.

2.0 Request/Action

Title 10 of the Code of Federal Regulations (10 CFR) part 73, "Physical protection of plants and materials," section 73.55, "Requirements for physical protection of licensed activities in nuclear power reactors against radiological sabotage," published as part of a final rule in the **Federal Register** on March 27, 2009 (74 FR 13926), requires licensees to protect, with high assurance, against radiological sabotage by designing and implementing comprehensive site security programs. The final rule became effective on May 26, 2009, and compliance with the final rule is required by March 31, 2010.

The amendments to 10 CFR 73.55 published on March 27, 2009, establish and update generically applicable security requirements similar to those previously imposed by Commission orders issued after the terrorist attacks of September 11, 2001, and implemented by licensees. In addition, the amendments to 10 CFR 73.55 include additional requirements to further enhance site security based upon insights gained from implementation of the post September 11, 2001, security orders. It is from three of these new requirements that PSEG now seeks an exemption from the March 31, 2010, implementation date for HCGS and Salem. All other physical security requirements established by this recent rulemaking have already been or will be implemented by the licensee by March 31, 2010. Specifically, by two letters dated November 3, 2009, PSEG requested an exemption in accordance with 10 CFR 73.5, "Specific exemptions." Due to the significant number of engineering design packages, procurement needs, and installation activities associated with the required security system upgrades, the licensee has requested an exemption from the March 31, 2010, implementation date specified in the new rule for three requirements in the rule. The items subject to the request for exemption are proposed to be implemented by December 17, 2010. The first letter, PSEG letter number LR–N09–0248 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML093100223), contains one enclosure that was designated by the licensee as containing safeguards information and, accordingly, the enclosure is not available to the public. The second letter, PSEG letter number LR–N09–0249 (ADAMS Accession No. ML093100222), including its two enclosures, is publicly available. The first enclosure is a redacted version of the safeguards enclosure in letter number LR–N09–0248 and the second enclosure is an environmental impact statement.

Based on a discussion with the NRC staff, as documented in an e-mail dated November 12, 2009 (ADAMS Accession No. ML093200070), PSEG submitted a letter dated November 20, 2009, to clarify the exemption request. The November 20, 2009, letter contains safeguards information and, accordingly, is not publicly available.

On December 15, 2009, the NRC staff held a closed meeting with PSEG to discuss the proposed exemption. A summary of the meeting was issued by the NRC staff on December 28, 2009 (ADAMS Accession No. ML093500644). As follow-up to the meeting, PSEG submitted two letters, dated December 22, 2009, that superseded the November 3, and November 20, 2009, submittals, with the exception of the environmental impact statement. The first letter, PSEG letter number LR–N09–0313, contains

safeguards information and, accordingly, is not available to the public. The second letter, PSEG letter number LR–N09–0314 (ADAMS Accession No. ML093640062), is publicly available and contains a redacted version of the safeguards information contained in letter number LR–N09–0313.

Being granted this exemption for the three items would allow the licensee additional time to complete the upgrades to the HCGS—Salem security system as required by the recent revisions to 10 CFR 73.55.

3.0 Discussion of Part 73 Schedule Exemptions From the March 31, 2010, Full Implementation Date

Pursuant to 10 CFR 73.55(a)(1), "By March 31, 2010, each nuclear power reactor licensee, licensed under 10 CFR Part 50, shall implement the requirements of this section through its Commission-approved Physical Security Plan, Training and Qualification Plan, Safeguards Contingency Plan, and Cyber Security Plan referred to collectively hereafter as 'security plans.' " Pursuant to 10 CFR 73.5, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR Part 73 when the exemptions are authorized by law, and will not endanger life or property or the common defense and security, and are otherwise in the public interest.

NRC approval of this exemption request would, as noted above, allow an extension from March 31, 2010, until December 17, 2010, for the three specific portions of the rule. The NRC staff has determined that granting of the licensee's proposed exemption would not result in a violation of the Atomic Energy Act of 1954, as amended, or the Commission's regulations. Therefore, NRC approval of the licensee's exemption request is authorized by law.

In the draft final rule sent to the Commission on July 9, 2008 (ADAMS Accession No. ML081780209), the NRC staff proposed that the requirements of the new regulation be met within 180 days. The Commission directed a change from 180 days to approximately 1 year for licensees to fully implement the new requirements. This change was incorporated into the final rule. From this, it is clear that the Commission wanted to provide a reasonable timeframe for licensees to achieve full compliance.

As noted in the final rule, the Commission also anticipated that licensees would have to conduct site-specific analyses to determine what changes were necessary to implement the rule's requirements, and that changes could be accomplished through a variety of licensing mechanisms, including exemptions. Since issuance of the final rule, the Commission has rejected a generic industry request to extend the rule's compliance date for all operating nuclear power plants, but noted that the Commission's regulations provide mechanisms for individual licensees, with good cause, to apply for relief from the compliance date (Reference: June 4, 2009, letter from R.W. Borchardt, NRC, to M. S. Fertel, Nuclear Energy Institute, ADAMS Accession No. ML091410309). The licensee's request for an exemption is therefore consistent with the approach set forth by the Commission and discussed in the June 4, 2009, letter.

HCGS—Salem Schedule Exemption Request

The licensee provided detailed information regarding the proposed exemption in the enclosure to its letter dated December 22, 2009. The enclosure describes a comprehensive plan to upgrade the HCGS—Salem security system to meet the new requirements in 10 CFR Part 73. Due to the significant number of engineering design packages, procurement needs, and installation activities associated with the required security system upgrades, the licensee has requested an exemption from the March 31, 2010, implementation date specified in the new rule for three specific requirements in the rule. The three items subject to the request for exemption are proposed to be implemented by December 17, 2010.

The enclosure to the licensee's letter dated December 22, 2009, details the specific portions of the regulation for which the site cannot be in compliance by the March 31, 2010, implementation date, along with justifications for each of the proposed non-compliances. The enclosure also provides a milestone schedule with the activities necessary to bring the licensee into full compliance with 10 CFR 73.55 by December 17, 2010.

Notwithstanding the schedular exemptions for these limited requirements, the licensee will continue to be in compliance with all other applicable physical security requirements as described in 10 CFR 73.55 and reflected in its current NRC-approved physical security program. By December 17, 2010, HCGS and Salem will be in full compliance with all the regulatory requirements of 10 CFR 73.55, as issued on March 27, 2009.

4.0 Conclusion for Part 73 Schedule Exemption Request

The staff has reviewed the licensee's submittals and concludes that the licensee has provided adequate justification for its request for an extension of the compliance date to December 17, 2010, with regard to three specified requirements of 10 CFR 73.55.

Accordingly, the Commission has determined that pursuant to 10 CFR 73.5, "Specific exemptions," an exemption from the March 31, 2010, compliance date is authorized by law and will not endanger life or property or the common defense and security, and is otherwise in the public interest. Therefore, the Commission hereby grants the requested exemption.

The NRC staff has determined that the long-term benefits that will be realized when the security upgrades are complete justifies extending the March 31, 2010, full compliance date for the three items in the licensee's exemption request. The security measures that the licensee needs additional time to implement are new requirements imposed by March 27, 2009, amendments to 10 CFR 73.55, and are in addition to those required by the security orders issued in response to the events of September 11, 2001. Therefore, the NRC staff concludes that the licensee's actions are in the best interest of protecting the public health and safety through the security changes that will result from granting this exemption.

As per the licensee's request and the NRC's regulatory authority to grant an exemption from the March 31, 2010, implementation deadline for the three items specified in the enclosure to PSEG's letter dated December 22, 2009, the licensee is required to be in full compliance with 10 CFR 73.55 by December 17, 2010. In achieving compliance, the licensee is reminded that it is responsible for determining the appropriate licensing mechanism (i.e., 10 CFR 50.54(p) or 10 CFR 50.90) for incorporation of all necessary changes to its security plans.

Pursuant to 10 CFR 51.32, "Finding of no significant impact," the Commission has previously determined that the granting of this exemption will not have a significant effect on the quality of the human environment (75 FR 6223; dated February 8, 2010).

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 25th day of February 2010.

For the Nuclear Regulatory Commission.

Allen G. Howe,

Acting Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2010–4527 Filed 3–3–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–400; NRC–2010–0020]

Carolina Power & Light Company, Shearon Harris Nuclear Power Plant, Unit 1; Exemption

1.0 Background

Carolina Power & Light Company (the licensee), now doing business as Progress Energy Carolinas, Inc. (PEC), is the holder of Renewed Facility Operating License No. NPF–63, which authorizes operation of the Shearon Harris Nuclear Power Plant, Unit 1 (HNP). The license provides, among other things, that the facility is subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (NRC, the Commission) now or hereafter in effect. The facility consists of one pressurized water reactor located in New Hill, North Carolina.

2.0 Request/Action

Title 10 of the Code of Federal Regulations (10 CFR) part 73, "Physical Protection of Plants and Materials," section 73.55, "Requirements for physical protection of licensed activities in nuclear power reactors against radiological sabotage," published March 27, 2009, effective May 26, 2009, with a full implementation date of March 31, 2010, requires licensees to protect, with high assurance, against radiological sabotage by designing and implementing comprehensive site security programs. The amendments to 10 CFR 73.55 published on March 27, 2009, establish and update generically applicable security requirements similar to those previously imposed by the Commission orders issued after the terrorist attacks of September 11, 2001, and implemented by licensees. In addition, the amendments to 10 CFR 73.55 include additional requirements to further enhance site security based upon insights gained from implementation of the post-September 11, 2001, security orders. It is from three of these new requirements that HNP now seeks an exemption from the March 31, 2010, implementation date. All other physical security requirements established by this recent rulemaking have already been or will be implemented by the licensee by March 31, 2010.

By letter dated November 30, 2009, as supplemented by letter dated December 16, 2009, the licensee requested an exemption in accordance with 10 CFR 73.5, "Specific Exemptions." Attachment 1 to the licensee's November 30, 2009, letter, as well as the December 16, 2009, letter in its entirety, contain security-related information and, accordingly, are not available to the public. The licensee has requested an exemption from the March 31, 2010, compliance date stating that it must complete a number of significant physical modifications to the current site security configuration before all requirements of 10 CFR part 73 can be met. Specifically, the request is to extend the compliance date for one requirement from the current March 31, 2010, deadline to July 30, 2010, and to extend the compliance date for two additional requirements to December 15, 2010. Being granted this exemption for the three items would allow the licensee to complete the modifications designed to update aging equipment and incorporate state-of-the-art technology to meet the regulatory requirements.

3.0 Discussion of Part 73 Schedule Exemptions From the March 31, 2010, Full Implementation Date

The regulation in 10 CFR 73.55(a)(1) states: "By March 31, 2010, each nuclear power reactor licensee, licensed under 10 CFR part 50, shall implement the requirements of this section through its Commission-approved Physical Security Plan, Training and Qualification Plan, Safeguards Contingency Plan, and Cyber Security Plan referred to collectively hereafter as "security plans.' " Pursuant to 10 CFR 73.5, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR part 73 when the exemptions are authorized by law, and will not endanger life or property or the common defense and security, and are otherwise in the public interest.

NRC approval of this exemption, as noted above, would allow an extension from March 31, 2010, until July 30, 2010, for one requirement, and December 15, 2010, for two other requirements. As stated above, 10 CFR 73.5 allows the NRC to grant exemptions from the requirements of 10 CFR 73. The NRC staff has determined that granting the licensee's proposed exemption would not result in a violation of the Atomic Energy Act of 1954, as amended, or the Commission's regulations. Therefore, the exemption is authorized by law.

In the draft final rule provided to the Commission on July 9, 2008, the NRC staff proposed that the requirements of the new regulation be met within 180 days. The Commission directed a change from 180 days to approximately 1 year for licensees to fully implement the new requirements. This change was incorporated into the final rule. From this, it is clear that the Commission desires to provide a reasonable timeframe for licensees to achieve full compliance.

As noted in the final rule, the Commission also anticipated that licensees would have to conduct site-specific analyses in order to determine what changes were necessary to implement the rule's requirements, and that changes could be accomplished through a variety of licensing mechanisms, including exemptions. Since issuance of the final rule, the Commission has rejected a generic industry request to extend the rule's compliance date for all operating nuclear power plants, but noted that the Commission's regulations provide mechanisms for individual licensees, with good cause, to apply for relief from the compliance date (Reference: June 4, 2009 letter from R. W. Borchardt, NRC, to M. S. Fertel, Nuclear Energy Institute). The licensee's request for an exemption is therefore consistent with the approach set forth by the Commission and discussed in the June 4, 2009 letter.

Shearon Harris Nuclear Power Plant, Unit 1, Schedule Exemption Request

The licensee provided detailed information in Attachment 1 of its November 30, 2009, letter requesting an exemption. It describes a comprehensive plan to install additional intrusion detection equipment, relocate certain security assets, and upgrade other security related systems at the HNP site, as well as providing a timeline for achieving full compliance with the new regulation. Attachment 1 contains security-related information regarding the site security plan, details of the specific requirements of the regulation for which the site cannot be in compliance by the March 31, 2010, deadline and why, the required changes to the site's security configuration, and a timeline with critical path activities that will enable the licensee to achieve full compliance by July 30, 2010, and December 15, 2010, respectively. The timeline provides dates indicating when: (1) The design work will be completed for the projects that will bring each of the three remaining areas into compliance; (2) construction will begin on various phases of the projects

(i.e., new roads, buildings, and fences); and (3) critical equipment will be ordered, installed, tested and become operational.

The licensee indicated that with completion of the three projects noted above by July 30, 2010, and December 15, 2010, HNP will be in full compliance with all the regulatory requirements of 10 CFR 73.55, as issued on March 27, 2009. Notwithstanding the schedular exemptions for these limited requirements, the licensee will continue to be in compliance with all other applicable physical security requirements as described in 10 CFR 73.55 and reflected in HNP's current NRC approved physical security program.

4.0 Conclusion for Part 73 Schedule Exemption Request

The staff has reviewed the licensee's submittals and concludes that the licensee has provided adequate justification for its request for an extension of the compliance date to July 30, 2010, and December 15, 2010, respectively, with regard to three specified requirements of 10 CFR 73.55. Accordingly, the Commission has determined that pursuant to 10 CFR 73.5, an exemption from the March 31, 2010, compliance date is authorized by law and will not endanger life or property or the common defense and security, and is otherwise in the public interest. Therefore, the Commission hereby grants the requested exemption.

The NRC staff has determined that the long-term benefits that will be realized when the installation of additional intrusion detection equipment, relocation of certain security assets, and upgrades to other security related systems are complete at HNP justifies extending the full compliance date with regard to the specified requirements of 10 CFR 73.55. The security measures that HNP needs additional time to implement are new requirements imposed by the March 27, 2009, amendments to 10 CFR 73.55, and are in addition to those required by the security orders issued in response to the events of September 11, 2001. Therefore, it is concluded that the licensee's actions are in the best interest of protecting the public health and safety through the security changes that will result from granting this exemption.

As per the licensee's request and the NRC's regulatory authority to grant an exemption from the March 31, 2010, deadline for the three items specified in Attachment 1 of the PEC letter dated November 30, 2009, the licensee is required to be in full compliance with the specified requirements of 10 CFR 73.55 by July 30, 2010, and December 15, 2010, as applicable. In achieving compliance, the licensee is reminded that it is responsible for determining the appropriate licensing mechanism (i.e., 10 CFR 50.54(p) or 50.90) for incorporation of all necessary changes to its security plans.

Pursuant to 10 CFR 51.32, "Finding of no significant impact," the Commission has previously determined that the granting of this exemption will not have a significant effect on the quality of the human environment (75 FR 3942, dated January 25, 2010).

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 24th day of February 2010.

For the Nuclear Regulatory Commission.

Allen Howe,

Acting Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2010–4525 Filed 3–3–10; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–29161]

Notice of Applications for Deregistration Under Section 8(f) of the Investment Company Act of 1940

February 26, 2010.

The following is a notice of applications for deregistration under section 8(f) of the Investment Company Act of 1940 for the month of February, 2010. A copy of each application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090. An order granting each application will be issued unless the SEC orders a hearing. Interested persons may request a hearing on any application by writing to the SEC's Secretary at the address below and serving the relevant applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on March 23, 2010, and should be accompanied by proof of service on the applicant, 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 Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

FOR FURTHER INFORMATION CONTACT: Diane L. Titus at (202) 551–6810, SEC, Division of Investment Management, Office of Investment Company Regulation, 100 F Street, NE., Washington, DC 20549–4041.

Oppenheimer Baring Japan Fund [File No. 811–21954]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On August 8, 2009, applicant transferred its assets to Oppenheimer International Growth Fund, based on net asset value. Expenses of $33,608 incurred in connection with the reorganization were paid by applicant.

Filing Date: The application was filed on February 2, 2010.

Applicant's Address: 6803 S. Tucson Way, Centennial, CO 80112.

Samarnan Investment Corporation [File No. 811–2824]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On December 2, 2009, applicant made a final liquidating distribution to its shareholders, based on net asset value. Expenses of $93,115 incurred in connection with the liquidation were paid by applicant. Applicant has retained $37,700 in cash to pay certain outstanding expenses.

Filing Date: The application was filed on February 1, 2010.

Applicant's Address: 214 North Ridgeway Dr., Cleburne, TX 76033.

North Track Funds, Inc. [File No. 811–4401]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On July 31, 2009, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of $74,209 incurred in connection with the liquidation were paid by applicant and Ziegler Capital Management, LLC, applicant's investment adviser.

Filing Date: The application was filed on February 5, 2010.

Applicant's Address: 200 South Wacker Dr., Suite 2000, Chicago, IL 60606.

Cohen & Steers European Realty Shares, Inc. [File No. 811–22010]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On September 18, 2009, applicant transferred its assets to Cohen & Steers International Realty Fund, Inc., based on net asset value.

Expenses of $107,423 incurred in connection with the reorganization were paid by Cohen & Steers Capital Management, Inc., applicant's investment adviser.

Filing Date: The application was filed on January 22, 2010.

Applicant's Address: 280 Park Ave., 10th Floor, New York, NY 10017.

Grosvenor Registered Multi-Strategy Fund NewSub, LLC [File No. 811–22373]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant has never made a public offering of its securities and does not propose to make a public offering or engage in business of any kind.

Filing Date: The application was filed on January 22, 2010.

Applicant's Address: c/o Banc of America Investment Advisors, Inc., One Financial Center, Boston, MA 02111.

Dow Jones EURO STOXX 50 Premium & Dividend Income Fund Inc. [File No. 811–22089]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant has never made a public offering of its securities and does not propose to make a public offering or engage in business of any kind.

Filing Date: The application was filed on January 26, 2010.

Applicant's Address: 4 World Financial Center, 6th Floor, New York, NY 10080.

T Funds Investment Trust [File No. 811–21655]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant has never made a public offering of its securities and does not propose to make a public offering or engage in business of any kind.

Filing Dates: The application was filed on December 24, 2009, and amended on February 19, 2010.

Applicant's Address: 555 South Flower St., Suite 3300, Los Angeles, CA 90071.

Fortress Registered Investment Trust [File No. 811–9751]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant has never made a public offering of its securities and does not propose to make a public offering or engage in business of any kind.

Filing Dates: The application was filed on January 7, 2010, and amended on February 23, 2010.

Applicant's Address: 1345 Avenue of the Americas, 46th Floor, New York, NY 10105.

W.P. Stewart & Co. Growth Fund, Inc. [File No. 811–8128]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On November 30, 2009, applicant transferred its assets to W.P. Stewart & Co. Growth Fund, a series of Investment Managers Series Trust, based on net asset value. Expenses of $314,876 incurred in connection with the reorganization were paid by W.P. Stewart & Co., Inc., applicant's investment adviser, and UMB Fund Services, Inc., the co-administrator and transfer agent for the acquiring fund.

Filing Dates: The application was filed on December 16, 2009, and amended on February 8, 2010.

Applicant's Address: c/o W.P. Stewart & Co., Inc., 527 Madison Ave., New York, NY 10022.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–4499 Filed 3–3–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Investment Company Act Release No. 29163; 812–13161–01]

First Trust/Aberdeen Global Opportunity Income Fund, et al.; Notice of Application

February 26, 2010.

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Notice of application under section 6(c) of the Investment Company Act of 1940 ("Act") for an exemption from section 19(b) of the Act and rule 19b–1 under the Act.

Summary of Application: Applicants request an order to permit certain closed-end investment companies to make periodic distributions of long-term capital gains with respect to their outstanding common stock as frequently as twelve times each year, and as frequently as distributions are specified by or in accordance with the terms of any outstanding preferred stock that such investment companies may issue.

Applicants: First Trust/Aberdeen Global Opportunity Income Fund, First Trust Enhanced Equity Income Fund, First Trust/Four Corners Senior Floating Rate Income Fund, First Trust/Four Corners Senior Floating Rate Income Fund II, Macquarie/First Trust Global Infrastructure/Utilities Dividend & Income Fund, First Trust/FIDAC Mortgage Income Fund, First Trust Strategic High Income Fund, First Trust Strategic High Income Fund II, First Trust Strategic High Income Fund III, First Trust/Aberdeen Emerging Opportunity Fund, First Trust Specialty Finance and Financial Opportunities Fund, First Trust Active Dividend Income Fund, First Trust Municipal Target Term Trust, First Trust/StoneCastle Bank Select Income Fund, First Trust Income Fund, First Trust/Chartwell Total Return Equity Income Fund, First Trust/Aberdeen Global Credit Strategies Fund (collectively, the "Current Funds"), First Trust Advisors L.P. (the "Adviser") and First Trust Portfolios, L.P. (the "Broker-Dealer").

Filing Dates: January 26, 2005, August 9, 2007, September 9, 2008, December 12, 2008, April 20, 2009 and August 11, 2009.

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 March 23, 2010, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090; Applicants, Chapman and Cutler LLP, 111 West Monroe St., Chicago, Illinois 60603, attention: Eric F. Fess, Esq. and Suzanne M. Russell, Esq.

FOR FURTHER INFORMATION CONTACT: Wendy Friedlander, Senior Counsel, at (202) 551–6837, or James M. Curtis, Branch Chief, at (202) 551–6712 (Division of Investment Management, Office of Chief Counsel).

SUPPLEMENTARY INFORMATION: The following is a summary of the

application. The complete application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations:

1. Each Current Fund and any future fund that may rely on the requested order (each a "Fund" and collectively the "Funds") is or will be registered under the Act as a closed-end management investment company.[1] Each Fund's common stock is or will be listed and traded on a "national securities exchange," as defined in section 2(a)(26) of the Act. Any preferred stock that has been or may be issued by a Fund is not and will not be listed or traded on any exchange. Applicants believe that the common stockholders of the Funds are or will be generally conservative, dividend- and income-sensitive investors who desire current income periodically.

2. The Adviser is an Illinois limited partnership and is registered under the Investment Advisers Act of 1940. The Adviser is or will be responsible for implementing each Fund's overall investment strategy. The Adviser is controlled by Grace Partners of DuPage L.P. ("Grace") and The Charger Corporation ("Charger"). Grace's general partner is Charger, which is controlled by the Robert Donald Van Kampen family.

3. The Broker-Dealer is registered under the Securities Exchange Act of 1934 as a broker-dealer and is an "affiliated person" of the Adviser as defined in section 2(a)(3) of the Act. Applicants represent that the Broker-Dealer maintains a Web site that includes information on financial products that it offers or distributes, including information about the Current Funds that have issued publicly-offered stock.

4. Applicants represent that, before any Fund will implement a policy to make level, periodic distributions with respect to its common stock, the board of trustees (the "Board") of such Fund, including a majority of the trustees who are not "interested persons" as defined in Section 2(a)(19) of the Act (each an "Independent Trustee") of the respective Fund will approve the Fund's adoption of such policy. Applicants represent that the Board will request, and the Adviser will provide, such information as is reasonably necessary for the Board to make an informed determination of whether the Fund should adopt the proposed distribution policy. Applicants represent that, in particular, the Board, including the Independent Trustees, will review information regarding the purpose and terms of the proposed distribution policy, the likely effects of such policy on the Fund's long-term total return (in relation to market price and net asset value ("NAV") per common share) and the relationship between the Fund's distribution rate on its common stock under the policy and the Fund's total return (in relation to NAV per common share). Applicants represent that the Independent Trustees also will consider what conflicts of interest the Adviser and the affiliated persons of the Adviser and the Fund might have with respect to the adoption or implementation of such policy. Applicants represent that after considering such information the Board, including the Independent Trustees, will approve the distribution policy with respect to the Fund's common stock (the "Plan"), provided that the Board, including the Independent Trustees, determines that the Plan is consistent with the Fund's investment objective(s) and in the best interests of the Fund's common stockholders.

5. Applicants represent that the purpose of any Plan will be to permit a Fund to provide its common stockholders with level, periodic distributions. Applicants represent that, under the Plan of a Fund, such Fund would distribute to its respective common stockholders a fixed percentage of the market price of the Fund's common stock at a particular point in time or a fixed percentage of NAV per common share at a particular point in time or a fixed amount per common share, any of which may be adjusted from time to time. Applicants state that the minimum annual distribution rate with respect to a Fund's common stock under its respective Plan would be independent of the Fund's performance during any particular period but would be expected to correlate with the Fund's performance over time. Applicants explain that each distribution on the common stock would be at the stated rate then in effect except for extraordinary distributions and potential increases or decreases in the final dividend periods in light of the Fund's performance for the entire calendar or taxable year and to enable the Fund to comply with the distribution requirements of Subchapter M of the Internal Revenue Code of 1986 (the "Code") for the calendar or taxable year.

6. Applicants represent that the Board of each Fund that relies on the order also will approve the Fund's adoption of policies and procedures under rule 38a–1 under the Act that are reasonably designed to ensure that all notices sent to stockholders with distributions under the Plan ("Notices") comply with condition II.A below, and that all other written communications by any such Fund or its agents regarding distributions under the Plan include the disclosure required by condition III.A below. Applicants state that the Board of each Fund also will approve the Fund's adoption of policies and procedures that require such Fund to keep records that demonstrate the Fund's compliance with all of the conditions of the requested order and that are necessary for the Fund to form the basis for, or demonstrate the calculation of, the amounts disclosed in its Notices.

Applicants' Legal Analysis:

1. Section 19(b) generally makes it unlawful for any registered investment company to make long-term capital gains distributions more than once each year. Rule 19b–1 limits the number of capital gains dividends, as defined in section 852(b)(3)(C) of the Code ("distributions"), that a fund may make with respect to any one taxable year to one, plus a supplemental "clean up" distribution made pursuant to section 855 of the Code not exceeding 10% of the total amount distributed for the year, plus one additional capital gain dividend made in whole or in part to avoid the excise tax under section 4982 of the Code.

2. Section 6(c) provides that the Commission may, by order upon application, conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision of the Act, if and to the extent that the 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.

3. Applicants state that the one of the concerns underlying section 19(b) and rule 19b–1 is that shareholders might be unable to differentiate between regular distributions of capital gains and distributions of investment income.

[1] Applicants request that any order issued granting the relief requested in the application also apply to any closed-end investment company that in the future: (a) is advised by the Adviser (including any successor in interest) or by any entity controlling, controlled by, or under common control (within the meaning of section 2(a)(9) of the Act) with the Adviser; and (b) complies with the terms and conditions of the requested order. A successor in interest is limited to entities that result from a reorganization into another jurisdiction or a change in the type of business organization.

Applicants state, however, that rule 19a–1 effectively addresses this concern by requiring that a separate statement showing the sources of a distribution (*e.g.,* estimated net income, net short-term capital gains, net long-term capital gains and/or return of capital) accompany any distributions (or the confirmation of the reinvestment of distributions) estimated to be sourced in part from capital gains or capital. Applicants state that the same information also is included in each fund's reports to shareholders and on its IRS Form 1099–DIV, which is sent to each common and preferred shareholder who received distributions during the year.

4. Applicants further state that each Fund will make the additional disclosures required by the conditions set forth below, and each of them will adopt compliance policies and procedures in accordance with rule 38a–1 to ensure that all required Notices and disclosures are sent to shareholders. Applicants argue that by providing the information required by section 19(a) and rule 19a–1, and by complying with the procedures adopted under each Plan and the conditions listed below, the Funds would ensure that each Fund's shareholders are provided sufficient information to understand that their periodic distributions are not tied to the Fund's net investment income (which for this purpose is the Fund's taxable income other than from capital gains) and realized capital gains to date, and may not represent yield or investment return. Applicants also state that compliance with each Fund's compliance procedures and condition III set forth below will ensure that prospective shareholders and third parties are provided with the same information. Accordingly, applicants assert that continuing to subject the Funds to section 19(b) and rule 19b–1 would afford shareholders no extra protection.

5. Applicants note that section 19(b) and rule 19b–1 also were intended to prevent certain improper sales practices, including, in particular, the practice of urging an investor to purchase shares of a fund on the basis of an upcoming capital gains dividend ("selling the dividend"), where the dividend would result in an immediate corresponding reduction in NAV and would be in effect a taxable return of the investor's capital. Applicants assert that the "selling the dividend" concern should not apply to closed-end investment companies which do not continuously distribute shares. According to Applicants, if the underlying concern extends to secondary market purchases of shares of closed-end funds that are subject to a large upcoming capital gains dividend, adoption of a Plan actually helps minimize the concern by avoiding, through periodic distributions, any buildup of large end-of-the-year distributions.

6. Applicants also note that common shares of closed-end funds that invest primarily in equity securities often trade in the marketplace at a discount to their NAV. Applicants believe that this discount may be reduced for closed-end funds that pay relatively frequent dividends on their common shares at a consistent rate, whether or not those dividends contain an element of long-term capital gain.

7. Applicants assert that the application of rule 19b–1 to a Plan actually could have an undesirable influence on portfolio management decisions. Applicants state that, in the absence of an exemption from rule 19b–1, the implementation of a Plan imposes pressure on management (i) not to realize any net long-term capital gains until the point in the year that the fund can pay all of its remaining distributions in accordance with rule 19b–1, and (ii) not to realize any long-term capital gains during any particular year in excess of the amount of the aggregate pay-out for the year (since as a practical matter excess gains must be distributed and accordingly would not be available to satisfy pay-out requirements in following years), notwithstanding that purely investment considerations might favor realization of long-term gains at different times or in different amounts. Applicants thus assert that the limitation on the number of capital gains distributions that a fund may make with respect to any one year imposed by rule 19b–1 may prevent the efficient operation of a Plan whenever that fund's realized net long-term capital gains in any year exceed the total of the periodic distributions that may include such capital gains under the rule.

8. In addition, Applicants assert that rule 19b–1 may cause fixed regular periodic distributions under a Plan to be funded with returns of capital [2] (to the extent net investment income and realized short-term capital gains are insufficient to fund the distribution), even though realized net long-term capital gains otherwise could be available. To distribute all of a fund's long-term capital gains within the limits in rule 19b–1, a fund may be required to make total distributions in excess of the annual amount called for by its Plan, or to retain and pay taxes on the excess amount. Applicants thus assert that the requested order would minimize these effects of rule 19b–1 by enabling the funds to realize long-term capital gains as often as investment considerations dictate without fear of violating rule 19b-1.

9. Applicants state that *Revenue Ruling 89–81* under the Code requires that a fund that has both common stock and preferred stock outstanding designate the types of income, *e.g.,* investment income and capital gains, in the same proportion as the total distributions distributed to each class for the tax year. To satisfy the proportionate designation requirements of *Revenue Ruling 89–81,* whenever a fund has realized a long-term capital gain with respect to a given tax year, the fund must designate the required proportionate share of such capital gain to be included in common and preferred stock dividends. Applicants state that although rule 19b–1 allows a fund some flexibility with respect to the frequency of capital gains distributions, a fund might use all of the exceptions available under the rule for a tax year and still need to distribute additional capital gains allocated to the preferred stock to comply with *Revenue Ruling 89–81.*

10. Applicants assert that the potential abuses addressed by section 19(b) and rule 19b–1 do not arise with respect to preferred stock issued by a closed-end fund. Applicants assert that such distributions are fixed or determined in periodic auctions by reference to short-term interest rates rather than by reference to performance of the issuer and *Revenue Ruling 89–81* determines the proportion of such distributions that are comprised of the long-term capital gains.

11. Applicants also submit that the "selling the dividend" concern is not applicable to preferred stock, which entitles a holder to no more than a periodic dividend at a fixed rate or the rate determined by the market, and, like a debt security, is priced based upon its liquidation value, credit quality, and frequency of payment. Applicants state that investors buy preferred shares for the purpose of receiving payments at the frequency bargained for, and do not expect the liquidation value of their shares to change.

12. Applicants request an order under section 6(c) granting an exemption from the provisions of section 19(b) and rule 19b–1 to permit each Fund to distribute periodic capital gains dividends (as defined in section 852(b)(3)(C) of the Code) as often as monthly in any one taxable year in respect of its common

[2] Returns of capital as used in the application means return of capital for financial accounting purposes and not for tax accounting purposes.

stock and as often as specified by or determined in accordance with the terms thereof in respect of its preferred stock.[3]

Applicants' Conditions:

Applicants agree that, with respect to each Fund seeking to rely on the order, the order will be subject to the following conditions:

I. *Compliance Review and Reporting.* The fund's chief compliance officer will: (a) Report to the fund Board, no less frequently than once every three months or at the next regularly scheduled quarterly board meeting, whether (i) the fund and the Adviser have complied with the conditions to the requested order, and (ii) a Material Compliance Matter, as defined in rule 38a–1(e)(2), has occurred with respect to compliance with such conditions; and (b) review the adequacy of the policies and procedures adopted by the fund no less frequently than annually.

II. *Disclosures to Fund Shareholders:*

A. Each Notice to The holders of the fund's common stock, in addition to the information required by section 19(a) and rule 19a–1:

1. Will provide, in a tabular or graphical format:

(a) The amount of the distribution, on a per common share basis, together with the amounts of such distribution amount, on a per common share basis and as a percentage of such distribution amount, from estimated: (A) Net investment income; (B) net realized short-term capital gains; (C) net realized long-term capital gains; and (D) return of capital or other capital source;

(b) The fiscal year-to-date cumulative amount of distributions, on a per common share basis, together with the amounts of such cumulative amount, on a per common share basis and as a percentage of such cumulative amount of distributions, from estimated: (A) Net investment income; (B) net realized short-term capital gains; (C) net realized long-term capital gains; and (D) return of capital or other capital source;

(c) The average annual total return in relation to the change in NAV for the 5-year period (or, if the fund's history of operations is less than five years, the time period commencing immediately following the fund's first public offering) ending on the last day of the month prior to the most recent distribution record date compared to the current fiscal period's annualized distribution rate expressed as a percentage of NAV as of the last day of the month prior to the most recent distribution record date; and

(d) The cumulative total return in relation to the change in NAV from the last completed fiscal year to the last day of the month prior to the most recent distribution record date compared to the fiscal year-to-date cumulative distribution rate expressed as a percentage of NAV as of the last day of the month prior to the most recent distribution record date.

Such disclosure shall be made in a type size at least as large and as prominent as the estimate of the sources of the current distribution; and

2. will include the following disclosure:

(a) "You should not draw any conclusions about the fund's investment performance from the amount of this distribution or from the terms of the fund's Plan";

(b) "The fund estimates that it has distributed more than its income and net realized capital gains; therefore, a portion of your distribution may be a return of capital. A return of capital may occur for example, when some or all of the money that you invested in the fund is paid back to you. A return of capital distribution does not necessarily reflect the fund's investment performance and should not be confused with 'yield' or 'income'";[4] and

(c) "The amounts and sources of distributions reported in this Notice are only estimates and are not being provided for tax reporting purposes. The actual amounts and sources of the amounts for tax reporting purposes will depend upon the fund's investment experience during the remainder of its fiscal year and may be subject to changes based on tax regulations. The fund will send you a Form 1099–DIV for the calendar year that will tell you how to report these distributions for federal income tax purposes."

Such disclosure shall be made in a type size at least as large as and as prominent as any other information in the Notice and placed on the same page in close proximity to the amount and the sources of the distribution.

B. On the inside front cover of each report to shareholders under rule 30e–1 under the Act, the fund will:

1. Describe the terms of the Plan (including the fixed amount or fixed percentage of the distributions and the frequency of the distributions);

2. Include the disclosure required by condition II.A.2.a above;

3. State, if applicable, that the Plan provides that the Board may amend or terminate the Plan at any time without prior notice to fund shareholders; and

4. Describe any reasonably foreseeable circumstances that might cause the fund to terminate the Plan and any reasonably foreseeable consequences of such termination.

C. Each report provided to shareholders under rule 30e–1 and each prospectus filed with the Commission on Form N–2 under the Act, will provide the fund's total return in relation to changes in NAV in the financial highlights table and in any discussion about the fund's total return.

III. *Disclosure to Shareholders, Prospective Shareholders and Third Parties:*

A. The fund will include the information contained in the relevant Notice, including the disclosure required by condition II.A.2 above, in any written communication (other than a Form 1099) about the Plan or distributions under the Plan by the fund, or agents that the fund has authorized to make such communication on the fund's behalf, to any fund common shareholder, prospective common shareholder or third-party information provider;

B. The fund will issue, contemporaneously with the issuance of any Notice, a press release containing the information in the Notice and will file with the Commission the information contained in such Notice, including the disclosure required by condition II.A.2 above, as an exhibit to its next filed Form N–CSR; and

C. The fund will post prominently on the Web site maintained by the Broker-Dealer, an affiliated person of the Adviser, a statement containing the information in each Notice, including the disclosure required by condition II.A.2 above, and will maintain such information on such Web site for at least 24 months.[5]

IV. *Delivery of Notices to Beneficial Owners:* If a broker, dealer, bank or other person ("financial intermediary") holds common stock issued by the fund in nominee name, or otherwise, on behalf of a beneficial owner, the fund: (a) Will request that the financial intermediary, or its agent, forward the Notice to all beneficial owners of the fund's stock held through such financial intermediary; (b) will provide, in a timely manner, to the financial intermediary, or its agent, enough

[3] Applicants state that a future fund that relies on the requested order will satisfy each of the representations in the application except that such representations will be made in respect of actions by the board of trustees of such future fund and will be made at a future time.

[4] This disclosure will be included only if the current distribution or the fiscal year-to-date cumulative distributions are estimated to include a return of capital.

[5] None of the funds nor the Adviser maintains a Web site. First Trust Portfolios, a registered broker-dealer and an affiliate of the Adviser, maintains a Web site that is used by the Adviser and the funds.

copies of the Notice assembled in the form and at the place that the financial intermediary, or its agent, reasonably requests to facilitate the financial intermediary's sending of the Notice to each beneficial owner of the fund's stock; and (c) upon the request of any financial intermediary, or its agent, that receives copies of the Notice, will pay the financial intermediary, or its agent, the reasonable expenses of sending the Notice to such beneficial owners.

V. *Additional Board Determinations for Funds Whose Shares Trade at a Premium:* If:

A. The fund's common stock has traded on the exchange that it primarily trades on at the time in question at an average premium to NAV equal to or greater than 10%, as determined on the basis of the average of the discount or premium to NAV of the fund's common stock as of the close of each trading day over a 12-week rolling period (each such 12-week rolling period ending on the last trading day of each week); and

B. The fund's annualized distribution rate for such 12-week rolling period, expressed as a percentage of NAV as of the ending date of such 12-week rolling period, is greater than the fund's average annual total return in relation to the change in NAV over the 2-year period ending on the last day of such 12-week rolling period; then:

1. At the earlier of the next regularly scheduled meeting or within four months of the last day of such 12-week rolling period the Board, including a majority of the Independent Trustees:

(a) Will request and evaluate, and the Adviser will furnish, such information as may be reasonably necessary to make an informed determination of whether the Plan should be continued or continued after amendment;

(b) Will determine whether continuation, or continuation after amendment, of the Plan is consistent with the fund's investment objective(s) and policies and in the best interests of the fund and its stockholders, after considering the information in condition V.B.1.a above; including, without limitation:

(1) Whether the Plan is accomplishing its purpose(s);

(2) The reasonably foreseeable effects of the Plan on the fund's long-term total return in relation to the market price and NAV of the fund's common stock; and

(3) The fund's current distribution rate, as described in condition V.B above, compared to with the fund's average annual total return over the 2-year period, as described in condition V.B, or such longer period as the board deems appropriate; and

(c) Based upon that determination, will approve or disapprove the continuation, or continuation after amendment, of the Plan; and

2. The Board will record the information considered by it and the basis for its approval or disapproval of the continuation, or continuation after amendment, of the Plan in its meeting minutes, which must be made and preserved for a period of not less than six years from the date of such meeting, the first two years in an easily accessible place.

VI. *Public Offerings:* The fund will not make a public offering of the fund's common stock other than:

A. A rights offering below NAV to holders of the fund's common stock;

B. An offering in connection with a dividend reinvestment plan, merger, consolidation, acquisition, spin-off or reorganization of the fund; or

C. An offering other than an offering described in conditions VI.A and VI.B above, unless, with respect to such other offering:

1. the fund's annualized distribution rate for the six months ending on the last day of the month ended immediately prior to the most recent distribution declaration date,[6] expressed as a percentage of NAV per share as of such date, is no more than 1 percentage point greater than the fund's average annual total return for the 5-year period ending on such date;[7] and

2. the transmittal letter accompanying any registration statement filed with the Commission in connection with such offering discloses that the fund has received an order under section 19(b) to permit it to make periodic distributions of long-term capital gains with respect to its common stock as frequently as twelve times each year, and as frequently as distributions are specified in accordance with the terms of any outstanding preferred stock that such fund may issue.

VII. *Amendments to Rule 19b–1.* The requested relief will expire on the effective date of any amendment to rule 19b–1 that provides relief permitting certain closed-end investment companies to make periodic distributions of long-term capital gains with respect to their outstanding common stock as frequently as twelve times each year.

[6] If the fund has been in operation fewer than six months, the measured period will begin immediately following the fund's first public offering.

[7] If the fund has been in operation fewer than five years, the measured period will begin immediately following the fund's first public offering.

For the Commission, by the Division of Investment Management, under delegated authority.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–4516 Filed 3–3–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61605/March 1, 2010]

Order Making Fiscal Year 2010 Mid-Year Adjustment to the Fee Rates Applicable Under Sections 31(b) and (c) of the Securities Exchange Act of 1934

I. Background

Section 31 of the Securities Exchange Act of 1934 ("Exchange Act") requires each national securities exchange and national securities association to pay transaction fees to the Commission.[1] Specifically, section 31(b) requires each national securities exchange to pay to the Commission fees based on the aggregate dollar amount of sales of certain securities transacted on the exchange.[2] Section 31(c) requires each national securities association to pay to the Commission fees based on the aggregate dollar amount of sales of certain securities transacted by or through any member of the association other than on an exchange.[3]

Sections 31(j)(1) and (3) require the Commission to make annual adjustments to the fee rates applicable under Sections 31(b) and (c) for each of the fiscal years 2003 through 2011, and one final adjustment to fix the fee rates for fiscal year 2012 and beyond.[4] Section 31(j)(2) requires the Commission, in certain circumstances, to make a mid-year adjustment to the fee rates in fiscal years 2002 through 2011.[5] The annual and mid-year adjustments are designed to adjust the fee rates in a given fiscal year so that, when applied to the aggregate dollar volume of sales for the fiscal year, they are reasonably likely to produce total fee collections under Section 31 equal to the "target offsetting collection amount" specified in Section 31(*l*)(1) for that fiscal year.[6] For fiscal year 2010, the target offsetting collection amount is $1,161,000,000.[7]

[1] 15 U.S.C. 78ee.

[2] 15 U.S.C. 78ee(b).

[3] 15 U.S.C. 78ee(c).

[4] 15 U.S.C. 78ee(j)(1) and (j)(3).

[5] 15 U.S.C. 78ee(j)(2).

[6] 15 U.S.C. 78ee(*l*)(1).

[7] *See id.*

II. Determination of the Need for a Mid-Year Adjustment in Fiscal 2010

Under section 31(j)(2) of the Exchange Act, the Commission must make a mid-year adjustment to the fee rates under Sections 31(b) and (c) in fiscal year 2010 if it determines, based on the actual aggregate dollar volume of sales during the first five months of the fiscal year, that the baseline estimate $84,822,877,437,603 is reasonably likely to be 10% (or more) greater or less than the actual aggregate dollar volume of sales for fiscal year 2010.[8] To make this determination, the Commission must estimate the actual aggregate dollar volume of sales for fiscal year 2010.

Based on data provided by the national securities exchanges and the national securities association that are subject to section 31,[9] the actual aggregate dollar volume of sales during the first four months of fiscal year 2010 was $19,531,642,600,905.[10] Using these data and a methodology for estimating the aggregate dollar amount of sales for the remainder of fiscal year 2010 (developed after consultation with the Congressional Budget Office and the OMB),[11] the Commission estimates that the aggregate dollar amount of sales for the remainder of fiscal year 2010 to be $43,755,155,427,595. Thus, the Commission estimates that the actual aggregate dollar volume of sales for all of fiscal year 2010 will be $63,286,798,028,500.

Because the baseline estimate of $84,822,877,437,603 is more than 10% greater than the $63,286,798,028,500 estimated actual aggregate dollar volume of sales for fiscal year 2010, Section 31(j)(2) of the Exchange Act requires the Commission to issue an order adjusting the fee rates under Sections 31(b) and (c).

III. Calculation of the Uniform Adjusted Rate

Section 31(j)(2) specifies the method for determining the mid-year adjustment for fiscal 2010. Specifically, the Commission must adjust the rates under sections 31(b) and (c) to a "uniform adjusted rate that, when applied to the revised estimate of the aggregate dollar amount of sales for the remainder of fiscal year 2010, is reasonably likely to produce aggregate fee collections under section 31 (including fees collected during such 5-month period and assessments collected under section 31(d)) that are equal to $1,161,000,000."[12] In other words, the uniform adjusted rate is determined by subtracting fees collected prior to the effective date of the new rate and assessments collected under section 31(d) during all of fiscal year 2010 from $1,161,000,000, which is the target offsetting collection amount for fiscal year 2010. That difference is then divided by the revised estimate of the aggregate dollar volume of sales for the remainder of the fiscal year following the effective date of the new rate.

The Commission estimates that it will collect $598,633,917 in fees for the period prior to the effective date of the mid-year adjustment and $18,611 in assessments on round turn transactions in security futures products during all of fiscal year 2010. Using the methodology referenced in Part II above, the Commission estimates that the aggregate dollar volume of sales for the remainder of fiscal year 2010 following the effective date of the new rate will be $33,260,374,276,849. This amount reflects more recent information on the dollar amount of sales of securities than was available at the time of the setting of the initial fee rate for fiscal year 2010, and indicates a significant reduction in sales. Based on these estimates, and employing the mid-year adjustment mechanism established by statute, the uniform adjusted rate must be adjusted to $16.90 per million of the aggregate dollar amount of sales of securities.[13] The aggregate dollar amount of sales of securities subject to Section 31 fees is illustrated in Appendix A.

IV. Effective Date of the Uniform Adjusted Rate

Section 31(j)(4)(B) of the Exchange Act provides that a mid-year adjustment shall take effect on April 1 of the fiscal year in which such rate applies. Therefore, the exchanges and the national securities association that are subject to section 31 fees must pay fees under sections 31(b) and (c) at the uniform adjusted rate of $16.90 per million for sales of securities transacted on April 1, 2010, and thereafter until the annual adjustment for fiscal 2011 is effective.

V. Conclusion

Accordingly, pursuant to Section 31 of the Exchange Act,[14]

It is hereby ordered that *each* of the fee rates under sections 31(b) and (c) of the Exchange Act shall be $16.90 per $1,000,000 of the aggregate dollar amount of sales of securities subject to these sections effective April 1, 2010.

By the Commission.

Elizabeth M. Murphy,

Secretary.

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A. Baseline Estimate of the Aggregate Dollar Amount of Sales

First, calculate the average daily dollar amount of sales (ADS) for each month in the sample (January 2000–January 2010). The data obtained from the exchanges and FINRA are presented in Table A. The monthly aggregate dollar amount of sales from all exchanges and FINRA is contained in column C.

Next, calculate the change in the natural logarithm of ADS from month-to-month. The average monthly change in the logarithm of ADS over the entire sample is 0.004 and the standard deviation 0.125. Assume the monthly percentage change in ADS follows a random walk. The expected monthly percentage growth rate of ADS is 1.2 percent.

Now, use the expected monthly percentage growth rate to forecast total dollar volume. For example, one can use the ADS for January 2010 ($245,357,654,413) to forecast ADS for February 2010 ($248,264,845,054 = $245,357,654,413 × 1.012).[15] Multiply by the number of trading days in February 2010 (19) to obtain a forecast of the total dollar volume for the month ($4,717,032,056,030). Repeat

[8] The amount $84,822,877,437,603 is the baseline estimate of the aggregate dollar amount of sales for fiscal year 2010 calculated by the Commission in its Order Making Fiscal 2010 Annual Adjustments to the Fee Rates Applicable Under Section 6(b) of the Securities Act of 1933 and Sections 13(e), 14(g), 31(b) and 31(c) of the Securities Exchange Act of 1934, Rel. No. 33–9030 (April 30, 2009), 74 FR 21018 (May 6, 2009).

[9] The Financial Industry Regulatory Authority, Inc. ("FINRA") and each exchange are required to file a monthly report on Form R31 containing dollar volume data on sales of securities subject to Section 31. The report is due on the 10th business day following any month in which the exchange or association has covered sales.

[10] Although section 31(j)(2) indicates that the Commission should determine the actual aggregate dollar volume of sales for fiscal 2010 "based on the actual aggregate dollar volume of sales during the first 5 months of such fiscal year," data are only available for the first four months of the fiscal year as of the date the Commission is required to issue this order, *i.e.,* March 1, 2010. Dollar volume data on sales of securities subject to Section 31 for February 2010 will not be available from the exchanges and FINRA for several weeks.

[11] *See* Appendix A.

[12] 15 U.S.C. 78ee(j)(2). The term "fees collected" is not defined in section 31. Because national securities exchanges and national securities associations are not required to pay the first installment of section 31 fees for fiscal 2010 until March 15, the Commission will not "collect" any fees in the first five months of fiscal 2010. *See* 15 U.S.C. 78ee(e). However, the Commission believes that, for purposes of calculating the mid-year adjustment, Congress, by stating in section 31(j)(2) that the "uniform adjusted rate * * * is reasonably likely to produce aggregate fee collections under section 31 * * * that are equal to [$1,161,000,000]," intended the Commission to include the fees that the Commission will collect based on transactions in the six months before the effective date of the mid-year adjustment.

[13] The calculation is as follows: ($1,161,000,000 − $598,633,917 − $18,611)/$33,260,374,276,849 = $0.0000169080. Round this result to the seventh decimal point, yielding a rate of $16.90 per million.

[14] 15 U.S.C. 78ee.

[15] The value 1.012 has been rounded. All computations are done with the unrounded value.

the method to generate forecasts for subsequent months.

The forecasts for total dollar volume are in column G of Table A. The following is a more formal (mathematical) description of the procedure:

1. Divide each month's total dollar volume (column C) by the number of trading days in that month (column B) to obtain the average daily dollar volume (ADS, column D).

2. For each month t, calculate the change in ADS from the previous month as $\Delta_t = \log(ADS_t/ADS_{t-1})$, where log (x) denotes the natural logarithm of x.

3. Calculate the mean and standard deviation of the series $\{\Delta_1, \Delta_2, * * *, \Delta_{120}\}$. These are given by $\mu = 0.004$ and $\sigma = 0.125$, respectively.

4. Assume that the natural logarithm of ADS follows a random walk, so that Δ_s and Δ_t are statistically independent for any two months s and t.

5. Under the assumption that Δ_t is normally distributed, the expected value of ADS_t/ADS_{t-1} is given by $\exp(\mu + \sigma^2/2)$, or on average $ADS_t = 1.012 \times ADS_{t-1}$.

6. For February 2010, this gives a forecast ADS of $1.012 \times \$245,357,654,413 = \$248,264,845,054$. Multiply this figure by the 19 trading days in February 2010 to obtain a total dollar volume forecast of $4,717,032,056,030.

7. For March 2010, multiply the February 2010 ADS forecast by 1.012 to obtain a forecast ADS of $251,206,482,379. Multiply this figure by the 23 trading days in March 2010 to obtain a total dollar volume forecast of $5,777,749,094,716.

8. Repeat this procedure for subsequent months.

B. Using the forecasts from A to calculate the new fee rate

1. Determine the aggregate dollar volume of sales between 10/1/09 and 1/14/10 to be $16,715,256,569,641. Multiply this amount by the fee rate of $25.70 per million dollars in sales during this period and get $429,582,094 in actual fees collected during 10/1/09 and 1/14/10. Determine the actual and projected aggregate dollar volume of sales between 1/15/10 and 3/31/10 to be $13,311,167,182,011. Multiply this amount by the fee rate of $12.70 per million dollars in sales during this period and get an estimate of $169,051,823 in actual and projected fees collected during 1/15/10 and 3/31/10.

2. Estimate the amount of assessments on security futures products collected during 10/1/09 and 9/30/10 to be $18,611 by summing the amounts collected through January 2010 of $5,684 with projections of a 1.2% monthly increase in subsequent months.

3. Determine the projected aggregate dollar volume of sales between 4/1/10 and 9/30/10 to be $33,260,374,276,849.

4. The rate necessary to collect the target $1,161,000,000 in fee revenues is then calculated as: ($1,161,000,000 − $429,582,094 − $169,051,823 − $18,611) ÷ $33,260,374,276,849 = 0.0000169080.

5. Round the result to the seventh decimal point, yielding a rate of 0.0000169000 (or $16.90 per million).

TABLE A—ESTIMATION OF BASELINE OF THE AGGREGATE DOLLAR AMOUNT OF SALES

[Methodology developed in consultation with the Office of Management and Budget and the Congressional Budget Office]

Fee rate calculation

a. Baseline estimate of the aggregate dollar amount of sales, 10/1/09 to 1/14/10 ($Millions)	16,715,257
b. Baseline estimate of the aggregate dollar amount of sales, 1/15/00 to 3/31/10 ($Millions)	13,311,167
c. Baseline estimate of the aggregate dollar amount of sales, 4/1/00 to 9/30/10 ($Millions)	33,260,374
d. Estimated collections in assessmests on security futures products in FY 2010 ($Millions)	0.019
e. Implied fee rate (($1,161,000,000 − 0.0000257 × a − 0.0000127 × b − d)/c)	$16.90

Data

Month	Number of trading days in month	Aggregate dollar amount of sales	Average daily dollar amount of sales (ADS)	Change in LN of ADS	Forecast ADS	Forecast aggregate dollar amount of sales
(A)	(B)	(C)	(D)	(E)	(F)	(G)
Jan–00	20	3,057,831,397,113	152,891,569,856	–		
Feb–00	20	2,973,119,888,063	148,655,994,403	−0.028		
Mar–00	23	4,135,152,366,234	179,789,233,315	0.190		
Apr–00	19	3,174,694,525,687	167,099,185,562	−0.073		
May–00	22	2,649,273,207,318	120,421,509,424	−0.328		
Jun–00	22	2,883,513,997,781	131,068,818,081	0.085		
Jul–00	20	2,804,753,395,361	140,237,669,768	0.068		
Aug–00	23	2,720,788,395,832	118,295,147,645	−0.170		
Sep–00	20	2,930,188,809,012	146,509,440,451	0.214		
Oct–00	22	3,485,926,307,727	158,451,195,806	0.078		
Nov–00	21	2,795,778,876,887	133,132,327,471	−0.174		
Dec–00	20	2,809,917,349,851	140,495,867,493	0.054		
Jan–01	21	3,143,501,125,244	149,690,529,774	0.063		
Feb–01	19	2,372,420,523,286	124,864,238,068	−0.181		
Mar–01	22	2,554,419,085,113	116,109,958,414	−0.073		
Apr–01	20	2,324,349,507,745	116,217,475,387	0.001		
May–01	22	2,353,179,388,303	106,962,699,468	−0.083		
Jun–01	21	2,111,922,113,236	100,567,719,678	−0.062		
Jul–01	21	2,004,384,034,554	95,446,858,788	−0.052		
Aug–01	23	1,803,565,337,795	78,415,884,252	−0.197		
Sep–01	15	1,573,484,946,383	104,898,996,426	0.291		
Oct–01	23	2,147,238,873,044	93,358,211,871	−0.117		
Nov–01	21	1,939,427,217,518	92,353,677,025	−0.011		
Dec–01	20	1,921,098,738,113	96,054,936,906	0.039		
Jan–02	21	2,149,243,312,432	102,344,919,640	0.063		
Feb–02	19	1,928,830,595,585	101,517,399,768	−0.008		
Mar–02	20	2,002,216,374,514	100,110,818,726	−0.014		
Apr–02	22	2,062,101,866,506	93,731,903,023	−0.066		
May–02	22	1,985,859,756,557	90,266,352,571	−0.038		
Jun–02	20	1,882,185,380,609	94,109,269,030	0.042		
Jul–02	22	2,349,564,490,189	106,798,385,918	0.126		

Month	Number of trading days in month	Aggregate dollar amount of sales	Average daily dollar amount of sales (ADS)	Change in LN of ADS	Forecast ADS	Forecast aggregate dollar amount of sales
(A)	(B)	(C)	(D)	(E)	(F)	(G)
Aug–02	22	1,793,429,904,079	81,519,541,095	−0.270		
Sep–02	20	1,518,944,367,204	75,947,218,360	−0.071		
Oct–02	23	2,127,874,947,972	92,516,302,086	0.197		
Nov–02	20	1,780,816,458,122	89,040,822,906	−0.038		
Dec–02	21	1,561,092,215,646	74,337,724,555	−0.180		
Jan–03	21	1,723,698,830,414	82,080,896,686	0.099		
Feb–03	19	1,411,722,405,357	74,301,179,229	−0.180		
Mar–03	21	1,699,581,267,718	80,932,441,320	0.085		
Apr–03	21	1,759,751,025,279	83,797,667,870	0.035		
May–03	21	1,871,390,985,678	89,113,856,461	0.062		
Jun–03	21	2,122,225,077,345	101,058,337,016	0.126		
Jul–03	22	2,100,812,973,956	95,491,498,816	−0.057		
Aug–03	21	1,766,527,686,224	84,120,366,011	−0.127		
Sep–03	21	2,063,584,421,939	98,265,924,854	0.155		
Oct–03	23	2,331,850,083,022	101,384,786,218	0.031		
Nov–03	19	1,903,726,129,859	100,196,112,098	−0.012		
Dec–03	22	2,066,530,151,383	93,933,188,699	−0.065		
Jan–04	20	2,390,942,905,678	119,547,145,284	0.241		
Feb–04	19	2,177,765,594,701	114,619,241,826	−0.042		
Mar–04	23	2,613,809,754,550	113,643,858,893	−0.009		
Apr–04	21	2,418,663,760,191	115,174,464,771	0.013		
May–04	20	2,259,243,404,459	112,962,170,223	−0.019		
Jun–04	21	2,112,826,072,876	100,610,765,375	−0.116		
Jul–04	21	2,209,808,376,565	105,228,970,313	0.045		
Aug–04	22	2,033,343,354,640	92,424,697,938	−0.130		
Sep–04	21	1,993,803,487,749	94,943,023,226	0.027		
Oct–04	21	2,414,599,088,108	114,980,908,958	0.191		
Nov–04	21	2,577,513,374,160	122,738,732,103	0.065		
Dec–04	22	2,673,532,981,863	121,524,226,448	−0.010		
Jan–05	20	2,581,847,200,448	129,092,360,022	0.060		
Feb–05	19	2,532,202,408,589	133,273,810,978	0.032		
Mar–05	22	3,030,474,897,226	137,748,858,965	0.033		
Apr–05	21	2,906,386,944,434	138,399,378,306	0.005		
May–05	21	2,697,414,503,460	128,448,309,689	−0.075		
Jun–05	22	2,825,962,273,624	128,452,830,619	0.000		
Jul–05	20	2,604,021,263,875	130,201,063,194	0.014		
Aug–05	23	2,846,115,585,965	123,744,155,912	−0.051		
Sep–05	21	3,009,640,645,370	143,316,221,208	0.147		
Oct–05	21	3,279,847,331,057	156,183,206,241	0.086		
Nov–05	21	3,163,453,821,548	150,640,658,169	−0.036		
Dec–05	21	3,090,212,715,561	147,152,986,455	−0.023		
Jan–06	20	3,573,372,724,766	178,668,636,238	0.194		
Feb–06	19	3,314,259,849,456	174,434,728,919	−0.024		
Mar–06	23	3,807,974,821,564	165,564,122,677	−0.052		
Apr–06	19	3,257,478,138,851	171,446,217,834	0.035		
May–06	22	4,206,447,844,451	191,202,174,748	0.109		
Jun–06	22	3,995,113,357,316	181,596,061,696	−0.052		
Jul–06	20	3,339,658,009,357	166,982,900,468	−0.084		
Aug–06	23	3,410,187,280,845	148,269,012,211	−0.119		
Sep–06	20	3,407,409,863,673	170,370,493,184	0.139		
Oct–06	22	3,980,070,216,912	180,912,282,587	0.060		
Nov–06	21	3,933,474,986,969	187,308,332,713	0.035		
Dec–06	20	3,715,146,848,695	185,757,342,435	−0.008		
Jan–07	20	4,263,986,570,973	213,199,328,549	0.138		
Feb–07	19	3,946,799,860,532	207,726,308,449	−0.026		
Mar–07	22	5,245,051,744,090	238,411,442,913	0.138		
Apr–07	20	4,274,665,072,437	213,733,253,622	−0.109		
May–07	22	5,172,568,357,522	235,116,743,524	0.095		
Jun–07	21	5,586,337,010,802	266,016,048,133	0.123		
Jul–07	21	5,938,330,480,139	282,777,641,911	0.061		
Aug–07	23	7,713,644,229,032	335,375,836,045	0.171		
Sep–07	19	4,805,676,596,099	252,930,347,163	−0.282		
Oct–07	23	6,499,651,716,225	282,593,552,879	0.111		
Nov–07	21	7,176,290,763,989	341,728,131,619	0.190		
Dec–07	20	5,512,903,594,564	275,645,179,728	−0.215		
Jan–08	21	7,997,242,071,529	380,821,051,025	0.323		
Feb–08	20	6,139,080,448,887	306,954,022,444	−0.216		
Mar–08	20	6,767,852,332,381	338,392,616,619	0.098		
Apr–08	22	6,150,017,772,735	279,546,262,397	−0.191		
May–08	21	6,080,169,766,807	289,531,893,657	0.035		

Month	Number of trading days in month	Aggregate dollar amount of sales	Average daily dollar amount of sales (ADS)	Change in LN of ADS	Forecast ADS	Forecast aggregate dollar amount of sales
(A)	(B)	(C)	(D)	(E)	(F)	(G)
Jun–08	21	6,962,199,302,412	331,533,300,115	0.135		
Jul–08	22	8,104,256,787,805	368,375,308,537	0.105		
Aug–08	21	6,106,057,711,009	290,764,652,905	−0.237		
Sep–08	21	8,156,991,919,103	388,428,186,624	0.290		
Oct–08	23	8,644,538,213,244	375,849,487,532	−0.033		
Nov–08	19	5,727,998,341,833	301,473,596,939	−0.221		
Dec–08	22	5,176,041,317,640	235,274,605,347	−0.248		
Jan–09	20	4,670,249,433,806	233,512,471,690	−0.008		
Feb–09	19	4,771,470,184,048	251,130,009,687	0.073		
Mar–09	22	5,885,594,284,780	267,527,012,945	0.063		
Apr–09	21	5,123,665,205,517	243,984,057,406	−0.092		
May–09	20	5,086,717,129,965	254,335,856,498	0.042		
Jun–09	22	5,271,742,782,609	239,624,671,937	−0.060		
Jul–09	22	4,659,599,245,583	211,799,965,708	−0.123		
Aug–09	21	4,582,102,295,783	218,195,347,418	0.030		
Sep–09	21	4,929,211,335,509	234,724,349,310	0.073		
Oct–09	22	5,410,071,946,836	245,912,361,220	0.047		
Nov–09	20	4,770,994,671,867	238,549,733,593	−0.030		
Dec–09	22	4,688,780,548,360	213,126,388,562	−0.113		
Jan–10	19	4,661,795,433,843	245,357,654,413	0.141		
Feb–10	19				248,264,845,054	4,717,032,056,030
Mar–10	23				251,206,482,379	5,777,749,094,716
Apr–10	21				254,182,974,538	5,337,842,465,308
May–10	20				257,194,734,520	5,143,894,690,405
Jun–10	22				260,242,180,205	5,725,327,964,515
Jul–10	21				263,325,734,426	5,529,840,422,940
Aug–10	22				266,445,825,024	5,861,808,150,526
Sep–10	21				269,602,884,912	5,661,660,583,153

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SECURITIES AND EXCHANGE COMMISSION

[Release No. PA–41; File No. S7–05–10]

Privacy Act of 1974: Systems of Records

AGENCY: Securities and Exchange Commission.

ACTION: Notice of revised system of records.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, as amended, 5 U.S.C. 552a, the Securities and Exchange Commission ("Commission" or "SEC") proposes to revise a Privacy Act system of records: "Mailing, Contact and Other Lists (SEC–56)", originally published in the **Federal Register** Volume 74, Number 139 on Wednesday, July 22, 2009.

DATES: The proposed changes will become effective April 13, 2010 unless further notice is given. The Commission will publish a new notice if the effective date is delayed to review comments or if changes are made based on comments received. To be assured of consideration, comments should be received on or before April 5, 2010.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/other.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number S7–05–10 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 S7–05–10. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/other.shtml*). Comments are available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Barbara A. Stance, Chief Privacy Officer, Office of Information Technology, 202–551–7209.

SUPPLEMENTARY INFORMATION: The Commission proposes to revise a system of records: "Mailing, Contact and Other Lists (SEC–56)". As described in the original notice, the system contains records related to individuals and employees who submit requests for information, subscriptions, inquiries, guidance, informal advice and other assistance to the SEC, and records related to individuals who register for SEC-related activities and events. This notice is published to revise the system of records to add the following new routine use: "To individuals who register for SEC-sponsored seminars, training programs or compliance meetings, such as the CCOutreach Program."

The Commission has submitted a report of the revised system of records to the appropriate Congressional committees and to the Director of the Office of Management and Budget ("OMB") as required by 5 U.S.C. 552a(r) (Privacy Act of 1974) and guidelines

issued by OMB on December 12, 2000 (65 FR 77677).

Accordingly, the Commission is revising the system of records to read as follows:

SEC–56

SYSTEM NAME:

Mailing, Contact and Other Lists.

SYSTEM LOCATION:

Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549. Records are also maintained in the SEC Regional Offices.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Records contain information related to individuals and employees who submit requests for information, subscriptions, inquiries, guidance, informal advice and other assistance to the SEC in any format, including but not limited to paper, telephone, and electronic submissions; SEC personnel assigned to handle such correspondence; individuals who have registered for SEC events, such as seminars, training programs or compliance meetings; and individuals who have responded to questionnaires, request forms and feedback forms.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records may contain information relating to but not limited to name, title, affiliation, mailing address, telephone number, cell phone number, fax number, e-mail address, business affiliation, other contact and related supporting information provided to the Commission by individuals or derived from other sources covered by this system of records and not currently covered under an existing SORN.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

15 U.S.C. 77a *et seq.*, 78a *et seq.*, 80a–1 *et seq.*, and 80b–1 *et seq.*

PURPOSE(S):

1. To track and process complaints/inquiries/requests/comments and communications from members of the public, including industry representatives, counsel, and others.

2. To handle subscription requests for informational literature, reports, and other SEC materials, via individual, mass, and targeted mailing in the furtherance of SEC activities.

3. To process registration to SEC-related activities and events, and allow the sharing of personal contact information of registrants who consent to the sharing of their personal information at the time of registration.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the Commission as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

1. When (1) it is suspected or confirmed that the security or confidentiality of information in the system of records has been compromised; (2) the SEC has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the SEC or another agency or entity) that rely upon the compromised information; and (3) the disclosure is made to such agencies, entities, and persons who are reasonably necessary to assist in connection with the SEC's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

2. Where there is an indication of a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule or order issued pursuant thereto, the relevant records in the system of records may be referred, as a routine use, to the appropriate agency, whether federal, state, local, foreign or a securities self-regulatory organization charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation or order issued pursuant thereto.

3. Records in this system may, in the discretion of the Commission's staff, be disclosed to any person during the course of any inquiry or investigation conducted by the Commission staff, or in connection with civil litigation, if the staff has reason to believe that the person to whom the record is disclosed may have further information about the matters related therein, and those matters appeared to be relevant at the time to the subject matter of the inquiry.

4. A record or information in this system may be disclosed to any person with whom the Commission contracts to reproduce, by typing, photocopy or other means, any record within this system for use by the Commission and its staff in connection with their official duties or to any person who is utilized by the Commission to perform clerical or stenographic functions relating to the official business of the Commission.

5. Records or information in records contained in this system may be disclosed to members of advisory committees that are created by the Commission or by Congress to render advice and recommendations to the Commission or to Congress, to be used solely in connection with their official, designated functions.

6. Disclosure may be made to a Congressional office from the record of an individual in response to an inquiry from the Congressional office made at the request of that individual.

7. To interns, grantees, experts and contractors who have been engaged by the Commission to assist in the performance of a service related to this system of records and who need access to the records for the purpose of assisting the Commission in the efficient administration of its programs. Recipients of these records shall be required to comply with the requirements of the Privacy Act of 1974, as amended, 5 U.S.C. 552a.

8. To individuals who register for SEC-sponsored seminars, training programs or compliance meetings, such as the CCOutreach Program.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained in electronic format, paper form, magnetic disk and tape. Electronic records are stored in computerized databases. Paper, magnetic disk or tape records are stored in locked file rooms or file cabinets.

RETRIEVABILITY:

Records may be retrieved by any of the following: E-mail address, name, or an assigned file number for the purpose of responding to the requestor. Information may additionally be retrieved by other personal identifiers.

SAFEGUARDS:

Records are safeguarded in a secured environment. Buildings where records are stored have security cameras and 24 hour security guard service. The records are kept in limited access areas during duty hours and in locked file cabinets and/or locked offices or file rooms at all other times. Access is limited to those personnel whose official duties require access. Computerized records are safeguarded through use of access codes and information technology security. Contractors and other recipients providing services to the Commission are contractually obligated to maintain equivalent safeguards.

RETENTION AND DISPOSAL:

These records will be maintained until they become inactive, at which time they will be retired or destroyed in accordance with records schedules of the United States Securities and Exchange Commission and as approved by the National Archives and Records Administration.

SYSTEM MANAGER(S) AND ADDRESS:

FOR SEC HEADQUARTERS

U. S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549. Components: Office of the Chairman and Commissioners, Division of Corporation Finance, Division of Trading and Markets, Division of Investment Management, Division of Enforcement, Office of the General Counsel, Office of the Chief Accountant, Office of Economic Analysis, Office of Compliance Inspections and Examinations, Office of International Affairs, Office of Investor Education and Advocacy, Office of Information Technology, Office of the Executive Director, Office of Human Resources, Office of Financial Management, Office of Administrative Services, Office of Risk Assessment, Office of the Inspector General, Office of Legislative and Intergovernmental Affairs, Office of Public Affairs, Office of the Secretary, Office of Equal Employment Opportunity, and Office of Administrative Law Judges.

FOR REGIONAL OFFICES

New York Regional Office, Regional Director, 3 World Financial Center, Suite 400, New York, NY 10281–1022; Boston Regional Office, Regional Director, 33 Arch Street, 23rd Floor, Boston, MA 02110–1424; Philadelphia Regional Office, Regional Director, The Mellon Independence Center, 701 Market Street, Suite 2000, Philadelphia, PA 19106–1532; Miami Regional Office, Regional Director, 801 Brickell Avenue, Suite 1800, Miami, FL 33131–4901, Atlanta Regional Office, Regional Director, 3475 Lenox Road, NE, Suite 1000, Atlanta, GA 30326–1232; Chicago Regional Office, Regional Director, 175 West Jackson Boulevard, Suite 900, Chicago, IL 60604–2908; Denver Regional Office, Regional Director, 1801 California Street, Suite 1500, Denver, CO 80202–2656; Fort Worth Regional Office, Regional Director, Burnett Plaza, Suite 1900, 801 Cherry Street, Unit #18, Fort Worth, TX 76102–6882; Salt Lake Regional Office, Regional Director, 15 West South Temple Street, Suite 1800, Salt Lake City, UT 84101–1573; Los Angeles Regional Office, Regional Director, 5670 Wilshire Boulevard, 11th Floor, Los Angeles, CA 90036–3648; San Francisco Regional Office, Regional Director, 44 Montgomery Street, Suite 2600, San Francisco, CA 94104–4716.

NOTIFICATION PROCEDURE:

All requests to determine whether this system of records contains a record pertaining to the requesting individual may be directed to the FOIA/PA Officer, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–5100.

RECORD ACCESS PROCEDURES:

Persons wishing to obtain information on the procedures for gaining access to or contesting the contents of these records may contact the FOIA/PA Officer, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–5100.

CONTESTING RECORD PROCEDURES:

See Record Access Procedures above.

RECORD SOURCE CATEGORIES:

The information is supplied by the individual and/or company making the request; or the individual who has registered for an SEC-related event such as a seminar, training program or compliance meeting. Data may also be added pertaining to the fulfillment of the request. Information may also be obtained from other SEC records systems.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Dated: February 25, 2010.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–4529 Filed 3–3–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61588; File No. 4–551]

Program for Allocation of Regulatory Responsibilities Pursuant to Rule 17d–2; Notice of Filing and Order Approving and Declaring Effective an Amendment to the Plan for the Allocation of Regulatory Responsibilities Among the NYSE Amex LLC, BATS Exchange, Inc., C2 Options Exchange, Incorporated, the Chicago Board Options Exchange, Incorporated, the International Securities Exchange, LLC, Financial Industry Regulatory Authority, Inc., the NYSE Arca, Inc., The NASDAQ Stock Market LLC, NASDAQ OMX BX, Inc., and NASDAQ OMX PHLX, Inc. Concerning Options-Related Market Surveillance

February 25, 2010.

Notice is hereby given that the Securities and Exchange Commission ("Commission") has issued an Order, pursuant to Section 17(d) of the Securities Exchange Act of 1934 ("Act"),[1] approving and declaring effective an amendment to the plan for allocating regulatory responsibility ("Plan") filed pursuant to Rule 17d–2 of the Act,[2] by the NYSE Amex LLC ("Amex"), BATS Exchange, Inc. ("BATS"), C2 Options Exchange, Incorporated ("C2"), the Chicago Board Options Exchange, Incorporated ("CBOE"), the International Securities Exchange LLC ("ISE"), Financial Industry Regulatory Authority, Inc. ("FINRA"), NYSE Arca, Inc. ("Arca"), The NASDAQ Stock Market LLC ("NASDAQ"), NASDAQ OMX BX, Inc. ("BX") and NASDAQ OMX PHLX, Inc. ("Phlx") (collectively, "SRO participants").

I. Introduction

Section 19(g)(1) of the Act,[3] among other things, requires every self-regulatory organization ("SRO") registered as either a national securities exchange or national securities association to examine for, and enforce compliance by, its members and persons associated with its members with the Act, the rules and regulations thereunder, and the SRO's own rules, unless the SRO is relieved of this responsibility pursuant to Section 17(d)[4] or Section 19(g)(2)[5] of the Act. Without this relief, the statutory

[1] 15 U.S.C. 78q(d).

[2] 17 CFR 240.17d–2.

[3] 15 U.S.C. 78s(g)(1).

[4] 15 U.S.C. 78q(d).

[5] 15 U.S.C. 78s(g)(2).

obligation of each individual SRO could result in a pattern of multiple examinations of broker-dealers that maintain memberships in more than one SRO ("common members"). Such regulatory duplication would add unnecessary expenses for common members and their SROs.

Section 17(d)(1) of the Act[6] was intended, in part, to eliminate unnecessary multiple examinations and regulatory duplication.[7] With respect to a common member, Section 17(d)(1) authorizes the Commission, by rule or order, to relieve an SRO of the responsibility to receive regulatory reports, to examine for and enforce compliance with applicable statutes, rules, and regulations, or to perform other specified regulatory functions.

To implement Section 17(d)(1), the Commission adopted two rules: Rule 17d–1 and Rule 17d–2 under the Act.[8] Rule 17d–1 authorizes the Commission to name a single SRO as the designated examining authority ("DEA") to examine common members for compliance with the financial responsibility requirements imposed by the Act, or by Commission or SRO rules.[9] When an SRO has been named as a common member's DEA, all other SROs to which the common member belongs are relieved of the responsibility to examine the firm for compliance with the applicable financial responsibility rules. On its face, Rule 17d–1 deals only with an SRO's obligations to enforce member compliance with financial responsibility requirements. Rule 17d–1 does not relieve an SRO from its obligation to examine a common member for compliance with its own rules and provisions of the Federal securities laws governing matters other than financial responsibility, including sales practices and trading activities and practices.

To address regulatory duplication in these and other areas, the Commission adopted Rule 17d–2 under the Act.[10] Rule 17d–2 permits SROs to propose joint plans for the allocation of regulatory responsibilities with respect to their common members. Under paragraph (c) of Rule 17d–2, the Commission may declare such a plan effective if, after providing for notice and comment, it determines that the plan is necessary or appropriate in the public interest and for the protection of investors, to foster cooperation and coordination among the SROs, to remove impediments to, and foster the development of, a national market system and a national clearance and settlement system, and is in conformity with the factors set forth in Section 17(d) of the Act. Commission approval of a plan filed pursuant to Rule 17d–2 relieves an SRO of those regulatory responsibilities allocated by the plan to another SRO.

II. The Plan

On December 11, 2007, the Commission declared effective the SRO participants' Plan for allocating regulatory responsibilities pursuant to Rule 17d–2.[11] On April 11, 2008, the Commission approved an amendment to the Plan to include NASDAQ as a participant.[12] On October 9, 2008, the Commission approved an amendment to the Plan to clarify that the term Regulatory Responsibility for options position limits includes examination responsibilities for the delta hedging exemption.[13] The Plan is designed to reduce regulatory duplication for common members by allocating regulatory responsibility for certain options-related market surveillance matters among the SRO Participants.[14] Generally, under the current Plan, an SRO Participant will serve as the Designated Options Surveillance Regulator ("DOSR") for each common member assigned to it and will assume regulatory responsibility with respect to that common member's compliance with applicable common rules for certain accounts. When an SRO has been named as a common member's DOSR, all other SROs to which the common member belongs will be relieved of regulatory responsibility for that common member, pursuant to the terms of the Plan, with respect to the applicable common rules specified in Exhibit A to the Plan.

III. Proposed Amendment to the Plan

On February 4, 2010, the parties submitted a proposed amendment to the Plan. The primary purpose of the amendment is to add BATS Exchange, Inc. and C2 Options Exchange, Incorporated as SRO participants and to reflect the name changes of the American Stock Exchange LLC to the NYSE Amex LLC, and the Boston Stock Exchange, Inc. to the NASDAQ OMX BX, Inc. The amended agreement replaces the previous agreement in its entirety. The text of the proposed amended 17d–2 plan is as follows (additions are *italicized;* deletions are [bracketed]):

* * * * *

AGREEMENT BY AND AMONG *NYSE AMEX LLC* [THE AMERICAN STOCK EXCHANGE], *BATS EXCHANGE, INC., NASDAQ OMX BX, INC.* [THE BOSTON STOCK EXCHANGE], *C2 OPTIONS EXCHANGE, INCORPORATED,* THE CHICAGO BOARD OPTIONS EXCHANGE, INCORPORATED, THE INTERNATIONAL SECURITES EXCHANGE LLC, FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC, NYSE ARCA, INC., THE NASDAQ STOCK MARKET LLC, AND NASDAQ OMX PHLX, INC., PURSUANT TO RULE 17D–2 UNDER THE SECURITIES EXCHANGE ACT OF 1934

This agreement (this "Agreement"), by and among the *NYSE Amex LLC* [American Stock Exchange] ("Amex"), *BATS Exchange, Inc., ("BATS"),* the [Boston Stock Exchange, Inc. ("BSE")] *C2 Options Exchange, Incorporated ("C2"),* the Chicago Board Options Exchange, Incorporated ("CBOE"), the International Securities Exchange LLC ("ISE"), Financial Industry Regulatory Authority, Inc. ("FINRA"), NYSE Arca, Inc. ("Arca"), The NASDAQ Stock Market LLC ("Nasdaq"), *the NASDAQ OMX BX, Inc. ("BX")* and the NASDAQ OMX PHLX, Inc. ("PHLX"), is made this 10th day of October 2007, and as amended the 31st day of March 2008, *the* 1st day of October 2008, *and this 3rd day of February 2010* pursuant to Section 17(d) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and Rule 17d–2 thereunder ("Rule 17d–2"), which allows for a joint plan among self-regulatory organizations ("SROs") to allocate regulatory obligations with respect to brokers or dealers that are members of two or more of the parties to this Agreement ("Common Members"). The Amex, *BATS, C2,* [BSE,] CBOE, ISE, FINRA,

[6] 15 U.S.C. 78q(d)(1).

[7] *See* Securities Act Amendments of 1975, Report of the Senate Committee on Banking, Housing, and Urban Affairs to Accompany S. 249, S. Rep. No. 94–75, 94th Cong., 1st Session 32 (1975).

[8] 17 CFR 240.17d–1 and 17 CFR 240.17d–2, respectively.

[9] *See* Securities Exchange Act Release No. 12352 (April 20, 1976), 41 FR 18808 (May 7, 1976).

[10] *See* Securities Exchange Act Release No. 12935 (October 28, 1976), 41 FR 49091 (November 8, 1976).

[11] *See* Securities Exchange Act Release No. 56941 (December 11, 2007), 72 FR 71723 (December 18, 2007) (File No. 4–551).

[12] *See* Securities Exchange Act Release No. 57649 (April 11, 2008), 73 FR 20976 (April 17, 2008) (File No. 4–551).

[13] *See* Securities Exchange Act Release No. 58765 (October 9, 2008), 73 FR 62344 (October 20, 2008) (File No. 4–551).

[14] The Plan is wholly separate from the multiparty options agreement made pursuant to Rule 17d–2 by and among Amex, BSE, CBOE, ISE, FINRA, New York Stock Exchange LLC, NASDAQ, NYSE Arca, and Phlx involving the allocation of regulatory responsibilities with respect to common members for options-related sales practice matters relating to the conduct of broker-dealers of accounts for listed options or index warrants. *See* Securities Exchange Act Release Nos. 57987 (June 18, 2008), 73 FR 36156 (June 25, 2008) (File No. S7–966).

Arca, Nasdaq, *BX,* and PHLX are collectively referred to herein as the "Participants" and individually, each a "Participant." This Agreement shall be administered by a committee known as the Options Surveillance Group (the "OSG" or "Group"), as described in Section V hereof. Unless defined in this Agreement or the context otherwise requires, the terms used herein shall have the meanings assigned thereto by the Exchange Act and the rules and regulations thereunder.

Whereas, the Participants desire to eliminate regulatory duplication with respect to SRO market surveillance of Common Member [1] activities with regard to certain common rules relating to listed options ("Options"); and

Whereas, for this purpose, the Participants desire to execute and file this Agreement with the Securities and Exchange Commission (the "SEC" or "Commission") pursuant to Rule 17d–2.

Now, therefore, in consideration of the mutual covenants contained in this Agreement, the Participants agree as follows:

I. Except as otherwise provided in this Agreement, each Participant shall assume Regulatory Responsibility (as defined below) for the Common Members that are allocated or assigned to such Participant in accordance with the terms of this Agreement and shall be relieved of its Regulatory Responsibility as to the remaining Common Members. For purposes of this Agreement, a Participant shall be considered to be the Designated Options Surveillance Regulator ("DOSR") for each Common Member that is allocated to it in accordance with Section VII.

II. As used in this Agreement, the term "Regulatory Responsibility" shall mean surveillance, investigation and enforcement responsibilities relating to compliance by the Common Members with such Options rules of the Participants as the Participants shall determine are substantially similar and shall approve from time to time, insofar as such rules relate to market surveillance (collectively, the "Common Rules"). For the purposes of this Agreement the list of Common Rules is attached as Exhibit A hereto, which may only be amended upon unanimous written agreement by the Participants. The DOSR assigned to each Common Member shall assume Regulatory Responsibility with regard to that Common Member's compliance with the applicable Common Rules for certain accounts.[2] A DOSR may perform its Regulatory Responsibility or enter an agreement to transfer or assign such responsibilities to a national securities exchange registered with the SEC under Section 6(a) of the Exchange Act or a national securities association registered with the SEC under Section 15A of the Exchange Act. A DOSR may not transfer or assign its Regulatory Responsibility to an association registered for the limited purpose of regulating the activities of members who are registered as brokers or dealers in security futures products.

The term "Regulatory Responsibility" does not include, and each Participant shall retain full responsibility with respect to:

(a) Surveillance, investigative and enforcement responsibilities other than those included in the definition of Regulatory Responsibility;

(b) Any aspects of the rules of a Participant that are not substantially similar to the Common Rules or that are allocated for a separate surveillance purpose under any other agreement made pursuant to Rule 17d–2. Any such aspects of a Common Rule will be noted as excluded on Exhibit A.

With respect to options position limits, the term Regulatory Responsibility shall include examination responsibilities for the delta hedging exemption. Specifically, the Participants intend that FINRA will conduct examinations for delta hedging for all Common Members that are members of FINRA notwithstanding the fact that FINRA's position limit rule is, in some cases, limited to only firms that are not members of an options exchange (*i.e.,* access members). In such cases, FINRA's examinations for delta hedging options position limit violations will be for the identical or substantively similar position limit rule(s) of the other Participant(s). Examinations for delta hedging for Common Members that are non-FINRA members will be conducted by the same Participant conducting position limit surveillance. The allocation of Common Members to DOSRs for surveillance of compliance with options position limits and other agreed to Common Rules is provided in Exhibit B. The allocation of Common Members to DOSRs for examinations of the delta hedging exemption under the options position limits rules is provided in Exhibit C.

III. Each year within 30 days of the anniversary date of the commencement of operation of this Agreement, or more frequently if required by changes in the rules of a Participant, each Participant shall submit to the other Participants, through the Chair of the OSG, an updated list of Common Rules for review. This updated list may add Common Rules to Exhibit A, shall delete from Exhibit A rules of that Participant that are no longer identical or substantially similar to the Common Rules, and shall confirm that the remaining rules of the Participant included on Exhibit A continue to be identically or substantially similar to the Common Rules. Within 30 days from the date that each Participant has received revisions to Exhibit A from the Chair of the OSG, each Participant shall confirm in writing to the Chair of the OSG whether that Participant's rules listed in Exhibit A are Common Rules.

IV. Apparent violation of another Participant's rules discovered by a DOSR, but which rules are not within the scope of the discovering DOSR's Regulatory Responsibility, shall be referred to the relevant Participant for such action as is deemed appropriate by that Participant.

Notwithstanding the foregoing, nothing contained herein shall preclude a DOSR in its discretion from requesting that another Participant conduct an investigative or enforcement proceeding ("Proceeding") on a matter for which the requesting DOSR has Regulatory Responsibility. If such other Participant agrees, the Regulatory Responsibility in such case shall be deemed transferred to the accepting Participant and confirmed in writing by the Participants involved. Additionally, nothing in this Agreement shall prevent another Participant on whose market potential violative activity took place from conducting its own Proceeding on a matter. The Participant conducting the Proceeding shall advise the assigned DOSR. Each Participant agrees, upon request, to make available promptly all relevant files, records and/or witnesses necessary to assist another Participant in a Proceeding.

V. The OSG shall be composed of one representative designated by each of the Participants (a "Representative"). Each Participant shall also designate one or more persons as its alternate representative(s) (an "Alternate Representative"). In the absence of the Representative, the Alternate Representative shall assume the powers, duties and responsibilities of the Representative. Each Participant may at any time replace its Representative and/or its Alternate Representative to the

[1] In the case of [the BSE]*BX,* members are those persons who are Options Participants (as defined in the Boston Options Exchange LLC Rules).

[2] Certain accounts shall include customer ("C" as classified by the Options Clearing Corporation ("OCC")) and firm ("F" as classified by OCC) accounts, as well as other accounts, such as market maker accounts as the Participants shall, from time to time, identify as appropriate to review.

Group.[3] A majority of the OSG shall constitute a quorum and, unless otherwise required, the affirmative vote of a majority of the Representatives present (in person, by telephone or by written consent) shall be necessary to constitute action by the Group.

The Group will have a Chair, Vice Chair and Secretary. A different Participant will assume each position on a rotating basis for a one-year term. In the event that a Participant replaces a Representative who is acting as Chair, Vice Chair or Secretary, the newly appointed Representative shall assume the position of Chair, Vice Chair, or Secretary (as applicable) vacated by the Participant's former Representative. In the event a Participant cannot fulfill its duties as Chair, the Participant serving as Vice Chair shall substitute for the Chair and complete the subject unfulfilled term. All notices and other communications for the OSG are to be sent in care of the Chair and, as appropriate, to each Representative.

VI. The OSG shall determine the times and locations of Group meetings, provided that the Chair, acting alone, may also call a meeting of the Group in the event the Chair determines that there is good cause to do so. To the extent reasonably possible, notice of any meeting shall be given at least ten business days prior to the meeting date. Representatives shall always be given the option of participating in any meeting telephonically at their own expense rather than in person.

VII. No less frequently than every two years, in such manner as the Group deems appropriate, the OSG shall allocate Common Members that conduct an Options business among the Participants ("Allocation"), and the Participant to which a Common Member is allocated will serve as the DOSR for that Common Member. Any Allocation shall be based on the following principles, except to the extent all affected Participants consent to one or more different principles:

(a) The OSG may not allocate a Common Member to a Participant unless the Common Member is a member of that Participant.

(b) To the extent practicable, Common Members that conduct an Options business shall be allocated among the Participants of which they are members in such manner as to equalize as nearly as possible the allocation among such Participants, provided that no Common Members shall be allocated to FINRA. For example, if sixteen Common Members that conduct an Options business are members only of three Participants, none of which is FINRA, those Common Members shall be allocated among the three Participants such that no Participant is allocated more than six such members and no Participant is allocated less than five such members. If, in the previous example, one of the three Participants is FINRA, the sixteen Common Members would be allocated evenly between the remaining Participants, so that the two non-FINRA Participants would be allocated eight Common Members each.

(c) To the extent practicable, Allocation shall take into account the amount of Options activity conducted by each Common Member in order to most evenly divide the Common Members with the largest amount of activity among the Participants of which they are members. Allocation will also take into account similar allocations pursuant to other plans or agreements to which the Common Members are party to maintain consistency in oversight of the Common Members.[4]

(d) To the extent practicable, Allocation of Common Members to Participants will be rotated among the applicable Participants such that a Common Member shall not be allocated to a Participant to which that Common Member was allocated within the previous two years. The assignment of DOSRs pursuant to the Allocation is attached as Exhibit B hereto, and will be updated from time to time to reflect Common Member Allocation changes.

(e) The Group may reallocate Common Members from time-to-time, as it deems appropriate.

(f) Whenever a Common Member ceases to be a member of its DOSR, the DOSR shall promptly inform the Group, which shall review the matter and allocate the Common Member to another Participant.

(g) A DOSR may request that a Common Member to which it is assigned be reallocated to another Participant by giving 30 days written notice to the Chair of the OSG. The Group, in its discretion, may approve such request and reallocate the Common Member to another Participant.

(h) All determinations by the Group with respect to Allocation shall be made by the affirmative vote of a majority of the Participants that, at the time of such determination, share the applicable Common Member being allocated; a Participant shall not be entitled to vote on any Allocation relating to a Common Member unless the Common Member is a member of such Participant.

VIII. Each DOSR shall conduct routine surveillance reviews to detect violations of the applicable Common Rules by each Common Member allocated to it with a frequency (daily, weekly, monthly, quarterly, semi-annually or annually as noted on Exhibit A) not less than that determined by the Group. The other Participants agree that, upon request, relevant information in their respective files relative to a Common Member will be made available to the applicable DOSR. In addition, each Participant shall provide, to the extent not otherwise already provided, information pertaining to its surveillance program that would be relevant to FINRA or the Participant(s) conducting routine examinations for the delta hedging exemption.

At each meeting of the OSG, each Participant shall be prepared to report on the status of its surveillance program for the previous quarter and any period prior thereto that has not previously been reported to the Group. In the event a DOSR believes it will not be able to complete its Regulatory Responsibility for its allocated Common Members, it will so advise the Group in writing promptly. The Group will undertake to remedy this situation by reallocating the subject Common Members among the remaining Participants. In such instance, the Group may determine to impose a regulatory fee for services provided to the DOSR that was unable to fulfill its Regulatory Responsibility.

IX. Each Participant will, upon request, promptly furnish a copy of the report or applicable portions thereof relating to any investigation made pursuant to the provisions of this Agreement to each other Participant of which the Common Member under investigation is a member.

X. Each Participant will routinely populate a common database, to be accessed by the Group relating to any formal regulatory action taken during the course of a Proceeding with respect to the Common Rules concerning a Common Member.

XI. Any written notice required or permitted to be given under this Agreement shall be deemed given if sent by certified mail, return receipt requested, to any Participant to the attention of that Participant's Representative, to the Participant's principal place of business or by e-mail at such address as the Representative shall have filed in writing with the Chair.

XII. The costs incurred by each Participant in discharging its Regulatory Responsibility under this Agreement are

[3] A Participant must give notice to the Chair of the Group of such a change.

[4] For example, if one Participant was allocated a Common Member by another regulatory group that Participant would be assigned to be the DOSR of that Common Member, unless there is good cause not to make that assignment.

not reimbursable. However, any of the Participants may agree that one or more will compensate the other(s) for costs incurred.

XIII. The Participants shall notify the Common Members of this Agreement by means of a uniform joint notice approved by the Group. Each Participant will notify the Common Members that have been allocated to it that such Participant will serve as DOSR for that Common Member.

XIV. This Agreement shall be effective upon approval of the Commission. This Agreement may only be amended in writing duly approved by each Participant. All amendments to this Agreement, excluding changes to Exhibits A, B and C, must be filed with and approved by the Commission.

XV. Any Participant may manifest its intention to cancel its participation in this Agreement at any time upon providing written notice to (i) the Group six months prior to the date of such cancellation, or such other period as all the Participants may agree, and (ii) the Commission. Upon receipt of the notice the Group shall allocate, in accordance with the provisions of this Agreement, those Common Members for which the canceling Participant was the DOSR. The canceling Participant shall retain its Regulatory Responsibility and other rights, privileges and duties pursuant to this Agreement until the Group has completed the reallocation as described above, and the Commission has approved the cancellation.

XVI. The cancellation of its participation in this Agreement by any Participant shall not terminate this Agreement as to the remaining Participants. This Agreement will only terminate following notice to the Commission, in writing, by the then Participants that they intend to terminate the Agreement and the expiration of the applicable notice period. Such notice shall be given at least six months prior to the intended date of termination, or such other period as all the Participants may agree. Such termination will become effective upon Commission approval.

XVII. Participation in the Group shall be strictly limited to the Participants and no other party shall have any right to attend or otherwise participate in the Group except with the unanimous approval of all Participants. Notwithstanding the foregoing, any national securities exchange registered with the SEC under Section 6(a) of the Act or any national securities association registered with the SEC under section 15A of the Act may become a Participant to this Agreement provided that: (i) Such applicant has adopted rules substantially similar to the Common Rules, and received approval thereof from the SEC; (ii) such applicant has provided each Participant with a signed statement whereby the applicant agrees to be bound by the terms of this Agreement to the same effect as though it had originally signed this Agreement and (iii) an amended agreement reflecting the addition of such applicant as a Participant has been filed with and approved by the Commission.

XVIII. This Agreement is wholly separate from the multiparty Agreement made pursuant to Rule 17d–2 by and among the [Amex, BSE, CBOE, ISE, NASD, the New York Stock Exchange, LLC, Arca and PHLX] *American Stock Exchange, LLC, the Boston Stock Exchange, Inc., the Chicago Board Options Exchange, Inc., the International Securities Exchange, LLC, Financial Industry Regulatory Authority, The NASDAQ Stock Market LLC, Inc., the New York Stock Exchange, LLC, the NYSE Arca, Inc., and the Philadelphia Stock Exchange, Inc.* involving the allocation of regulatory responsibilities with respect to common members for compliance with common rules relating to the conduct by broker-dealers of accounts for listed options or index warrants entered into on [December 1, 2006] *June 5, 2008,* and as may be amended from time to time.

Limitation of Liability

No Participant nor the Group nor any of their respective directors, governors, officers, employees or representatives shall be liable to any other Participant in this Agreement for any liability, loss or damage resulting from or claimed to have resulted from any delays, inaccuracies, errors or omissions with respect to the provision of Regulatory Responsibility as provided hereby or for the failure to provide any such Regulatory Responsibility, except with respect to such liability, loss or damages as shall have been suffered by one or more of the Participants and caused by the willful misconduct of one or more of the other Participants or its respective directors, governors, officers, employees or representatives. No warranties, express or implied, are made by the Participants, individually or as a group, or by the OSG with respect to any Regulatory Responsibility to be performed hereunder.

Relief From Responsibility

Pursuant to Section 17(d)(1)(A) of the Exchange Act and Rule 17d–2, the Participants join in requesting the Commission, upon its approval of this Agreement or any part thereof, to relieve the Participants that are party to this Agreement and are not the DOSR as to a Common Member of any and all Regulatory Responsibility with respect to the matters allocated to the DOSR.

Common Rules

VIOLATION I—EXPIRING EXERCISE DECLARATIONS (EED)—FOR LISTED EQUITY OPTIONS EXPIRING: THE THIRD SATURDAY FOLLOWING THE THIRD FRIDAY OF A MONTH, QUARTERLY, AND FOR LISTED FLEX OPTIONS

SRO	Description of rule	Exchange rule number	Frequency of review
NYSE Amex	Exercise of Options Contracts	Rule 980	At Expiration.
BATS	Exercise of Options Contracts	Rule 23.1	At Expiration.
BOX	Exercise of Options Contracts	Chapter VII, Section 1	At Expiration.
C2	Exercise of Options Contracts	Rule 11.1	At Expiration.
CBOE	Exercise of Options Contracts	Rule 11.1	At Expiration.
FINRA	Exercise of Options Contracts	Rule 2360(b)(23)	At Expiration.
ISE	Exercise of Options Contracts	Rule 1100	At Expiration.
Nasdaq	Exercise of Options Contracts	Nasdaq Chapter VIII, Sec.1	At Expiration.
NYSE Arca	Exercise of Options Contracts	Rule 6.24	At Expiration.
NASDAQ OMX PHLX	Exercise of Equity Options Contracts	Rule 1042	At Expiration

VIOLATION II—POSITION LIMITS (PL)—FOR LISTED EQUITY OPTIONS EXPIRING: THE THIRD SATURDAY FOLLOWING THE THIRD FRIDAY OF A MONTH, QUARTERLY

SRO	Description of rule (for review as they apply to PL)	Exchange rule number	Frequency of review
NYSE Amex	Position Limits	Rule 904	Daily.
	Liquidating Positions	Rule 907	As Needed.
BOX	Position Limits	Chapter III, Section 7	Daily.
	Exemptions from Position	Chapter III, Section 8	As Needed.
	Liquidation Positions	Chapter III, Section 11	As Needed.
BATS	Position Limits	Rule 18.7	Daily.
	Exemptions from Position Limits	Rule 18.8	As Needed.
	Liquidation Positions	Rule 18.11	As Needed.
C2	Position Limits	Rule 4.11	Daily.
	Liquidation of Positions	Rule 4.14	As Needed.
CBOE	Position Limits	Rule 4.11	Daily.
	Liquidation of Positions	Rule 4.14	As Needed.
FINRA	Position Limits	Rule 2360(b)(3)	Daily.
	Liquidation of Positions and Restrictions on Access	Rule 2360(b)(6)	As Needed.
ISE	Position Limits	Rule 412	Daily.
	Exemptions from Position Limits	Rule 413	As Needed.
	Liquidating Positions	Rule 416	As Needed.
Nasdaq	Position Limits	Nasdaq Rule Chapter III Section 7	Daily.
	Exemptions from Position Limits	Nasdaq Rule Chapter III Section 8	As Needed.
	Liquidating Positions	Nasdaq Rule Chapter III Section 11.	As Needed.
NYSE Arca	Position Limits	Rule 6.8	Daily.
	Liquidation of Position	Rule 6.7	As Needed.
NASDAQ OMX PHLX	Position Limits	Rule 1001	Daily.
	Liquidation of Positions	Rule 1004	As Needed.

VIOLATION III—LARGE OPTIONS POSITION REPORT (LOPR)—FOR LISTED EQUITY AND ETF OPTIONS

SRO	Description of rule (for review as they apply to LOPR)	Exchange rule number	Frequency of review
NYSE Amex	Reporting of Options Positions	Rule 906	Yearly.
BATS	Reports Related to Position Limits	Rule 18.10	Yearly.
BOX	Reports Related to Position Limits	Chapter III, Section 10	Yearly.
C2	Reports Related to Position Limits	Rule 4.13(a),	Yearly.
	Reports Related to Position Limits	Rule 4.13(b)	Yearly.
	Reports Related to Position Limits	Rule 4.13(d)	Yearly.
CBOE	Reports Related to Position Limits	Rule 4.13(a),	Yearly.
	Reports Related to Position Limits	Rule 4.13(b)	Yearly.
	Reports Related to Position Limits	Rule 4.13(d)	Yearly.
FINRA	Options	Rule 2360(b)(5)	Yearly.
ISE	Reports Related to Position Limits	Rule 415	Yearly.
Nasdaq	Reports Related to Position Limits	Chapter III Section 10	Yearly.
NYSE Arca	Reporting of Options Positions	Rule 6.6	Yearly.
NASDAQ OMX PHLX	Reporting of Options Positions	Rule 1003	Yearly.

VIOLATION IV—OPTIONS CLEARING CORPORATION (OCC) ADJUSTMENT PROCESS

SRO	Description of rule (as they apply to OCC Adjustments/By-laws Article VI, Section 1 .01(a) and .02))	Exchange rule number	Frequency of review
NYSE Amex	Contract made on Acceptance of Bid or Offer	Rule 965NY	Yearly.
BATS	Adherence to Law	Rule 18.1	Yearly.
BOX	Adherence to Law	Chapter III, Section 1	Yearly.
C2	Adherence to Law	Rule 4.2	Yearly.
CBOE	Adherence to Law	Rule 4.2	Yearly.
FINRA	Violation of By-Laws and Rules of FINRA or The OCC.	Rule 2360(b)(21)	Yearly.
ISE	Adherence to Law	Rule 401	Yearly.
Nasdaq	Adherence to Law	Chapter III, Section 1	Yearly.
NYSE Arca	Adherence to Law and Good Business Practice	Rule 11.1	Yearly.
NASDAQ OMX PHLX	Violation of By-Laws and Rules of OCC	Rule 1050	Yearly.

* * * * *

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. 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 4–551 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 4–551. 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 that are filed with the Commission, and all written communications relating to the proposed plan 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 plan also will be available for inspection and copying at the principal offices of Amex, BATS, C2, CBOE, ISE, FINRA, Arca, NASDAQ, BX and Phlx. 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 4–551 and should be submitted on or before March 25, 2010.

V. Discussion

The Commission continues to believe that the Plan, as proposed to be amended, is an achievement in cooperation among the SRO participants, and will reduce unnecessary regulatory duplication by allocating to the designated SRO the responsibility for certain options-related market surveillance matters that would otherwise be performed by multiple SROs. The Plan promotes efficiency by reducing costs to firms that are members of more than one of the SRO participants. In addition, because the SRO participants coordinate their regulatory functions in accordance with the Plan, the Plan promotes, and will continue to promote, investor protection.

Under paragraph (c) of Rule 17d–2, the Commission may, after appropriate notice and comment, declare a plan, or any part of a plan, effective. In this instance, the Commission believes that appropriate notice and comment can take place after the proposed amendment is effective. The purpose of the amendment is to add BATS Exchange, Inc. and C2 Options Exchange, Incorporated as SRO participants and to reflect the name changes of Amex and BX. By declaring it effective today, the amended Plan can become effective and be implemented without undue delay. In addition, the Commission notes that the prior version of this Plan was published for comment, and the Commission did not receive any comments thereon.[15] Finally, the Commission does not believe that the amendment to the Plan raises any new regulatory issues that the Commission has not previously considered.

VI. Conclusion

This order gives effect to the amended Plan submitted to the Commission that is contained in File No. 4–551.

It is therefore ordered, pursuant to Section 17(d) of the Act,[16] that the Plan, as amended by and between the Amex, BATS, C2, CBOE, ISE, FINRA, Arca, NASDAQ, BX and Phlx filed with the Commission pursuant to Rule 17d–2 on February 4, 2010 is hereby approved and declared effective.

It is further ordered that those SRO participants that are not the DOSR as to a particular common member are relieved of those regulatory responsibilities allocated to the common member's DOSR under the amended Plan to the extent of such allocation.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–4455 Filed 3–3–10; 8:45 am]

BILLING CODE 8011–01–P

[15] *See supra* note 13 (citing to Securities Exchange Act Release No. 58765).

[16] 15 U.S.C. 78q(d).

[17] 17 CFR 200.30–3(a)(34).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61589; File No. S7–966]

Program for Allocation of Regulatory Responsibilities Pursuant to Rule 17d–2; Notice of Filing and Order Approving and Declaring Effective an Amendment to the Plan for the Allocation of Regulatory Responsibilities Among the BATS Exchange, Inc., the Chicago Board Options Exchange, Incorporated, C2 Options Exchange, Incorporated, the International Securities Exchange, LLC, Financial Industry Regulatory Authority, Inc., the New York Stock Exchange LLC, NYSE Amex LLC, NYSE Arca, Inc., The NASDAQ Stock Market LLC, NASDAQ OMX BX, Inc., and NASDAQ OMX PHLX, Inc. Concerning Options-Related Sales Practice Matters

February 25, 2010.

Notice is hereby given that the Securities and Exchange Commission ("Commission") has issued an Order, pursuant to Section 17(d) of the Securities Exchange Act of 1934 ("Act"),[1] approving and declaring effective an amendment to the plan for allocating regulatory responsibility filed pursuant to Rule 17d–2 of the Act,[2] by the BATS Exchange, Inc. ("BATS"), the Chicago Board Options Exchange, Incorporated ("CBOE"), C2 Options Exchange, Incorporated ("C2"), the International Securities Exchange, LLC ("ISE"), Financial Industry Regulatory Authority, Inc. ("FINRA"), the New York Stock Exchange LLC ("NYSE"), NYSE Amex LLC ("Amex"), NYSE Arca, Inc.("Arca"), The NASDAQ Stock Market LLC ("NASDAQ"), NASDAQ OMX BX, Inc. ("BX"), and NASDAQ OMX PHLX, Inc. ("Phlx") (collectively, "SRO participants").

I. Introduction

Section 19(g)(1) of the Act,[3] among other things, requires every self-regulatory organization ("SRO") registered as either a national securities exchange or national securities association to examine for, and enforce compliance by, its members and persons associated with its members with the Act, the rules and regulations thereunder, and the SRO's own rules, unless the SRO is relieved of this responsibility pursuant to Section 17(d)[4] or Section 19(g)(2)[5] of the Act.

[1] 15 U.S.C. 78q(d).

[2] 17 CFR 240.17d–2.

[3] 15 U.S.C. 78s(g)(1).

[4] 15 U.S.C. 78q(d).

[5] 15 U.S.C. 78s(g)(2).

Without this relief, the statutory obligation of each individual SRO could result in a pattern of multiple examinations of broker-dealers that maintain memberships in more than one SRO ("common members"). Such regulatory duplication would add unnecessary expenses for common members and their SROs.

Section 17(d)(1) of the Act[6] was intended, in part, to eliminate unnecessary multiple examinations and regulatory duplication.[7] With respect to a common member, Section 17(d)(1) authorizes the Commission, by rule or order, to relieve an SRO of the responsibility to receive regulatory reports, to examine for and enforce compliance with applicable statutes, rules, and regulations, or to perform other specified regulatory functions.

To implement Section 17(d)(1), the Commission adopted two rules: Rule 17d–1 and Rule 17d–2 under the Act.[8] Rule 17d–1 authorizes the Commission to name a single SRO as the designated examining authority ("DEA") to examine common members for compliance with the financial responsibility requirements imposed by the Act, or by Commission or SRO rules.[9] When an SRO has been named as a common member's DEA, all other SROs to which the common member belongs are relieved of the responsibility to examine the firm for compliance with the applicable financial responsibility rules. On its face, Rule 17d–1 deals only with an SRO's obligations to enforce member compliance with financial responsibility requirements. Rule 17d–1 does not relieve an SRO from its obligation to examine a common member for compliance with its own rules and provisions of the Federal securities laws governing matters other than financial responsibility, including sales practices and trading activities and practices.

To address regulatory duplication in these and other areas, the Commission adopted Rule 17d–2 under the Act.[10] Rule 17d–2 permits SROs to propose joint plans for the allocation of regulatory responsibilities with respect to their common members. Under paragraph (c) of Rule 17d–2, the Commission may declare such a plan effective if, after providing for notice and comment, it determines that the plan is necessary or appropriate in the public interest and for the protection of investors, to foster cooperation and coordination among the SROs, to remove impediments to, and foster the development of, a national market system and a national clearance and settlement system, and is in conformity with the factors set forth in Section 17(d) of the Act. Commission approval of a plan filed pursuant to Rule 17d–2 relieves an SRO of those regulatory responsibilities allocated by the plan to another SRO.

II. The Plan

On September 8, 1983, the Commission approved the SRO participants' plan for allocating regulatory responsibilities pursuant to Rule 17d–2.[11] On May 23, 2000, the Commission approved an amendment to the plan that added the ISE as a participant.[12] On November 8, 2002, the Commission approved another amendment that replaced the original plan in its entirety and, among other things, allocated regulatory responsibilities among all the participants in a more equitable manner.[13] On February 5, 2004, the parties submitted an amendment to the plan, primarily to include the BSE, which was establishing a new options trading facility to be known as the Boston Options Exchange ("BOX"), as an SRO participant.[14] On December 5, 2007, the parties submitted an amendment to the plan to, among other things, provide that the National Association of Securities Dealers ("NASD") (n/k/a the Financial Industry Regulatory Authority, Inc. or "FINRA") and NYSE are Designated Options Examining Authorities under the plan.[15] On June 5, 2008, the parties submitted an amendment to the plan primarily to remove the NYSE as a Designated Options Examining Authority, leaving FINRA as the sole Designated Options Examining Authority for all common members that are members of FINRA.[16]

The plan reduces regulatory duplication for a large number of firms currently members of two or more of the SRO participants by allocating regulatory responsibility for certain options-related sales practice matters to one of the SRO participants. Generally, under the current plan, the SRO participant responsible for conducting options-related sales practice examinations of a firm, and investigating options-related customer complaints and terminations for cause of associated persons of that firm, is known as the firm's "Designated Options Examining Authority" ("DOEA"). Pursuant to the current plan, any other SRO of which the firm is a member is relieved of these responsibilities during the period in which the firm is assigned to another SRO acting as that firm's DOEA.

III. Proposed Amendment to the Plan

On February 9, 2010, the parties submitted a proposed amendment to the plan. The primary purpose of the amendment is to add BATS Exchange, Inc. and C2 Options Exchange, Incorporated as an SRO participant and to reflect the name changes of the American Stock Exchange LLC to the NYSE Amex LLC, the Boston Stock Exchanges, Inc., to the NASDAQ OMX BX, Inc. and the Philadelphia Stock Exchange, Inc. to the NASDAQ OMX PHLX, Inc. The amended agreement replaces the previous agreement in its entirety. The text of the proposed amended 17d–2 plan is as follows (additions are *italicized;* deletions are [bracketed]):

* * * * *

Agreement by and among [the American Stock Exchange, LLC, the Boston Stock] *BATS* Exchange, Inc., the Chicago Board Options Exchange, [Inc.] *Incorporated, C2 Options Exchange, Incorporated,* the International Securities Exchange, LLC, Financial Industry Regulatory Authority, Inc., the New York Stock Exchange[,] *LLC, the NYSE Amex* LLC, the NYSE Arca, Inc., The NASDAQ Stock Market LLC, *NASDAQ OMX BX, Inc.* and the [Philadelphia Stock Exchange] *NASDAQ OMX PHLX,* Inc. Pursuant to Rule 17d–2 under the Securities Exchange Act of 1934.

This agreement ("Agreement"), by and among [the American Stock Exchange, LLC, the Boston Stock]*BATS* Exchange, Inc., the Chicago Board Options Exchange, [Inc.]*Incorporated, C2 Options Exchange, Incorporated,* the International Securities Exchange, LLC, Financial Industry Regulatory Authority, Inc. ("FINRA"), The NASDAQ Stock Market LLC ("NASDAQ"), *NASDAQ OMX BX, Inc.,* the New York Stock Exchange LLC ("NYSE"), the NYSE *Amex LLC, the NYSE* Arca, Inc., and the [Philadelphia

[6] 15 U.S.C. 78q(d)(1).

[7] *See* Securities Act Amendments of 1975, Report of the Senate Committee on Banking, Housing, and Urban Affairs to Accompany S. 249, S. Rep. No. 94–75, 94th Cong., 1st Session 32 (1975).

[8] 17 CFR 240.17d–1 and 17 CFR 240.17d–2, respectively.

[9] *See* Securities Exchange Act Release No. 12352 (April 20, 1976), 41 FR 18808 (May 7, 1976).

[10] *See* Securities Exchange Act Release No. 12935 (October 28, 1976), 41 FR 49091 (November 8, 1976).

[11] *See* Securities Exchange Act Release No. 20158 (September 8, 1983), 48 FR 41256 (September 14, 1983).

[12] *See* Securities Exchange Act Release No. 42816 (May 23, 2000), 65 FR 34759 (May 31, 2000).

[13] *See* Securities Exchange Act Release No. 46800 (November 8, 2002), 67 FR 69774 (November 19, 2002).

[14] *See* Securities Exchange Act Release No. 49197 (February 5, 2004), 69 FR 7046 (February 12, 2004).

[15] *See* Securities Exchange Act Release No. 55532 (March 26, 2007), 72 FR 15729 (April 2, 2007).

[16] *See* Securities Exchange Act Release No. 57987 (June 18, 2008), 73 FR 36156 (June 25, 2008).

Stock Exchange]*NASDAQ OMX PHLX,* Inc., hereinafter collectively referred to as the Participants, is made this [27th]*5th* day of [December, 2008]*February, 2010,* pursuant to the provisions of Rule 17d–2 under the Securities Exchange Act of 1934 (the "Exchange Act"), which allows for plans among self-regulatory organizations to allocate regulatory responsibility. This Agreement shall be administered by a committee known as the Options Self-Regulatory Council (the "Council").

This Agreement amends and restates the agreement entered into among the Participants on [December 27, 2007]*June 5, 2008,* entitled "Agreement by and among the American Stock Exchange, LLC, the Boston Stock Exchange, Inc., the Chicago Board Options Exchange, [Inc.] *Incorporated,* the International Securities Exchange, LLC, Financial Industry Regulatory Authority, Inc., the New York Stock Exchange[,] LLC, the NYSE Arca, Inc., the NASDAQ Stock Market LLC, and the Philadelphia Stock Exchange, Inc., Pursuant to Rule 17d–2 under the Securities Exchange Act of 1934."

Whereas, the Participants are desirous of allocating regulatory responsibilities with respect to broker-dealers, and persons associated therewith, that are members [1] of more than one Participant (the "Common Members") and conduct a public business for compliance with Common Rules (as hereinafter defined) relating to the conduct by broker-dealers of accounts for listed options, index warrants, currency index warrants and currency warrants (collectively, "Covered Securities"); and

Whereas, the Participants are desirous of executing a plan for this purpose pursuant to the provisions of Rule 17d–2 and filing such plan with the Securities and Exchange Commission ("SEC" or the "Commission") for its approval;

Now, therefore, in consideration of the mutual covenants contained hereafter, the Participants agree as follows:

I. As used herein the term Designated Options Examining Authority ("DOEA") shall mean: (1) FINRA insofar as it shall perform Regulatory Responsibility (as hereinafter defined) for its broker-dealer members that also are members of another Participant or (2) the Designated Examination Authority ("DEA") pursuant to SEC Rule 17d–1 under the Securities Exchange Act ("Rule 17d–1") for a broker-dealer that is a member of a more than one Participant (but not a member of FINRA).

II. As used herein, the term "Regulatory Responsibility" shall mean the examination and enforcement responsibilities relating to compliance by Common Members with the rules of the applicable Participant that are substantially similar to the rules of the other Participants (the "Common Rules"), insofar as they apply to the conduct of accounts for Covered Securities. A list of the current Common Rules of each Participant applicable to the conduct of accounts for Covered Securities is attached hereto as Exhibit A. Each year within 30 days of the anniversary date of the commencement of operation of this Agreement, each Participant shall submit in writing to FINRA and each DEA performing as a DOEA for any members of such Participant any revisions to Exhibit A reflecting changes in the rules of the Participant, and confirm that all other rules of the Participant listed in Exhibit A continue to meet the definition of Common Rules as defined in this Agreement. Within 30 days from the date that FINRA and each DEA performing as a DOEA has received revisions and/or confirmation that no change has been made to Exhibit A from all Participants, FINRA and each DEA performing as a DOEA shall confirm in writing to each Participant whether the rules listed in any updated Exhibit A are Common Rules as defined in this Agreement. Notwithstanding anything herein to the contrary, it is explicitly understood that the term "Regulatory Responsibility" does not include, and each of the Participants shall (unless allocated pursuant to Rule 17d–2 otherwise than under this Agreement) retain full responsibility for, each of the following:

(a) Surveillance and enforcement with respect to trading activities or practices involving its own marketplace, including without limitation its rules relating to the rights and obligations of specialists and other market makers;

(b) Registration pursuant to its applicable rules of associated persons;

(c) Discharge of its duties and obligations as a DEA; and

(d) Evaluation of advertising, responsibility for which shall remain with the Participant to which a Common Member submits same for approval.

III. Apparent violations of another Participant's rules discovered by a DOEA, but which rules are not within the scope of the discovering DOEA's Regulatory Responsibility, shall be referred to the relevant Participant for such action as the Participant to which such matter has been referred deems appropriate. Notwithstanding the foregoing, nothing contained herein shall preclude a DOEA in its discretion from requesting that another Participant conduct an enforcement proceeding on a matter for which the requesting DOEA has Regulatory Responsibility. If such other Participants agree, the Regulatory Responsibility in such case shall be deemed transferred to the accepting Participant and confirmed in writing by the Participants involved. Each Participant agrees, upon request, to make available promptly all relevant files, records and/or witnesses necessary to assist another Participant in an investigation or enforcement proceeding.

IV. The Council shall be composed of one representative designated by each of the Participants. Each Participant shall also designate one or more persons as its alternate representative(s). In the absence of the representative of a Participant, such alternate representative shall have the same powers, duties and responsibilities as the representative. Each Participant may, at any time, by notice to the then Chair of the Council, replace its representative and/or its alternate representative on such Council. A majority of the Council shall constitute a quorum and, unless specifically otherwise required, the affirmative vote of a majority of the Council members present (in person, by telephone or by written consent) shall be necessary to constitute action by the Council. The representative from FINRA shall serve as Chair of the Council. All notices and other communications for the Council shall be sent to it in care of the Chair or to each of the representatives.

V. The Council shall determine the times and locations of Council meetings, provided that the Chair, acting alone, may also call a meeting of the Council in the event the Chair determines that there is good cause to do so. To the extent reasonably possible, notice of any meeting shall be given at least ten-business days prior thereto. Notwithstanding anything herein to the contrary, representatives shall always be given the option of participating in any meeting telephonically at their own expense rather than in person.

VI. FINRA shall have Regulatory Responsibility for all Common Members that are members of FINRA. For the purpose of fulfilling the Participants' Regulatory Responsibilities for Common Members that are not members of FINRA, the Participant that is the DEA shall serve as the DOEA. All Participants shall promptly notify the DOEAs no later than the next scheduled

[1] In the case of [the Boston Stock Exchange]*NASDAQ OMX BX,* Inc.[,] and NASDAQ members are those persons who are options participants (as defined in the BOX and NASDAQ Options Market Rules).

meeting of any change in membership of Common Members. A DOEA may request that a Common Member that is allocated to it be reallocated to another DOEA by giving thirty days written notice thereof. The DOEAs in their discretion may approve such request and reallocate such Common Member to another DOEA.

VII. Each DOEA shall conduct an examination of each Common Member. The Participants agree that, upon request, relevant information in their respective files relative to a Common Member will be made available to the applicable DOEA. At each meeting of the Council, each DOEA shall be prepared to report on the status of its examination program for the previous quarter and any period prior thereto that has not previously been reported to the Council.

VIII. Each DOEA will promptly furnish a copy of the Examination report, relating to Covered Securities, of any examination made pursuant to the provisions of this Agreement to each other Participant of which the Common Member examined is a member.

IX. Each DOEA's Regulatory Responsibility shall for each Common Member allocated to it include investigations into terminations "for cause" of associated persons relating to Covered Securities, unless such termination is related solely to another Participant's market. In the latter instance, that Participant to whose market the termination for cause relates shall discharge Regulatory Responsibility with respect to such termination for cause. In connection with a DOEA's examination, investigation and/or enforcement proceeding regarding a Covered Security-related termination for cause, the other Participants of which the Common Member is a member shall furnish, upon request, copies of all pertinent materials related thereto in their possession. As used in this Section, "for cause" shall include, without limitation, terminations characterized on Form U5 under the label "Permitted to Resign," "Discharge" or "Other."

X. Each DOEA shall discharge the Regulatory Responsibility for each Common Member allocated to it relative to a Covered Securities-related customer complaint [2] unless such complaint is uniquely related to another Participant's market. In the latter instance, the DOEA shall forward the matter to that Participant to whose market the matter relates, and the latter shall discharge Regulatory Responsibility with respect thereto. If a Participant receives a customer complaint for a Common Member related to a Covered Security for which the Participant is not the DOEA, the Participant shall promptly forward a copy of such complaint to the DOEA.

XI. Any written notice required or permitted to be given under this Agreement shall be deemed given if sent by certified mail, return receipt requested, or by a comparable means of electronic communication to each Participant entitled to receipt thereof, to the attention of the Participant's representative on the Council at the Participant's then principal office or by e-mail at such address as the representative shall have filed in writing with the Chair.

XII. The Participants shall notify the Common Members of this Agreement by means of a uniform joint notice approved by the Council.

XIII. This Agreement may be amended in writing duly approved by each Participant.

XIV. Any of the Participants may manifest its intention to cancel its participation in this Agreement at any time by giving the Council written notice thereof at least 90 days prior to the effective date of such cancellation. Upon receipt of such notice the Council shall allocate, in accordance with the provisions of this Agreement, any Common Members for which the petitioning party was the DOEA. Until such time as the Council has completed the reallocation described above; the petitioning Participant shall retain all its rights, privileges, duties and obligations hereunder.

XV. The cancellation of its participation in this Agreement by any Participant shall not terminate this Agreement as to the remaining Participants. This Agreement will only terminate following notice to the Commission, in writing, by the then Participants that they intend to terminate the Agreement and the expiration of the applicable notice period. Such notice shall be given at least six months prior to the intended date of termination, provided that in the event a notice of cancellation is received from a Participant that, assuming the effectiveness thereof, would result in there being just one remaining member of the Council, notice to the Commission of termination of this Agreement shall be given promptly upon the receipt of such notice of cancellation, which termination shall be effective upon the effectiveness of the cancellation that triggered the notice of termination to the Commission.

XVI. No Participant nor the Council nor any of their respective directors, governors, officers, employees or representatives shall be liable to any other Participant in this Agreement for any liability, loss or damage resulting from or claimed to have resulted from any delays, inaccuracies, errors or omissions with respect to the provision of Regulatory Responsibility as provided hereby or for the failure to provide any such Responsibility, except with respect to such liability, loss or damages as shall have been suffered by one or more of the Participants and caused by the willful misconduct of one or more of the other participants or their respective directors, governors, officers, employees or representatives. No warranties, express or implied, are made by any or all of the Participants or the Council with respect to any Regulatory Responsibility to be performed by each of them hereunder.

XVII. Pursuant to Section 17(d)(1)(A) of the Securities Exchange Act of 1934 and Rule 17d–2 promulgated pursuant thereto, the Participants join in requesting the Securities and Exchange Commission, upon its approval of this Agreement or any part thereof, to relieve those Participants which are from time to time participants in this Agreement which are not the DOEA as to a Common Member of any and all Regulatory Responsibility with respect to the matters allocated to the DOEA.

COMMON RULES

Opening of Accounts	
AMEX	Rules 411, 921 and 1101.
BATS	Rule 26.2.
CBOE	Rule 9.7.
C2*	CBOE Rule 9.7.
ISE	Rule 608.
FINRA	Rules 2360(b)(16) and 2352.
NYSE	Rule 721.[1]
PHLX	Rule 1024(b) and (c).[2]
NYSE ARCA	Rule 9.2(a) and Rule 9.18(b).
BX/BOX	Chapter XI, Section 9.
NASDAQ	Chapter XI, Section 7.

Supervision	
AMEX	Rules 411, 922 and 1104.
BATS	Rule 26.3.
CBOE	Rule 9.8.
C2	CBOE Rule 9.8.
ISE	Rule 609.
FINRA	Rules 2360(b)(20), 2360(b)(17)(B), 2355 and 2358.
NYSE	N/A.
PHLX	Rule 1025.
NYSE ARCA	Rules 9.2(b) and 9.18(d)(2)(G).
BX/BOX	Chapter XI, Section 10.

[2] For purposes of complaints, they can be reported pursuant to Form U4, Form U5 or RE–3 and any amendments thereto.

COMMON RULES—Continued

NASDAQ	Chapter XI, Section 8.

Suitability

AMEX	Rules 923 and 1102.
BATS	Rule 26.4.
CBOE	Rule 9.9.
C2	CBOE Rule 9.9.
ISE	Rule 610.
FINRA	Rule 2360(b)(19) and 2353.
NYSE	Rule 723.
PHLX	Rule 1026.
NYSE ARCA	Rule 9.18(c).
BX/BOX	Chapter XI, Section 11.
NASDAQ	Chapter XI, Section 9.

Discretionary Accounts

AMEX	Rules 421, 924 and 1103.
BATS	Rule 26.5.[3]
CBOE	Rule 9.10.
C2	CBOE Rule 9.10.
ISE	Rule 611.
FINRA	Rules 2360(b)(18) and 2354.
NYSE	N/A.
PHLX	Rule 1027.
NYSE ARCA	Rule 9.18(e).
BX/BOX	Chapter XI, Section 12.
NASDAQ	Chapter XI, Section 10.

Customer Communications (Advertising)

AMEX	Rules 991 and 1106.
BATS	Rule 26.16.
CBOE	Rule 9.21.[4]
C2	CBOE Rule 9.21.[4]
ISE	Rule 623.[4]
FINRA	Rules 2220 and 2357.
NYSE	N/A.
PHLX	N/A.
NYSE ARCA	N/A.
BX/BOX	Chapter XI, Section 24.[4]
NASDAQ	Chapter XI, Section 22.

Customer Complaints

AMEX	Rules 932 and 1105.
BATS	Rule 26.17.
CBOE	Rule 9.23.
C2	CBOE Rule 9.23.
ISE	Rule 625.
FINRA	FINRA Rules 2360(b)(17)(A) and 2356 and NASD Rule 3070(a) and (c).
NYSE	Rules 732 & 351(a) and (d).
PHLX	Rule 1070.
NYSE ARCA	Rule 9.18(l).
BX/BOX	Chapter XI, Section 26.
NASDAQ	Chapter XI, Section 24.

Customer Statements

AMEX	Rules 419 and 930.
BATS	Rule 26.7.
CBOE	Rule 9.12.
C2	CBOE Rule 9.12.
ISE	Rule 613.
FINRA	Rule 2360(b)(15).
NYSE	Rule 730.
PHLX	Rule 1032.
NYSE ARCA	Rule 9.18(j).
BX/BOX	Chapter XI, Sections 14.
NASDAQ	Chapter XI, Sections 12.

COMMON RULES—Continued

Confirmations

AMEX	Rule 925.
BATS	Rule 26.6.
CBOE	Rule 9.11.
C2	CBOE Rule 9.11.
ISE	Rule 612.
FINRA	Rule 2360(b)(12).
NYSE	Rule 725.[5]
PHLX	Rule 1028.
NYSE ARCA	Rule 9.18(f).
BX/BOX	Chapter XI, Section 13.
NASDAQ	Chapter XI, Section 11.

Allocation of Exercise Assignment Notices

AMEX	Rule 981.
BATS	Rule 23.2.
CBOE	Rule 11.2.
C2	CBOE Rule 11.2.
ISE	Rule 1101.
FINRA	Rule 2360(b)(23)(C).
NYSE	Rule 781.
PHLX	Rule 1043.
NYSE ARCA	Rule 6.25(a).
BX/BOX	Chapter VII, Section 2.
NASDAQ	Chapter VIII, Section 2.

Disclosure Documents

AMEX	Rules 921 and 926.
BATS	Rule 26.10.
CBOE	Rule 9.15.
C2	CBOE Rule 9.15.
ISE	Rule 616.
FINRA	Rule 2360(b)(11).
NYSE	Rule 726(a) and (c).
PHLX	Rule 1024(b)(v), 1029.
NYSE ARCA	Rule 9.18(g).
BX/BOX	Chapter XI, Section 17.
NASDAQ	Chapter XI, Section 15.

Branch Offices of Member Organizations

AMEX	Rule 922(d).[6]
CBOE	Rule 9.6.
C2	CBOE Rule 9.6.
ISE	Rule 607.
FINRA	Rules 2360(b)(20)(B) and 2355.
NYSE	N/A.
PHLX	N/A.
NYSE ARCA	Rule 9.18(m).
BX/BOX	Chapter XI, Section 8.
NASDAQ	Chapter XI, Section 6.

Prohibition Against Guarantees

AMEX	Rule 390.
BATS	Rule 26.13.
CBOE	Rule 9.18.
C2	CBOE Rule 9.18.
ISE	Rules 619 and 620.
FINRA	Rule 2150(b).
NYSE	Rule 2150(b).
PHLX	Rule 777.
NYSE ARCA	Rule 9.1(e).
BX/BOX	Chapter XI, Sections 20 and 21.
NASDAQ	Chapter XI, Sections 18 and 19.

COMMON RULES—Continued

Sharing in Accounts

AMEX	Rule 390.[7]
BATS	Rule 26.14.
CBOE	Rule 9.18(b).[8]
C2	CBOE Rule 9.18(b).[8]
ISE	Rule 620.[7]
FINRA	Rule 2150(c).
NYSE	Rule 2150(c).
PHLX	N/A.
NYSE ARCA	Rule 9.1(f).
BX/BOX	Chapter XI, Section 21.[8]
NASDAQ	Chapter XI, Section 19.[8]

Registration of ROP

AMEX	Rule 920.
BATS	17.2(g)(1), (2), (6) and (7).
CBOE	Rule 9.2.
C2	CBOE Rule 9.2.
ISE	Rule 601.
FINRA	NASD Rules 1022(f) & IM–1022–1.
NYSE	N/A.
PHLX	Rule 1024(a)(i).
NYSE ARCA	Rule 9.26.
BX/BOX	Chapter XI, Section 2.
NASDAQ	Chapter XI, Section 2.

Certification of Registered Personnel

AMEX	Rule 920.
BATS	Rule 2.5 Interpretation .01(c) and 11.4(e).
CBOE	Rule 9.3.
C2	CBOE Rule 9.3.
ISE	Rule 602.
FINRA	NASD Rule 1032(d).
NYSE	N/A.
PHLX	Rule 1024.
NYSE ARCA	Rule 9.27(a).
BX/BOX	Chapter XI, Section 3.
NASDAQ	Chapter XI, Section 3.

*Pursuant to C2 Chapters 9 and 11, the rules contained in CBOE Chapters IX and XI and referenced herein shall apply to C2.

[1] FINRA shall not have any Regulatory Responsibility regarding opening short uncovered option accounts requirements.

[2] FINRA shall not have any Regulatory Responsibility regarding foreign currency option requirements specified in any of the PHLX rules in this Exhibit A.

[3] FINRA shall not have any Regulatory Responsibility to enforce this rule as to time and price discretion in institutional accounts.

[4] FINRA shall not have any Regulatory Responsibility regarding the self regulatory organization's ("SRO") requirements to the extent that a customer would meet FINRA's definition of Institutional Investor and Institutional Sales Material but would not meet the requirements for such definitions in under the SRO's rule. In addition, FINRA shall not have any Regulatory Responsibility regarding the SRO's requirements regarding approval of all market letters.

[5] FINRA shall not have any Regulatory Responsibility regarding the requirement in confirmations to distinguish between NYSE option transactions and other transactions in option contracts.

[6] FINRA shall only have Regulatory Responsibility for the first paragraph and shall not have any Regulatory Responsibility regarding the requirements for debt options.

[7] FINRA shall not have any Regulatory Responsibility regarding the self regulatory organization's requirements to the extent such rules do not contain an exception to permit sharing in the profits and losses of an account.

[8] FINRA shall not have any Regulatory Responsibility regarding the self regulatory organization's requirements to the extent such rules do not contain an exception addressing immediate family.

IV. Solicitation of Comments

In order to assist the Commission in determining whether to approve the 17d–2 plan, interested persons are invited to submit written data, views, and arguments concerning the foregoing. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/other.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–966 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–966. 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/other.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed plan that are filed with the Commission, and all written communications relating to the proposed plan 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 the plan also will be available for inspection and copying at the principal offices of BATS, CBOE, C2, ISE, FINRA, NYSE, Amex, Arca, NASDAQ, BX and the Phlx. 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 S7–966 and should be submitted on or before March 25, 2010.

V. Discussion

The Commission continues to believe that the proposed plan is an achievement in cooperation among the SRO participants, and will reduce unnecessary regulatory duplication by allocating to the designated SRO the responsibility for certain options-related sales practice matters that would otherwise be performed by multiple SROs. The plan promotes efficiency by reducing costs to firms that are members of more than one of the SRO participants. In addition, because the SRO participants coordinate their regulatory functions in accordance with the plan, the plan promotes, and will continue to promote, investor protection.

Under paragraph (c) of Rule 17d–2, the Commission may, after appropriate notice and comment, declare a plan, or any part of a plan, effective. In this instance, the Commission believes that appropriate notice and comment can take place after the proposed amendment is effective. The primary purpose of the amendment is to add BATS Exchange, Inc. and C2 Options Exchange, Incorporated as SRO participants and to reflect the name changes of the American Stock Exchange, LLC to the NYSE Amex LLC, the Boston Stock Exchange, Inc. to the NASDAQ OMX BX, Inc., and the Philadelphia Stock Exchange, Inc. to the NASDAQ OMX PHLX, Inc. The Commission notes that the prior version of this plan immediately prior to this proposed amendment was published for comment and the Commission did not receive any comments thereon.[17] Furthermore, the Commission does not believe that the amendment to the plan raises any new regulatory issues that the Commission has not previously considered.

VI. Conclusion

This order gives effect to the amended plan submitted to the Commission that is contained in File No. S7–966.

It is therefore ordered, pursuant to Section 17(d) of the Act,[18] that the amended plan dated February 5, 2010 by and between the BATS, CBOE, C2, ISE, FINRA, NYSE, Amex, Arca, NASDAQ, BX and the Phlx filed pursuant to Rule 17d–2 is hereby approved and declared effective.

It is further ordered that those SRO participants that are not the DOEA as to a particular common member are relieved of those regulatory responsibilities allocated to the common member's DOEA under the amended plan to the extent of such allocation.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–4456 Filed 3–3–10; 8:45 am]

BILLING CODE 8011–01–P

[17] *See supra* note 16 (citing to Securities Exchange Act Release No. 57987).

[18] 15 U.S.C. 78q(d).

[19] 17 CFR 200.30–3(a)(34).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61591; File No. SR–OCC–2009–20]

Self-Regulatory Organizations; The Options Clearing Corporation; Order Approving Proposed Rule Change Relating to ETFS Physical Swiss Gold Shares and ETFS Physical Silver Shares

February 25, 2010.

I. Introduction

On December 14, 2009, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission the proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934.[1] On January 8, 2010, the Commission published notice of the proposed rule change in the **Federal Register** to solicit comments from interested persons.[2] For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description

The proposed rule change will amend the interpretation following the definition of "fund share" in Article I, Section 1, of OCC's By-Laws. This amendment will enable OCC to (i) clear and treat as securities options any option contracts on ETFS Physical Swiss Gold Shares or on ETFS Physical Silver Shares that are traded on securities exchanges and (ii) clear and treat as security futures any futures contracts on ETFS Physical Swiss Gold Shares and ETFS Physical Silver Shares.[3] In addition, in its capacity as a

[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 61254 (Dec. 29, 2009), 75 FR 1093.

[3] The Commission recently approved rule changes permitting NYSE Amex, NYSE Arca, International Securities Exchange, and the Chicago Board Options Exchange to each list and trade options based on the EFTS Gold Trust and EFTS Silver Trust shares. Securities Exchange Act Release

Continued

"derivatives clearing organization" registered with the Commodities Futures Trading Commission ("CFTC"), OCC also filed this proposed rule change with the CFTC for prior approval by the CFTC pursuant to provisions of the Commodity Exchange Act ("CEA") in order to foreclose any potential liability under the CEA based on an argument that OCC's clearing of such options as securities options or the clearing of such futures as security futures constitutes a violation of the CEA.

The products that are affected by this approval order are essentially the same as the options and security futures on SPDR Gold Shares, iShares COMEX Gold Shares, and iShares Silver Shares that OCC currently clears pursuant to rule changes approved by the Commission last year.[4]

III. Discussion

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and derivative transactions.[5] By amending its By-Laws to help clarify that options and security futures on ETFS Physical Swiss Gold Shares and ETFS Physical Silver Shares will be treated and cleared as securities options or security futures, OCC's proposed rule change should help clarify the jurisdictional status of such contracts and accordingly should help to promote the prompt and accurate clearance and settlement of securities transactions and of derivative transactions. In accordance with the Memorandum of Understanding entered into between the CFTC and the Commission on March 11, 2008, and in particular the addendum thereto concerning Principles Governing the Review of Novel Derivative Products, the Commission believes that novel derivative products that implicate areas of overlapping regulatory concern should be permitted to trade in either a CFTC- or Commission-regulated environment or both in a manner consistent with laws and regulations (including the appropriate use of all available exemptive and interpretive authority).

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular Section 17A of the Act[6] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[7] that the proposed rule change (File No. SR–OCC–2009–20) be and hereby is approved.[8]

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–4517 Filed 3–3–10; 8:45 am]

BILLING CODE 8011–01–P

No. 61483 (Feb. 3, 2010), 75 FR 6753 (Feb. 10, 2010).

[4] Securities Exchange Act Release Nos. 57895 (May 30, 2008), 73 FR 32066 (June 5, 2008) and 59054 (Dec. 4, 2008), 73 FR 75159 (Dec. 10, 2008).

[5] 15 U.S.C. 78q–1(b)(3)(F).

[6] 15 U.S.C. 78q–1.

[7] 15 U.S.C. 78s(b)(2).

[8] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61594; File No. SR–NASDAQ–2010–024]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt a Round Lot Holder Initial Listing Requirement for Listing of Warrants on the Nasdaq Global and Capital Markets Except for Initial Firm Commitment Underwritten Public Offering

February 25, 2010.

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 February 19, 2010, The NASDAQ Stock Market LLC ("NASDAQ" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been substantially prepared by NASDAQ. NASDAQ has designated the proposed rule change as constituting a non-controversial rule change under Rule 19b–4(f)(6) under the Act,[3] 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] 17 CFR 240.19b–4(f)(6).

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

NASDAQ is filing this proposed rule change to adopt a round lot holder requirement for listing on the Global and Capital markets, and to make a technical correction to a cross referenced rule.

The text of the proposed rule change is below. Proposed new language is in *italics* and proposed deletions are in [brackets].

5410. Initial Listing Requirements for Rights and Warrants

For initial listing, the rights or warrants must meet all the requirements below:

(a) No change.

(b) The underlying security must be listed on the Global Market or be a Covered Security; [and]

(c) There must be at least three registered and active Market Makers[.] *; and*

(d) In the case of warrants, there must be at least 400 Round Lot Holders (except that this requirement will not apply to the listing of warrants in connection with the initial firm commitment underwritten public offering of such warrants).

* * * * *

5515. Initial Listing Requirements for Rights, Warrants, and Convertible Debt

The following requirements apply to a Company listing convertible debt, rights or warrants on The Nasdaq Capital Market.

(a) For initial listing, rights, warrants and put warrants (that is, instruments that grant the holder the right to sell to the issuing company a specified number of shares of the Company's common stock, at a specified price until a specified period of time) must meet the following requirements:

(1) No change.

(2) The underlying security must be listed on Nasdaq or be a Covered Security; [and]

(3) At least three registered and active Market Makers[.] *; and*

(4) In the case of warrants, at least 400 Round Lot Holders (except that this requirement will not apply to the listing of rights or warrants in connection with the initial firm commitment underwritten public offering of such warrants).

(b)–(c) No change.

* * * * *

5730. Listing Requirements for Securities Not Specified Above (Other Securities)

(a) Initial Listing Requirements

(1) Nasdaq will consider listing on the Global Market any security not otherwise covered by the criteria in the *Rule* 5400 or 5700 Series, provided the instrument is otherwise suited to trade through the facilities of Nasdaq. Such securities will be evaluated for listing against the following criteria:

(A) The Company shall have assets in excess of $100 million and stockholders' equity of at least $10 million. In the case of a Company which is unable to satisfy the income criteria set forth in *Rule 5405(b)(1)(A)*[paragraph (a)(1)], Nasdaq generally will require the Company to have the following:

(i)–(ii) No change.

(B)–(D) No change.

(2)–(3) No change.

(b) No change.

* * * * *

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 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ is proposing to adopt a round lot holder requirement for the initial listing of warrants on the Global and Capital Markets, with a limited exemption for companies listing warrants pursuant to a firm commitment underwritten initial public offering.[4] Currently, Listing Rule 5410 provides that to list a warrant on the Global Market a Company must have at least 450,000 warrants issued, the underlying security must be listed on the Global Market or be a Covered Security[5], and there must be at least three registered and active Market Makers. To list a warrant on the Capital Market, a Company must have at least 400,000 warrants issued, the underlying security must be listed on NASDAQ or be a Covered Security, and there must be at least three registered and active Market Makers.[6]

On March 12, 2009, NASDAQ filed a proposed rule change to revise the rules relating to the qualification, listing, and delisting of companies listed on, or applying to list on, NASDAQ to improve the organization of the rules, eliminate redundancies and simplify the rule language.[7] These rules (the "Listing Rules") were operative April 13, 2009. In adopting the new Listing Rules, NASDAQ inadvertently omitted the requirement in the prior rules that a warrant have at least 400 round lot holders for initial listing[8] on the Global Market. NASDAQ is proposing to modify Rule 5410 to add the round lot holder requirement back to the rule.

NASDAQ is also proposing to adopt an identical 400 round lot holder requirement for the initial listing of warrants on the Capital Market. NASDAQ does not currently have a holder requirement for listing warrants on the Capital Market; however, NASDAQ believes that adopting such a requirement will help ensure that warrants listed on the Capital Market will have adequate distribution and a liquid trading market.

NASDAQ is proposing to adopt an exemption from the proposed round lot holder requirements of both the Global and Capital Markets for warrants listed pursuant to a firm commitment underwritten initial public offering. NASDAQ believes that a primary purpose of distribution requirements in listing standards is to ensure a liquid trading market, promoting price discovery and the establishment of an appropriate market price for the listed securities. In the case of warrants, NASDAQ believes that this liquidity concern is partially addressed by the fact that the market price for a warrant is in large part determined by the trading price of the underlying common stock. Warrant values are primarily determined using valuation models that factor in the trading price of the underlying stock, the warrant exercise price and the expiration date of the right or warrant. NASDAQ believes that the sale of warrants in an underwritten public offering provides an additional basis for believing that a liquid trading market will likely develop for such warrants after listing, since the offering process is designed to promote appropriate price discovery. Moreover, the underwriters in a firm commitment underwritten public offering will also generally make a market in the securities for a period of time after the offering, assisting in the creation of a liquid trading market. For the foregoing reasons, NASDAQ believes that it is consistent with the protection of investors and the public interest to exempt from the proposed holder requirements of Rules 5410 and 5515(a) any series of warrants that is listed in connection with its initial firm commitment underwritten public offering. This proposed exemption is also consistent with a recent change to the listing requirements of the New York Stock Exchange ("NYSE").[9]

NASDAQ is not proposing to require a minimum number of holders for the initial listing of rights, because rights are generally distributed to the holders of an existing security and becomes a part of the realizable value of that security. As such, because the existing security must meet liquidity requirements, including a continued listing holders requirement, there is not a need to require a separate minimum number of holders of the rights to help ensure the liquidity of the rights.[10]

NASDAQ is also making a technical correction to a cross-reference contained in the Listing Rules. Rule 5730(a)(1)(A) was derived from old Rule 4420(d), which contained a cross reference to the Global Market income criteria found under old Rule 4420(a)(1). Rule 4420(a)(1) was moved to new Listing Rule 5405(b)(1)(A), yet the cross reference in Rule 5730(a)(1)(A) was not updated to reflect this new location. Accordingly, NASDAQ proposes to correct the reference in Rule 5730(a)(1)(A).

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the

[4] The Commission notes that the proposed changes to the Global Market warrant holder requirement would apply to the Global Select Market under Nasdaq Rule 5320, which provides that "[i]f the Primary Equity Security of a Company is included in the Global Select Market, any other security of that same Company, such as other classes of common or preferred stock, warrants and units, that qualify for listing on the Global Market shall also be included in the Global Select Market."

[5] Rule 5005(a)(9) defines a Covered Security as a security described in Section 18(b) of the Securities Act of 1933.

[6] Rule 5515(a).

[7] Securities Exchange Act Release No. 59663 (March 31, 2009), 74 FR 15552 (April 6, 2009)(SR–NASDAQ–2009–018).

[8] Former Rule 4420(d)(1) required warrants to substantially meet the requirements of the Global Market listing rules, which included a minimum of 400 round lot shareholders under all three entry standards.

[9] *See* SR–NYSE–2009–115 (December 2, 2009), 74 FR 64781 (December 8, 2009) (amending Section 703.12 of the NYSE Listed Company Manual to exempt from the 400 holders requirement any series of warrants listed in connection with the initial firm commitment underwritten public offering of such warrants).

[10] This is also consistent with the NYSE's treatment of rights. *See* Section 703.03(N) of the NYSE Listed Company Manual.

provisions of Section 6 of the Act,[11] in general and with Section 6(b)(5) of the Act,[12] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed rule change, which imposes a round lot holder requirement applicable to the initial listing of warrants, subject to a limited exception for warrants listed pursuant to firm commitment initial public offerings, will protect investors and the public interest and remove impediments to and perfect the mechanism of a free and open market by helping to assure adequate liquidity, and correcting inadvertent errors in the adoption of the New Listing Rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [13] and Rule 19b–4(f)(6) [14] thereunder because the proposal does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) by its terms, become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.[15]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii) [16] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay period.

The Commission believes that waiver of the 30-day operative delay period is consistent with the protection of investors and the public interest. For the Global Market, Nasdaq would require the same 400 round lot warrant holders requirement that was contained in the rules for warrants prior to the reorganization of its Listing Rules. For the Capital Market, Nasdaq is proposing an identical 400 round lot warrant holders requirement as the Global Market. The Commission believes that waiver of the 30-day operative delay period is consistent with the protection of investors and the public interest as the proposed changes should help to enhance liquidity and price discovery for warrants. Further, for both the Global Market and the Capital Market, Nasdaq's proposed exemption from the holder requirement for initial firm commitment underwritten public offerings is identical to the rules of the NYSE, which were published for notice and comment in the **Federal Register.**[17] The Commission did not receive any comments during the public comment period. The Commission further notes that waiving the 30-day operative delay for this provision is consistent with the protection of investors and the public interest as market making by the underwriters in an initial firm commitment public offering of warrants for a period of time after the offering should help alleviate short term liquidity concerns.[18] Finally, Nasdaq proposes to correct inaccurate cross references in the Listing Rules. Based on the above, the Commission believes it is consistent with the protection of investors and the public interest to waive the 30-day operative delay and therefore deems the proposal effective upon filing.[19]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such proposed 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.[20]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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–2010–024 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–2010–024. 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 NASDAQ. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You

[11] 15 U.S.C. 78f.

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6).

[15] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied the pre-filing requirement.

[16] 17 CFR 240.19b–4(f)(6)(iii).

[17] *See* note 9 *supra.*

[18] As noted by Nasdaq, the price of such warrants would be established by the firm commitment underwritten offering process, in addition to the price of the underlying security, the exercise price of the warrants, and the expiration of the warrants.

[19] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[20] 15 U.S.C. 78s(b)(3)(C).

should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–NASDAQ–2010–024, and should be submitted on or before March 25, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–4411 Filed 3–3–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61582; File No. SR–NASDAQ–2010–025]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change To Amend the By-Laws of The NASDAQ OMX Group, Inc.

February 25, 2010.

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 February 24, 2010, The NASDAQ Stock Market LLC (the "Exchange" or "NASDAQ") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NASDAQ Exchange is filing this proposed rule change relating to the By-Laws of its parent corporation, The NASDAQ OMX Group, Inc. ("NASDAQ OMX"). The text of the proposed rule change is available at *http://nasdaqomx.cchwallstreet.com,* at the Exchange's principal office, on the Commission's Web site at *http://www.sec.gov,* and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NASDAQ 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 NASDAQ Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ OMX is proposing to make certain amendments to its By-Laws to make improvements in its governance. Currently, NASDAQ OMX By-Laws provide that each director receiving a plurality of the votes at any election of directors at which a quorum is present is duly elected to the Board.[3] Under Corporate Governance Guidelines adopted by the Board, however, any director in an uncontested election who receives a greater number of votes "withheld" from his or her election than votes "for" such election is required to tender his or her resignation promptly following receipt of the certification of the stockholder vote. The NASDAQ OMX Nominating & Governance Committee then considers the resignation offer and recommends to the Board whether to accept it. Within 90 days after the certification of the election results, the Board will decide whether to accept or reject the resignation. Promptly thereafter, the Board will announce its decision by means of a press release. In a contested election (i.e., where the number of nominees exceeds the number of directors to be elected), the unqualified plurality standard controls.

Uncontested Election

NASDAQ OMX proposes the adoption of a majority voting standard by amending Article IV, Section 4.4 of the By-Laws to provide that, in an uncontested election, directors shall be elected by holders of a majority of the votes cast at any meeting for the election of directors at which a quorum is present. Under the majority voting standard, a nominee who fails to receive the requisite vote would not be duly elected to the Board; however, because a director holds office until his or her successor is duly elected and qualified, any incumbent director-nominee who fails to receive the requisite vote does not automatically cease to be a director. Instead, such director continues as a "holdover director" until such director's death, resignation or removal, or until his or her successor is duly elected and qualified. For this reason, the majority voting standard under consideration requires that any incumbent nominee, as a condition to his or her nomination for election, must submit in writing an irrevocable resignation, the effectiveness of which is conditioned upon the director's failure to receive the requisite vote in any uncontested election and the Board's acceptance of the resignation. The resignation would be considered by the Nominating & Governance Committee and acted upon by the Board in the same manner as a resignation tendered under current rules.[4] Acceptance of that resignation by the Board shall be in accordance with the policies and procedures adopted by the Board for such purpose. NASDAQ OMX specifies its policies and procedures pertaining to the election of its directors in its By-Laws. Specifically, the policies and procedures for the acceptance of the resignation of a director, by the Board, are proposed to be specified in By-Law Article IV, Section 4.4. There are no additional policies and procedures other than what is indicated in the By-Laws. In the event that NASDAQ OMX proposes to further amend its By-Laws with respect to the election of directors, including the adoption of any policies and procedure with respect to such election, NASDAQ OMX shall file a proposed rule change with the Commission to seek approval of those amendments.

Contested Election

The Exchange is codifying its process for a contested election. The directors shall continue to be elected by a plurality vote in a contested election. There is no change to the process for contested elections because if a majority voting standard were to apply in a contested election, the likelihood of a "failed election" (i.e., a situation in which no director receives the requisite vote) would be more pronounced. Moreover, the rationale underpinning the majority voting policy does not

[21] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Section 216 of the General Corporation Law of the State of Delaware provides that in the absence of the specification in the certificate of incorporation or bylaws of a Delaware corporation, directors of the Delaware corporation shall be elected by a plurality of the shares present in person or represented by proxy at the meeting and entitled to vote on the election of directors. Since the Certificate of Incorporation and By-Laws of NASDAQ OMX do not specify the voting standard for the election of NASDAQ OMX's directors, the Section 216 default standard applies to NASDAQ OMX and, therefore, elections of NASDAQ OMX's directors are currently governed by a plurality vote standard.

[4] *See* NASDAQ OMX By-Law Article IV, Section 4.5.

apply in contested elections where stockholders are offered a choice among competing candidates. Directors are currently elected by a plurality of votes present in person or represented by proxy at a meeting. The directors who receive the greatest number of votes cast for election of directors at the meeting will be elected.

General Election Requirements

The following applies to elections of directors and is not being amended. Each share of common stock has one vote,[5] subject to the voting limitation in NASDAQ OMX's certificate of incorporation that generally prohibits a holder from voting in excess of 5% of the total voting power of NASDAQ OMX.[6] In addition, each note holder is entitled to the number of votes equal to the number of shares of common stock into which such note could be converted on the record date, subject to the 5% voting limitation contained in the certificate of incorporation.

The presence of owners of a majority (greater than 50%) of the votes entitled to be cast by holder of NASDAQ OMX voting securities constitutes a quorum. Presence may be in person or by proxy. Any securities not voted, by abstention, will not impact the vote.

2. Statutory Basis

The NASDAQ Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[7] in general, and with Sections 6(b)(1) and (b)(5) of the Act,[8] in particular, in that the proposal enables the NASDAQ Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Act and to comply with and enforce compliance by members and persons associated with members with provisions of the Act, the rules and regulations thereunder, and self-regulatory organization rules, and 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 regulating, clearing, settling, processing information with respect to, and 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.

For purposes of an uncontested election, the proposed amendments adopt a majority vote standard, for the NASDAQ Exchange's parent, which would enable its directors to be elected in a manner reflective of the desires of shareholders and provide a mechanism to protect against the election of directors by less than a majority vote of the shareholders. The plurality standard would continue to apply in contested elections.

B. Self-Regulatory Organization's Statement on Burden on Competition

The NASDAQ Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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–2010–025 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–2010–025. 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–NASDAQ–2010–025, and should be submitted on or before March 25, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–4453 Filed 3–3–10; 8:45 am]

BILLING CODE 8011–01–P

[5] *See* NASDAQ OMX Certificate of Incorporation at Article IV, C.1(a).

[6] *See* NASDAQ OMX Certificate of Incorporation at Article IV, C.1(b)2.

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(2), (5).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61593; File No. SR–DTC–2009–17]

Self-Regulatory Organizations; The Depository Trust Company; Order Approving Proposed Rule Change To Allow The Depository Trust Company To Provide Settlement Services to European Central Counterparty Limited for U.S. Securities Traded on European Trading Venues

February 25, 2010.

I. Introduction

On December 17, 2009, The Depository Trust Company ("DTC") filed with the Securities and Exchange Commission ("Commission") proposed rule change SR–DTC–2009–17 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").[1] The proposed rule change was published for comment in the **Federal Register** on January 5, 2010.[2] No comment letters were received on the proposal. This order approves the proposal.

II. Description

European Central Counterparty Limited ("EuroCCP") is a clearing house recognized by the United Kingdom and regulated by the Financial Services Authority ("FSA"). It provides central counterparty clearance and settlement services to its participants for their securities transactions executed on or through European trading venues. Several of the trading platforms EuroCCP services asked EuroCCP to clear and settle trades in U.S. equities, Exchange Traded Funds ("ETFs"), and American Depositary Receipts ("ADRs")(collectively, "U.S. Securities") that are executed on or through them.[3] Trades in these securities will be routed to EuroCCP through existing interfaces with the trading platforms and will be novated and netted in accordance with EuroCCP's Rules and Procedures. DTC will notify Participants by Important Notice of the effective date of the service. EuroCCP will employ its current trade day netting methodology to produce each day for each of its participants in the EuroCCP U.S. Program a single settlement obligation for each U.S. Security.[4]

Under the EuroCCP U.S. Program, EuroCCP will use DTC's settlement services for these netted securities obligations by opening and operating an account at DTC. Each EuroCCP participant in the EuroCCP U.S. Program will be required to appoint a DTC participant U.S. settlement agent to settle obligations on its behalf.[5] EuroCCP will be subject to the same net debit cap [6] and collateral monitor ("Risk Management Controls") [7] as any other DTC participant.

DTC is modifying its Settlement Service Guide in three ways to maximize settlement efficiencies for DTC participants acting as U.S. settlement agents in the EuroCCP U.S. Program. First, reclaims to EuroCCP's account will not be "matched". A reclaim is an instruction from a participant to DTC to return a delivery. It is generally used in the event of an error where a participant does not recognize the delivery. DTC's systems attempt to identify a corresponding original transaction for every reclaim presented for processing. If DTC's systems identify a corresponding original transaction, the reclaim is processed.[8]

Under DTC's existing Settlement Service Guide procedures, a matched reclaim for less than $15 million is not subject to DTC's risk management controls. As a result a matched reclaim to EuroCCP for less than $15 million would not be subject to DTC's risk management controls for EuroCCP's account and could create a debit in the EuroCCP account that could exceed EuroCCP's liquidity resources and cause EuroCCP to be unable to complete settlement with DTC. To avoid this outcome, DTC is changing its procedures so that all reclaims to the EuroCCP account, including matched reclaims under $15 million, will be subject to DTC's risk management controls. Consequently, all reclaims violating EuroCCP's net debit cap or collateral monitor will recycle until the reclaim can settle without violating the risk management controls or until the reclaim drops at the recycle cutoff.[9] This is how DTC currently treats reclaims that are over $15 million dollars.

Second, DTC is modifying its Settlement Service Guide so that pending valued transactions and pending free transactions to or from the EuroCCP account will fail to settle or "drop" [10] at 3:10 p.m.[11] This cutoff time will allow EuroCCP to close its business day.

Third, the Receiver Authorized Delivery ("RAD") cutoff time will be 3:30 p.m. for both valued transactions and free delivery transactions.[12] DTC's current RAD deadline for valued transactions is 3:30 p.m., and the RAD deadline for free delivery transactions is 6:30 p.m. To allow EuroCCP to halt transaction processing in the EuroCCP account and end its processing day, DTC will require a synchronized RAD cutoff time of 3:30 p.m.

III. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act [13] and the rules and regulations thereunder applicable to DTC. In particular, the Commission believes that the amendments DTC is making to its rules in connection to it providing settlement services to EuroCCP for U.S. Securities traded on European trading venues are consistent with DTC's obligations under

[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 61249 (December 29, 2009), 75 FR 0947.

[3] The trading platforms will support trading activity of U.S. issues in U.S. dollars. The platforms currently operate from 8 a.m. to 4:30 p.m. London time.

[4] Each single settlement obligation calculated by EuroCCP will settle at DTC on T+3.

[5] EuroCCP will be given a reason code for the transactions it processes through its DTC account. As part of this filing, DTC proposes updating its Settlement Service Guide to reflect this reason code. In addition, DTC will update the language in the Memo Segregation section of the Settlement Service Guide and the reason codes that receive Memo Segregation treatment to reflect this reason code and to reflect certain other technical, non-substantive changes to the reason codes.

[6] Before completing a transaction in which a participant is the receiver, DTC calculates the resulting effect the transaction would have on the participant's account to determine whether the resulting net settlement balance would exceed the participant's assigned net debit cap. Any transaction that would cause the participant's net settlement debit to exceed its net debit cap is placed in a pending queue that recycles until another transaction or payment creates credits in the participant's account such that the participant's net settlement debit is below its net debit cap.

[7] DTC tracks collateral in a participant's account through its collateral monitor. At all times, the collateral monitor reflects the amount by which the collateral in the account exceeds the net debit in the account. When processing a transaction, DTC verifies that the deliverer's and receiver's collateral monitors will not become negative when the transaction completes. If the transaction would cause either party to have a negative collateral monitor, the transaction will recycle until the deficient account has sufficient collateral.

[8] The following seven elements must be consistent for the system to process a reclaim as matched: Receiver, deliverer, CUSIP, quantity, dollar amount, shares, and settlement date.

[9] If the reclaim drops at the recycle cutoff, then the receiving participant will retain the securities and the debit for the delivery it received from EuroCCP.

[10] Items that will drop will include deliveries to EuroCCP failing due to lack of position by the delivering participant and items failing DTC's risk management controls.

[11] DTC's current cutoff time for pending valued transactions is 3:10 p.m. and for pending free transactions is 6:35 p.m.

[12] RAD is a control mechanism which allows a participant to review transactions prior to completion of processing. It limits the exposure from misdirected or erroneously entered deliver orders, payment orders, and pledges.

[13] 15 U.S.C. 78q–1.

Section 17A(b)(3)(F),[14] which requires, among other things, that the rules of a clearing agency are designed to provide for the safekeeping of securities and funds under its possession or control or for which it is responsible.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act[15] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[16] that the proposed rule change (File No. SR–DTC–2009–17) be, and hereby is, approved.[17]

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[18]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–4457 Filed 3–3–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61590; File No. SR–Phlx–2009–113]

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Order Granting Approval of Proposed Rule Change Relating to Index Option Position Limits

February 25, 2010.

On December 29, 2009, NASDAQ OMX PHLX, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to increase the position limits for certain narrow-based (industry) index option contracts. The Commission published the proposed rule change for comment in the **Federal Register** on January 19, 2010.[3] The Commission received no comments on the proposed rule change. This order approves the proposed rule change.

The Exchange proposes to revise the three tiered levels of position limits that are set forth in Phlx Rule 1001A by increasing those limits for options on the PHLX Oil Service Sector, PHLX Semiconductor Sector, PHLX Utility Sector, PHLX Gold/Silver Sector, PHLX Housing Sector, SIG Energy MLP Index, SIG Oil Exploration & Production Index, and the NASDAQ China Index (collectively, the "Specified Index Options").[4] Currently, the Specified Index Options are subject to position limits of 18,000, 24,000, or 31,500 contracts based generally on the degree of concentration of a single component stock or groups of component stocks comprising the index.[5] The Exchange proposes to increase these limits to 54,000, 72,000, and 94,500 contracts, respectively, for the Specified Index Options. In addition, the Exchange proposes to delete certain obsolete references in Rule 1001A.[6]

The Exchange states that it recognizes that the purpose of position limits is to prevent manipulation and protect against disruption of the markets for both the option as well as the underlying security. The Exchange states that it has considered the effects of increased position limits for the Specified Index Options on the marketplace, and believes that manipulation and disruption concerns are addressed by a combination of existing surveillance functions and the implementation of tiered position limits.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange.[7] In particular, the Commission believes that the proposed rule change is consistent with Section 6(b)(5) of the Act,[8] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to 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 Commission believes that the Exchange's proposal to increase the three tiered levels of position limits for the Specified Index Options is reasonable. Specifically, the Commission believes that increasing the three tiered levels of position limits for the Specified Index Options may bring additional depth and liquidity to these index options classes without significantly increasing concerns regarding manipulation or disruption of the market for index options or the underlying component securities.[9]

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[10] that the proposed rule change (SR–Phlx–2009–113) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–4458 Filed 3–3–10; 8:45 am]

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[14] 15 U.S.C. 78q–1(b)(3)(F).

[15] 15 U.S.C. 78q–1.

[16] 15 U.S.C. 78s(b)(2).

[17] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[18] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 61326 (January 11, 2010), 75 FR 2902 ("Notice").

[4] The SIG Indexes noted herein are trademarks of SIG Indices, LLLP.

[5] Specifically, Phlx Rule 1001A(b)(i) currently provides for the following position limits for narrow-based index options: (1) 18,000 contracts if the Exchange determines that any single underlying stock accounted, on average, for 30% or more of the index value during the 30-day period immediately preceding the semi-annual review of the pertinent index option required by Phlx Rule 1001A(b)(ii); (2) 24,000 contracts if the Exchange determines, at the time of the required semi-annual review, that any single underlying stock accounted, on average, for 20% or more of the index value or that any five underlying stocks together accounted, on average, for more than 50% of the index value, but that no single stock in the group accounted, on average, for 30% or more of the index value, during the 30-day period immediately preceding the review; or (3) 31,500 contracts if the Exchange determines that the conditions specified above which would require the establishment of a lower limit have not occurred. In addition, the rule provides that position limits with respect to options on the KBW Bank Index are 44,000 contracts.

[6] Phlx exercise limits in Phlx Rule 1002A, Exercise Limits, are established by reference to position limits. The proposed increase in position limits for the Specified Index Options would therefore effectively increase exercise limits for these options. *See* Phlx Rule 1002A.

[7] In approving this rule, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[8] 15 U.S.C. 78f(b)(5).

[9] The Exchange states that it dedicates substantial resources to monitoring the markets for evidence of manipulation or disruption caused by investors with positions at or near current position or exercise limits, and that the proposed increased position limits would not diminish the surveillance function in this regard. *See* Notice, *supra* note 3.

[10] 15 U.S.C. 78s(b)(2).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61583; File No. SR–Phlx–2010–23]

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Intermarket Linkage Rules

February 25, 2010.

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 February 19, 2010, NASDAQ OMX PHLX, Inc. ("Phlx" or the "Exchange") 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 self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to eliminate Exchange Rule 1088, *Phase Out of Intermarket Linkage Rules.*

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 purpose of the proposed rule change is to eliminate Exchange Rule 1088, a temporary rule titled *Phase Out of Intermarket Linkage Rules* because this rule is no longer necessary.

On June 17, 2008, the Exchange filed the Options Order Protection and Locked/Crossed Market Plan ("Plan"), joining all other approved options markets in adopting the Plan.[3] The Plan requires each options exchange to adopt rules implementing various requirements specified in the Plan.[4] The Plan replaces the former Plan for the Purpose of Creating and Operating an Intermarket Linkage ("Linkage Plan").[5] The Linkage Plan required Participating Options Exchanges to operate a stand-alone system or "Linkage" for sending order-flow between exchanges to limit trade-throughs.[6] The Options Clearing Corporation ("OCC") operated the Linkage system (the "System").[7] The Exchange adopted various new rules in connection with the Plan to avoid trade-throughs and locked markets, among other things.[8] The Exchange currently offers private routing directly to away markets.[9]

The Exchange adopted Exchange Temporary Rule 1088 in order to facilitate the participation of certain Participating Options Exchanges who may require the use of P/A Orders and Principal Orders after implementation of the Plan.[10] Certain Participating Options Exchanges required a temporary transition period during which they continued to utilize these order types that existed under the Linkage Plan. The Exchange proposed substantially similar rules with that of the other Participating Options Exchanges to accommodate the possibility of continued use of P/A Orders and Principal Orders. At this time all Participating Options Exchanges have discontinued use of the Linkage Plan. The Exchange proposes at this time to delete Temporary Rule 1088 because it is no longer necessary in light of the discontinued use of the Linkage Plan.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[11] in general, and furthers the objectives of Section 6(b)(5) of the Act[12] 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 proposing the elimination of Temporary Rule 1088, which reflects usage of a former Linkage Plan that has since been replaced by a new Plan.

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: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, it has become effective pursuant to Section

[1] 15 U.S.C.78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release Nos. 60405 (July 20, 2009) (National Market System Plan Relating to Options Order Protection and Locked/Crossed Markets). The Plan is a national market system plan proposed by the seven existing options exchanges and approved by the Commission. *See* Securities Exchange Act Release No. 59647 (March 30, 2009), 74 FR 15010 (April 2, 2009) (File No. 4–546) ("Plan Notice") and 60405 (July 30, 2009), 74 FR 39362 (August 6, 2009) (File No. 4–546) ("Plan Approval"). The seven options exchanges are: Chicago Board Options Exchange, Incorporated ("CBOE"); International Securities Exchange LLC ("ISE"); NASDAQ OMX BX, Inc. ("BOX"); The NASDAQ Stock Market LLC ("Nasdaq"); NYSE Amex LLC ("NYSE Amex"); NYSE Arca, Inc. ("NYSE Arca"); and Phlx (each exchange individually a "Participant" and, together, the "Participating Options Exchanges").

[4] *See* Securities Exchange Act Release No. 60363 (July 22, 2009), 74 FR 37270 (July 28, 2009) (SR–Phlx–2009–61). Linkage was governed by the Options Linkage Authority under the conditions set forth under the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage approved by the Commission. The registered U.S. options markets are linked together on a real-time basis through a network capable of transporting orders and messages to and from each market.

[5] *See* Securities Exchange Act Release No. 60363 (July 22, 2009), 74 FR 37270 (July 28, 2009) (SR–Phlx–2009–61). Linkage was governed by the Options Linkage Authority under the conditions set forth under the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage approved by the Commission. The registered U.S. options markets are linked together on a real-time basis through a network capable of transporting orders and messages to and from each market.

[6] *See* footnote 5.

[7] *See* footnote 5.

[8] *See* footnote 3.

[9] *See* Exchange Rule 1080(m).

[10] *See* Securities and Exchange Act Release No. 60550 (August 20, 2009), 74 FR 44430 (August 28, 2009) (SR–Phlx–2009–61).

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

19(b)(3)(A) of the Act[13] and Rule 19b–4(f)(6) thereunder.[14]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate 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–Phlx–2010–23 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–2010–23. 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.[15] 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–Phlx–2010–23 and should be submitted on or before March 25, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Florence E. Harmon,

Deputy Secretary.

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BILLING CODE 8011–01–P

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the self-regulatory organization to 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.

[15] The text of the proposed rule change is available on Phlx's Web site at *http://www.nasdaqtrader.com,* on the Commission's Web site at *http://www.sec.gov,* and at the Commission's Public Reference Room.

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61573; File No. SR–NASDAQ–2010–022]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ Stock Market, LLC. Inc. Relating To Amending NASDAQ Options Market ("NOM") Chapter V, Section 6, Obvious Errors

February 23, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1], and Rule 19b–4[2] thereunder, notice is hereby given that on February 18, 2010, The NASDAQ Stock Market LLC ("NASDAQ") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II, below, which Items have been prepared by the 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 proposes to amend NASDAQ Options Market ("NOM") Rule Chapter V, Section 6, Obvious Errors, to adopt the ability to review transactions on NASDAQ's own motion.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASDAQ included statements concerning the purpose of and basis for the 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend NOM Chapter V, Section 6 pertaining to the nullification and adjustment of options transactions. Specifically, NASDAQ proposes to adopt a provision which provides that in the interest of maintaining a fair and orderly market and for the protection of investors, the Chief Regulatory Officer of NASDAQ or his/her designee who is an officer (collectively "NASDAQ officer"), may, on his or her own motion or upon request, determine to review any transaction occurring on NASDAQ that is believed to be erroneous.[3] A transaction reviewed pursuant to this provision may be nullified or adjusted only if it is determined by the NASDAQ officer that the transaction is an obvious error as provided in Chapter V, Section 6. A transaction would be adjusted or nullified in accordance with the provision under which it is deemed an erroneous transaction. The NASDAQ officer may be assisted by a designated employee in NASDAQ Regulation that is trained in the application of this rule for reviewing a transaction(s).

The NASDAQ officer shall act pursuant to this paragraph as soon as possible after receiving notification of the transaction, and ordinarily would be expected to act on the same day as the transaction occurred. However, because a transaction under review may have occurred near the close of trading or due

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In the event a party to a transaction requests that NASDAQ review a transaction, the NASDAQ officer nonetheless would need to determine, on his or her own motion, whether to review the transaction.

to unusual circumstances, the rule provides that the NASDAQ officer shall act no later than 9:30 a.m. (ET) on the next trading day following the date of the transaction in question. A party affected by a determination to nullify or adjust a transaction pursuant to this provision may appeal such determination in accordance with Chapter V, Section 6; however, a determination by a NASDAQ officer not to review a transaction, or a determination not to nullify or adjust a transaction for which a review was requested or conducted, is not appealable. NASDAQ believes it is appropriate to limit review on appeal to only those situations in which a transaction is actually nullified or adjusted.

This provision is not intended to replace a party's obligation to request a review, within the required time periods under Chapter V, Section 6, of any transaction that it believes meets the criteria for an obvious error. And, if a transaction is reviewed and a determination has been rendered pursuant to Chapter V, Section 6, no additional relief may be granted under this new provision. Moreover, NASDAQ does not anticipate exercising this new authority in every situation in which a party fails to make a timely request for review of this transaction pursuant to Chapter V, Section 6. NASDAQ believes this provision should help to protect the integrity of its marketplace by vesting a NASDAQ officer with the authority to review a transaction that may be erroneous, in those situations where a party failed to make a timely request for a review.

NASDAQ believes that the provision would also be useful in situations where some parties, but not all, to trades around the same time have requested a review. Under the rule, reviews are currently request-based. Under the proposal, in this situation, NASDAQ would be able to invoke this provision to review a series of trades, whether or not all parties requested it.

2. Statutory Basis

NASDAQ believes that its proposal is consistent with Section 6(b) of the Act [4] in general, and furthers the objectives of Section 6(b)(5) of the Act [5] 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. NASDAQ notes that a NASDAQ officer can adjust or nullify a transaction under the authority granted by this provision only if the transaction meets the objective criteria for an obvious error under NASDAQ rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ 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; or (iii) 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, it has become effective pursuant to Section 19(b)(3)(A) of the Act [6] and Rule 19b–4(f)(6) thereunder.[7]

The Exchange has requested that the Commission waive the 30-day operative delay so that the Exchange may promptly implement the proposed rule change. The Exchange believes that a recent trading situation that resulted in divergent outcomes on some other options markets could have been handled in a more clear and orderly way if the new provision had been in place. The Commission notes that the proposed rule change is substantively identical to a previously approved proposal from CBOE [8] and thus presents no new regulatory issues. The Commission believes that, under the circumstances, it is appropriate and consistent with the protection of investors and the public interest to waive the 30-day operative delay. Therefore, the Commission hereby designates the proposed rule change operative upon filing.[9]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File No. SR–NASDAQ–2010–022 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–NASDAQ–2010–022. 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,[10] 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

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 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, 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.

[8] *See* Exchange Act Release No. 60978 (November 10, 2009), 74 FR 59296 (November 17, 2009) (approving SR–CBOE–2009–68).

[9] 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).

[10] The text of the proposed rule change is available on the Commission's Web site at *http://www.sec.gov.*

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 Nasdaq. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–NASDAQ–2010–022 and should be submitted on or before March 25, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–4452 Filed 3–3–10; 8:45 am]

BILLING CODE 8011–01–P

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law (Pub. L. 104–13), the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes revisions and extensions of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, e-mail, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Director to the following addresses or fax numbers.

(OMB), Office of Management and Budget, Attn: Desk Officer for SSA. *Fax:* 202–395–6974. *E-mail address: OIRA_Submission@omb.eop.gov.*

(SSA), Social Security Administration, DCBFM, Attn: Director, Center for Reports Clearance, 1333 Annex Building, 6401 Security Blvd., Baltimore, MD 21235. *Fax:* 410–965–0454. *E-mail address: OPLM.RCO@ssa.gov.*

I. The information collections below are pending at SSA. SSA will submit them to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than May 3, 2010. Individuals can obtain copies of the collection instruments by calling the SSA Director for Reports Clearance at 410–965–0454 or by writing to the above e-mail address.

1. *Application for Lump Sum Death Payment—20 CFR 404.390–404.392—0960–0013.* SSA uses Form SSA–8–F4 to collect information needed to authorize payment of the lump sum death payment (LSDP) to a widow, widower, or children as defined in section 202(i) of the Social Security Act. Respondents complete the application for this one-time payment via paper form, telephone, or an in-person interview with SSA employees. Respondents are applicants for the LSDP.

Type of Request: Revision of an OMB-approved information collection.

Collection method	Number of respondents	Estimated completion time (minutes)	Burden hours
MCS	278,825	10	46,471
MCS/Signature Proxy	278,825	9	41,824
Paper	29,350	10	4,892
Totals:	587,000		93,187

2. *Certificate of Responsibility for Welfare and Care of Child Not in Applicant's Custody—20 CFR 404.330, 404.339–341, and 404.348–404.349—0960–0019.* SSA uses Form SSA–781 to determine if non-custodial parents who are filing for spouse's or mother's and father's benefits based on having a child in their care meet the in-care requirements. Respondents are applicants for spouse's and/or mother's and father's benefits.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 14,000.

Frequency of Response: 1.

Average Burden Per Response: 10 minutes.

Estimated Annual Burden: 2,333 hours.

3. *Supplemental Statement Regarding Farming Activities of Person Living Outside the U.S.A.—0960–0103.* SSA uses Form SSA–7163A to document beneficiary or claimant reports of working on a farm outside the United States (U.S.). Specifically, the information provided on this form helps us to determine if we should apply foreign work deductions to the recipient's benefits. We collect the information either annually or every other year, depending on the respondent's country of residence. Respondents are Social Security recipients engaged in farming activities outside the U.S.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 1,000.

Frequency of Response: 1.

Average Burden Per Response: 1 hour.

Estimated Annual Burden: 1,000 hours.

4. *Disability Report—Appeal—20 CFR 404.1512, 416.912, 404.916(c), 416.1416(c), 405 Subpart C, 422.140—0960–0144.* SSA requires disability claimants who are appealing an unfavorable disability determination to complete Form SSA–3441–BK. This form allows claimants to disclose any changes to their disability or resources that might influence SSA's unfavorable determination. SSA may use the information to: (1) Reconsider and review an initial disability determination; (2) review a continuing disability; and (3) evaluate a request for a hearing. This information assists the State Disability Determination Services and administrative law judges (ALJ) in: (1) Preparing for the appeals and hearings; and (2) issuing a determination or decision on an individual's entitlement (initial or continuing) to disability benefits. Respondents are individuals who appeal denial, reduction, or cessation of Social Security disability income and Supplemental Security Income (SSI) payments, or who are requesting a hearing before an ALJ.

Type of Request: Revision of an OMB-approved information collection.

[11] 17 CFR 200.30–3(a)(12).

Collection method	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated annual burden (hours)
SSA–3441 (Paper Form)	12,604	1	45	9,453
Electronic Disability Collect System (EDCS)	843,090	1	45	632,318
I3441 (Internet Form)	417,268	1	120	834,536
Totals	1,272,962			1,476,307

5. *Request for Hearing by Administrative Law Judge—20 CFR 404.929, 404.933, 416.1429, 404.1433, 405.722, 418.1350—0960–0269.* When SSA denies applicants' or beneficiaries' requests for new or continuing benefits, those applicants/beneficiaries are entitled to request a hearing to appeal the decision. SSA uses Form HA–501 to document such requests. Although SSA collects this information, the actual hearings take place before ALJs employed by the Department of Health and Human Services (HHS). The respondents are: (1) Applicants for or current recipients of various Social Security benefits who want to appeal SSA's denial of their requests for new or continued benefits; and (2) Medicare Part B recipients whom SSA has determined must pay the Medicare Part B Income-Related Monthly Adjustment Amount, both of whom wish to appeal this decision at a hearing before an HHS ALJ.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 669,469.

Frequency of Response: 1.

Average Burden per Response: 10 minutes.

Estimated Annual Burden: 111,578 hours.

6. *Information about Joint Checking/Savings Accounts—20 CFR 416.120, 416.1208—0960–0461.* SSA considers a person's resources when evaluating eligibility for SSI payments. Generally, we consider funds in checking and savings accounts to be resources owned by the individuals whose names appear on the account. Individuals applying for SSI, however, may rebut an assumption of ownership in a joint account if they submit certain evidence establishing the funds do not belong to them. SSA uses Form SSA–2574 to collect information from SSI applicants/recipients who object to the assumption they own all or part of the funds in a joint checking or savings account bearing their names. SSA collects information about the account from both the SSI applicant/recipient and other account holder(s). After receiving the completed form, SSA can determine if we should consider the account to be a resource for the SSI payments applicant/recipient. The respondents are applicants and recipients of SSI and individuals who list themselves as joint owners of financial accounts with SSI applicants/recipients.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 200,000.

Frequency of Response: 1.

Average Burden per Response: 7 minutes.

Estimated Annual Burden: 23,333 hours.

7. *Request for Earnings and Benefit Estimate Statement—20 CFR 404.810—0960–0466.* SSA uses the information collected by Form SSA–7004 to identify respondents' Social Security earnings records, extract posted earnings information, calculate potential benefit estimates, produce the resulting Social Security statements, and mail them to the requesters. The respondents are Social Security number holders requesting information about their Social Security earnings records and estimates of their potential benefits.

Type of Request: Revision of an OMB-approved information collection.

Modality	Number of respondents	Frequency of response	Average burden per response (minutes)	Total annual burden (hours)
Paper Version	127,000	1	5	10,583
Internet Version	426,000	1	5	35,500
Totals	553,000			46,083

8. *Beneficiary Recontact Form—20 CFR 404.703, 404.705—0960–0502.* SSA must ensure that recipients of disability payments continue to be eligible for their payments. Research has indicated benefit recipients may fail to report circumstances that affect their benefits. Two such cases are: (1) When parents receiving disability benefits for their child marry; and (2) the removal of an entitled child from parents' care. SSA uses Form SSA–1588–OCR–SM to ask mothers/fathers about their marital status and children in care to detect overpayments and avoid continuing payment to those are no longer entitled. Respondents are recipients of mother/father Social Security benefits.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 133,400.

Frequency of Response: 1.

Average Burden per Response: 5 minutes.

Estimated Annual Burden: 11,117 hours.

9. *Complaint Form for Allegations of Discrimination in Programs or Activities Conducted by the Social Security Administration—0960–0585.* SSA uses Form SSA–437 to investigate and formally resolve complaints of discrimination based on disability, race, color, national origin (including limited English proficiency), sex, sexual orientation, age, religion, or retaliation for having participated in a proceeding under this administrative complaint process in connection with an SSA program or activity. SSA also uses this form to review, investigate, and resolve complaints alleging discrimination based on status as a parent in education, training programs, or activities conducted by SSA. Individuals who believe SSA discriminated against them on any of the above bases may file a written complaint of discrimination. SSA uses the information to identify the complainant; identify the alleged discriminatory act; ascertain the date of such alleged act; obtain the identity of any individual(s) with information about the alleged discrimination; and ascertain other relevant information that

would assist in the investigation and resolution of the complaint. Respondents are individuals who believe SSA or SSA employees, contractors, or agents in programs or activities conducted by SSA discriminated against them.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 140.

Frequency of Response: 1.

Average Burden per Response: 1 hour.

Estimated Annual Burden: 140 hours.

10. *Social Security Benefits Application—20 CFR 404.310–404.311, 404.315–404.322, 404.330–404.333, 404.601–404.603, and 404.1501–404.1512—0960–0618.* This collection comprises the various application modalities for retirement, survivors, and disability benefits. These modalities include paper forms (SSA Forms SSA–1, SSA–2, and SSA–16), Modernized Claims System (MCS) screens for in-person field office interview applications, and the Internet-based iClaim application. This information collection request (ICR) is for additions and revisions to the information collection.

Type of Request: Revision of an OMB-approved information collection.

Paper Forms/Accompanying MCS Screens Burden Information:

Collection method	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated annual burden (hours)
Form SSA–1				
MCS	172,200	1	11	31,570
MCS/Signature Proxy	1,250,800	1	10	208,467
Paper	20,000	1	11	3,667
Medicare-only MCS	299,000	1	7	34,883
Medicare-only Paper	1,000	1	7	117
Totals	1,743,000			278,704
Form SSA–2				
MCS	36,860	1	15	9,215
MCS/Signature Proxy	331,740	1	14	77,406
Paper	3,800	1	15	950
Totals	372,400			87,571
Form SSA–16				
MCS	218,657	1	20	72,886
MCS/Signature Proxy	1,967,913	1	19	623,172
Paper	24,161	1	20	8,054
Totals	2,210,731			704,112
iClaim				
iClaim 3rd Party	28,118	1	15	7,030
iClaim Applicant after 3rd Party Completion	28,118	1	5	2,343
First Party iClaim	541,851	1	15	135,463
Medicare-only iClaim	200,000	1	10	33,333
Totals	798,087			178,169

Aggregate Public Reporting Burden: 1,248,556 hours.

11. *SSI Telephone Wage Reporting System (SSITWR)—20 CFR 416.701–0732—0960–0715.* SSA requires SSI recipients to report changes that could affect their eligibility for and the amount of their SSI payments, such as changes in income, resources, and living arrangements. The SSITWR, formerly the Statement for SSI Monthly Wage Reporting (Telephone), enables SSI recipients to meet these requirements by providing them with a fully automated mechanism to report their monthly wages by telephone, instead of contacting their local field offices. The SSITWR allows callers to report their wages either by speaking their responses through voice recognition technology, or by keying in responses using the telephone key pad. To ensure the security of the information provided, SSITWR asks callers to provide information SSA can compare against its records for authentication purposes. Once the system authenticates the identity of the callers, the callers can speak or key in their wage data. The respondents are SSI recipients, deemors, and representative payees of recipients.

Type of Request: Revision of an OMB-approved information collection.

Collection method	Frequency of reporting	Number of respondents	Estimated completion time (minutes)	Burden (hours)
Training/Instruction	1	85,000	35	49,584
SSITWR	12	85,000	5	85,000

Collection method	Frequency of reporting	Number of respondents	Estimated completion time (minutes)	Burden (hours)
Total		*85,000		134,584

Note: * The same 85,000 respondents are completing both activities, so the actual total number of respondents is only 85,000.

12. *Treating Physician Consultative Examination Interest Form—20 CFR 404.1519g—20 CFR 404.1519i—0960–0751.* When an applicant for Social Security disability benefits has not consulted a physician for a specified period preceding the application, SSA will ask the applicant to complete a consultative examination (CE). If the applicant has a treating physician (TP), SSA sends a medical evidence of record request letter and Form SSA–84 to the applicant's TP; the TP completes the latter form and returns it to SSA to indicate interest in conducting the CE. If the TP does not return the form, SSA assumes the TP is not interested in performing the CE. Respondents are disability benefits applicants' treating physicians.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 168.

Frequency of Response: 1.

Average Burden Per Response: 5 minutes.

Estimated Annual Burden: 14 hours.

13. *Claimant Travel Reimbursement Request—20 CFR 404.999a–20 CFR 404.99c—0960–0752.* SSA sends Form SSA–104 to Social Security benefits recipients with a CE appointment notice. To receive reimbursement for their travel expenses to the CE, recipients must: (1) Submit an itemized list of expenditures for their round trip; and (2) complete, sign, and return the SSA–104 to SSA. SSA collects this information to determine the amount of reimbursement. Respondents are applicants for disability claims applying for reimbursement of travel expenses to a CE.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 11,092.

Frequency of Response: 1.

Average Burden Per Response: 10 minutes.

Estimated Annual Burden: 1,849 hours.

II. SSA has submitted the information collections listed below to OMB for clearance. Your comments on the information collections would be most useful if OMB and SSA receive them within 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than April 5, 2010. You can obtain a copy of the OMB clearance packages by calling the SSA Director for Reports Clearance at 410–965–0454 or by writing to the above e-mail address.

1. *Farm Self-Employment Questionnaire—20 CFR 404.1082(c) & 404.1095—0960–0061.* Section 211(a) of the Social Security Act requires the existence of a trade or business as a prerequisite for determining if an individual or partnership can claim net earnings from self-employment. During a personal interview, the requesting Social Security field office uses Form SSA–7165 to elicit the information necessary to establish the existence of an agricultural trade or business and subsequent covered earnings for Social Security entitlement purposes. The respondents are applicants for Social Security benefits whose entitlement depends on whether the worker has covered earnings from self-employment as a farmer.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 47,500.

Frequency of Response: 1.

Average Burden Per Response: 10 minutes.

Estimated Annual Burden: 7,917 hours.

2. *Statement for Determining Continuing Eligibility Supplemental Security Income Payment—20 CFR 416.204—0960–0145.* SSA uses the information from Form SSA–8202–BK to conduct low- and middle-error-profile (LEP–MEP) telephone or face-to-face redetermination (RZ) interviews with SSI recipients and representative payees. The information SSA collects during the interview is needed to determine whether SSI recipients have met and continue to meet all statutory and regulatory requirements for SSI eligibility and whether they have been, and are still receiving, the correct payment amount.

Note: SSA published this information collection with the incorrect burden information on December 28, 2009 at 74 FR 68655. The correct information is below.

Type of Request: Revision of an OMB-approved information collection.

Form No.	Number of respondents	Frequency of response	Average burden per response (minutes)	Total annual burden (hours)
SSA–8202–BK	235,390	1	21	82,387
MSSICS	333,408	1	20	111,136
Totals	568,798			193,523

3. *Claimant Statement About Loan of Food or Shelter; Statement About Food or Shelter Provided to Another—20 CFR 416.1130–416.1148—0960–0529.* SSA uses Forms SSA–5062 and SSA–L5063 to obtain statements about food and/or shelter provided to SSI claimants or recipients. SSA uses this information to determine whether food and/or shelter are bona fide loans or if SSA should count them as income for SSI purposes. This determination can affect a claimant or recipient's eligibility for SSI and the amount of SSI payments. The respondents are claimants and recipients for SSI payments and individuals who provide loans of food or shelter to them.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 131,080.

Frequency of Response: 1.

Average Burden Per Response: 10 minutes.

Estimated Annual Burden: 21,847 hours.

4. *Request To Resolve Questionable Quarters of Coverage (QC); Request for QC History Based on Relationship—0960–0575.* The Personal Responsibility and Work Opportunity Reconciliation Act states that aliens admitted for lawful residence who have worked and earned 40 qualifying QCs for Social Security

purposes can generally receive State benefits. States complete Form SSA–512 to request clarification from SSA on questionable QC information. Specifically, States use this form to request QC information for an alien's spouse or child in cases where the alien does not sign a consent form giving permission to access his/her Social Security records. We can allocate QCs to a spouse and/or to a child under age 18, if needed, to obtain 40 qualifying QCs for the alien. The respondents are State agencies that require QC information to determine eligibility for benefits.

Note: This is a correction notice. SSA published this information collection with the incorrect burden information on December 28, 2009 at 74 FR 68655. In addition, since we are revising the Privacy Act Statement, this is now a revision of an OMB-approved information collection.

Type of Request: Revision of an OMB-approved information collection.

Form No.	Number of respondents	Frequency of response	Average burden per response (minutes)	Total annual burden (hours)
SSA–512	25,000	1	2	833
SSA–513	25,000	1	2	833
Totals	50,000			1,666

5. *Site Review Questionnaire for Volume and Fee-for-Service Payees and Beneficiary Interview Form—20 CFR 404.2035, 404.2065, 416.665, 416.701, and 416.708—0960–0633.* SSA asks organizational representative payees to complete Form SSA–637, Site Review Questionnaire for Volume and Fee-for-Service Payees, to provide information on how they carry out their representative payee responsibilities, including how they manage beneficiary funds. SSA then obtains information from the beneficiaries these organizations represent via the SSA–639, Beneficiary Interview Form, to corroborate the payees' statements. Due to the sensitivity of the information, SSA employees always complete the forms based on the answers respondents give during the interview. The respondents are individuals, State and local governments, and non-profit and for-profit organizations that serve as representative payees and the beneficiaries they serve.

Note: This is a correction notice. SSA published this information collection as an extension on December 08, 2009 at 74 FR 64801. Since we are revising the Privacy Act Statement, this is now a revision of an OMB-approved information collection.

Type of Request: Revision of an OMB-approved information collection.

Form No.	Number of respondents	Frequency of response	Average burden per response (minutes)	Total annual burden (hours)
SSA–637	2,001	1	120	4,002
SSA–639	9,341	1	10	1,557
Totals	11,342			5,559

6. *Direct Deposit Sign-Up Form (Country)—31 CFR 210—0960–0686.* SSA's International Direct Deposit Program allows beneficiaries living abroad to receive their payments via direct deposit to an account at a financial institution outside the United States. SSA uses Form SSA–1199 to obtain the direct deposit information for such foreign accounts. Routing account number information varies slightly for each foreign country, so we use a variation of the Treasury Department's Form SF–1199A for each country. The respondents are Social Security beneficiaries residing abroad who want SSA to deposit their benefits payments directly to a foreign financial institution.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 5,000.

Frequency of Response: 1.

Average Burden per Response: 5 minutes.

Estimated Annual Burden: 417 hours.

7. *Certification of Prisoner Identity Information—20 CFR 422.107—0960–0688.* This regulation stipulates that when a valid agreement is in place, prison officials may verify the identity of certain incarcerated U.S. citizens who need replacement Social Security cards. Information the prison officials provide will come from the official prison files, sent on prison letterhead. SSA uses this information to establish the applicant's identity in the replacement Social Security card process. The respondents are prison officials who certify the identities of prisoners applying for replacement Social Security cards.

Note: This is a correction notice. SSA published this information collection as an extension on December 08, 2009 at 74 FR 64801. Since we are revising the Privacy Act Statement, this is now a revision of an OMB-approved information collection.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 1,000.

Frequency of Response: 200.

Average Burden per Response: 3 minutes.

Estimated Annual Burden: 10,000 hours.

8. *Temporary Extension of Attorney Fee Payment System to Title XVI; 5–Year Demonstration Project Extending Fee Withholding and Payment Procedures to Eligible Non-Attorney Representatives; Definition of Past-Due Benefits; and Assessment for Fee Payment Services—20 CFR 404.1717, 404.1730(c)(1), 404.1730(c)(2)(i), 404.1730(c)(2)(ii), 416.1517, 416.1528(a), 416.1530(c)(1), 416.1530(c)(2)(i), 416.1530(c)(2)(i)—0960–0745.* Section 302 of the Social Security Protection Act of 2004 (SSPA), Public Law 108–203, amended section 1631(d)(2) of the Social Security Act to temporarily extend the Title II attorney fee withholding and direct payment process to Title XVI. Section 303 of the SSPA directed SSA to develop and conduct a 5-year nationwide demonstration project to allow qualifying non-attorneys the option of

fee withholding and direct payment of fees under both Titles II and XVI. SSA uses the information obtained through this demonstration project to administer fee withholding and direct payment to certain non-attorney representatives. Respondents are non-attorneys who are eligible to receive direct payment of fees for representing individuals before SSA.

Type of Request: Extension of an OMB-approved information collection.

Regulation section	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated annual burden (hours)
404.1730(c)(2)(i)	841	10/year	30	4,205
404.1730(c)(2)(ii)	600	1	3	30
416.1530(c)(2)(i)	561	10/year	30	2,805
416.1530(c)(2)(ii)	400	1	3	20
Totals	2,402			7,060

Dated: February 26, 2010.

Faye I. Lipsky,

Acting Reports Clearance Officer, Social Security Administration.

[FR Doc. 2010–4448 Filed 3–3–10; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 6913]

Determination and Waiver Regarding the Sixth Proviso under the Heading "Economic Support Funds" in the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2009 (Div. H, Pub. L. 111–8) Relating to Assistance for Afghanistan

Pursuant to the authority vested in me as Secretary of State, including by Presidential Delegation No. 2007–29 of August 27, 2007, I hereby determine that it is in the national security interests of the United States to make available $200,000,000 appropriated under the heading Economic Support Funds in the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2009 (Div. H, Pub. L. 111–8), without regard to the restriction in the sixth proviso under that heading.

This determination shall be reported to the Congress promptly and published in the **Federal Register**.

Dated: October 15, 2009.

Hillary Rodham Clinton,

Secretary of State.

[FR Doc. 2010–4604 Filed 3–3–10; 8:45 am]

BILLING CODE 4710–17–P

DEPARTMENT OF STATE

[Public Notice 6911]

Bureau of Educational and Cultural Affairs (ECA) Request for Grant Proposals (RFGP): One-time Competitive Grants Program—Competition A—Academic Programs

Announcement Type: New Grant

Funding Opportunity Number: ECA/A–10–One-time-Comp–A

Catalog of Federal Domestic Assistance Number: 19.014

Key Dates:

Application Deadline: April 12, 2010

Executive Summary: This competition is one of two competitions that the Bureau of Educational and Cultural Affairs is conducting in accordance with the Conference Report (House Report 111–366) accompanying the Consolidated Appropriations Act, 2010 (Pub. L. 111–117) under Division F of the Department of State, Foreign Operations and Related Programs Appropriation Act 2010, "Educational and Cultural Exchange Programs" in support of an $8 million "One-Time Competitive Grants Program." All applications must be submitted by public or private non-profit organizations, meeting the provisions described in Internal Revenue code section 26 U.S.C. 501(c)(3). Total funding for this "One-Time Competitive Grants Program" is $8 million. Four million dollars will be dedicated to Competition A—Academic Programs One-time Grants Program—reference number ECA/A–10–One-time-Comp-A, and $4 million will be dedicated to and announced simultaneously in a separate RFGP Competition B—Professional, Cultural and Youth One-time Grants Program—reference number ECA/PE/C–10–One-time-Comp-B. **Please note:** The Bureau reserves the right to reallocate funds it has initially allocated to each of these two competitions, based upon factors such as the number of applications received and responsiveness to the review criteria outlined in each of the solicitations.

Applicants may submit only one proposal (total) to one of the two competitions referenced above. In addition, applicants under this competition (ECA/A–10–One-time-Comp-A) may apply to administer only one of the listed activities (total). If multiple proposals are received from the same applicant, all submissions will be declared technically ineligible and will be given no further consideration in the review process. Eligible applicants are strongly encouraged to read both RFGPs thoroughly, prior to developing and submitting proposals, to ensure that proposed activities are appropriate and responsive to the goals, objectives and criteria outlined in the solicitations.

As further directed by the Congress, "The program shall be only for the actual exchange of people and should benefit a population that is not being addressed through existing authorized exchanges."

The Bureau of Educational and Cultural Affairs announces a competition for grants that support international exchanges in order to increase mutual understanding and build relationships, through individuals and organizations, between the people of the United States and their counterparts in other countries. The Bureau welcomes proposals from organizations that have not received a previous grant from the Bureau as well as from those which have; see eligibility information below and in section III.

I. Funding Opportunity Description

Authority

Overall grant making authority for this program is contained in the Mutual Educational and Cultural Exchange Act of 1961, Public Law 87–256, as amended, also known as the Fulbright-Hays Act. The purpose of the Act is "to enable the Government of the United States to increase mutual understanding between the people of the United States

and the people of other countries * * *; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations * * * and thus to assist in the development of friendly, sympathetic and peaceful relations between the United States and the other countries of the world." The funding authority for the program above is provided through legislation.

Background

The Conference Agreement (House Report 111–366) accompanying the Consolidated Appropriations Act, 2010 (Pub. L. 111–117) under Division F of the Department of State, Foreign Operations and Related Programs Appropriation Act 2010, "Educational and Cultural Exchange Programs" provides support for an $8 million One-Time Competitive Grants Program. "The conferees also endorse language in the House and Senate Reports regarding this competitively awarded grants program."

As referenced in the Senate Report 111–44, "* * * an exchange program that received a one-time grant in a previous year is ineligible for additional one-time funding, but the Committee encourages the Department to consider new proposals from previously funded grantees within discretionary funding if they meet appropriate guidelines." Please see eligibility information below and in section III.

Programs shall support the actual exchange of people and should benefit a population that is not being addressed through existing authorized exchanges, such as exchanges with developing countries which target community leaders, students and youth with high financial need and minority and ethnic groups.

Grants shall address issues of mutual interest to the United States and other countries, consistent with the program criteria established in Public Law 110–161.

Purpose

The Office of Academic Programs will accept proposals for the following one-time special initiatives. For each of the activities listed below, the Bureau will emphasize engaging participants from selected geographic regions. Further details on specific program responsibilities are included in the Program Objectives, Goals, and Implementation (POGI) document for this initiative. Interested organizations should read the entire Federal Register announcement for all information prior to preparing proposals. Please refer to the solicitation package for further instructions.

1. Intensive English Language Program:

The U.S. Department of State is dedicated to increasing its engagement with undergraduate students worldwide who demonstrate the potential to become leaders and who represent indigenous, disadvantaged or underrepresented communities. ECA offers exchange programs that increase knowledge and understanding of the United States to undergraduates from underserved sectors of society. The Intensive English Program will enroll foreign undergraduate students in eight-to-ten weeks of intensive English language courses at colleges and universities in the United States, and provide them with an introduction to American institutions, society and culture. To support English acquisition, while in the U.S., participants will complete community service activities and have the opportunity to develop a project related to community service or volunteerism focused on topics such as the environment, public health, clean/renewable energy, conservation, or related fields. The project would be implemented upon the participant's return to their home countries.

A total of three grants will be awarded for the administration of the Intensive English Language Program. ECA expects to fund approximately 120 students. Participants will be selected by U.S. Embassies or Fulbright Commissions in participating countries. Regions of emphasis: Middle East/North Africa, Sub-Saharan Africa, South and Central America (including the Caribbean), South/Central Asia, and East Asia/Pacific.

Applicant organizations may be U.S. colleges and universities, consortia of U.S. colleges and universities, or non-governmental organizations meeting the provisions described in Internal Revenue code section 26 U.S.C. 501(c)(3). An individual university applying for the award will develop and administer the program and act as the host institution for all participants. A consortium applying for the award must identify a lead institution to receive and administer the award, but may place the participants at one or more of the consortium institutions.

Purpose: The Intensive English Language Program will provide promising undergraduate students from underserved sectors, who would not otherwise qualify for U.S. exchange opportunities based on English language ability, an opportunity to increase their English language skills through a substantive U.S. academic exchange experience. This program will make participants more competitive in applications for other U.S. government-sponsored exchanges in the future or for future graduate admission to U.S. institutions.

Program Design: Programs should have a duration of eight-to-ten weeks. ECA anticipates supporting approximately 120 participants, who may be divided into several cohorts of students. Programs should provide participants with intensive English language training, including English for Academic Purposes, as well as the development of general reading, writing, speaking and listening skills, and the testing of those skills. For planning purposes, interested applicants should anticipate that programs will take place from May–September 2011.

Student participants will be undergraduates and will be recruited and selected by the U.S. Embassy Public Affairs Sections or Fulbright Commissions in the students' home countries. ECA will approve nominations and make final selection. Participants will come from non-elite backgrounds, from both rural and urban sectors, and with little to no prior experience in the United States or elsewhere outside of their home country. Participants will exhibit academic ability and leadership potential including an interest in community service.

It is anticipated that the selection of participants will reflect each region's geographic, institutional, ethnic, and gender diversity. Most of the students selected will have a basic knowledge of the English language through formal study.

For applicants representing a consortium of colleges or universities, the proposal should indicate the lead institution and produce letters of support from all institutions or organizations that will carry out activities as part of the consortium. In identifying the participating host institutions, the proposal should make clear why these institutions have been recommended, and how those institutions will specifically meet the purposes outlined above.

Applicants should design a program that will offer an academic residency component of eight-to-ten weeks, the central element of which is an intensive English language training course (English for Academic Purposes), together with other instructional elements that will develop participants' general reading, writing, speaking and listening skills. It is essential that participants be placed in classes with students from a variety of language

backgrounds and not only in courses that contain only speakers of their native language. Provisions should also be made for testing those skills.

The program should also provide opportunities for participants to regularly meet with U.S. citizens from a variety of backgrounds, meet with American students, and to speak to appropriate students and civic groups about their experiences and life in their home countries. Programs must include a community service component, in which the students experience firsthand the role of volunteerism and social entrepreneurship in American civil society (please see POGI for details).

Participants for this program will come from the following regions: Middle East/North Africa, Sub-Saharan Africa, South and Central America (including the Caribbean), South/Central Asia, and East Asia/Pacific. Proposals from applicant organizations should indicate if they wish to host participants from one particular region or multiple regions. A pedagogical rationale for the program plan should demonstrate knowledge of the region or multiple regions indicated in the proposal.

ECA reserves the right to adjust the regional composition of student cohorts according to Bureau or program priorities. Participating countries within regions will be determined by ECA, in consultation with Public Affairs Sections at U.S. embassies abroad. International travel will be arranged by ECA and therefore should not be included in budget requests.

Please see the POGI document for detailed budget information. It is anticipated that the total amount of funding for administrative and program costs will be approximately $1.2 million. The total funding for this project will be approximately $1.5 million. ECA anticipates withholding approximately $300,000 for the purchase of participants' airline tickets and in-transit expenses. The funding levels for Award Average and Ceiling of Award do not include funding for travel which is to be provided by ECA.

Number of Awards: 3.

Award Average: $400,000.

Ceiling of Award: $400,000.

Contact: Vincent Pickett, *PickettVS@state.gov,* 202–632–3243.

2. Capacity Building for Undergraduate Study Abroad: Overall Purpose: To build the capacity of U.S. institutions of higher education and of potential host institutions abroad to provide study abroad opportunities for U.S. undergraduate students. A proposal may be submitted by an accredited college or university or by another public or private non-profit organization meeting the provisions described in Internal Revenue code section 26 U.S.C. 501(c)(3).

Program Design: Proposals must address one of three program goals and should specify the goal to be pursued:

(a) U.S. institutions with substantial experience providing study abroad opportunities may partner with international counterparts with limited experience receiving U.S. students in order to expand the capacity of the foreign partner to host U.S. students, particularly in locations that have been underserved by traditional study abroad programs.

(b) U.S. institutions with substantial experience providing study abroad opportunities may cooperate with less experienced U.S. partner colleges and universities to enable the less experienced institutions to develop programs with international counterparts or build their study abroad offices through professional visits of administrators, faculty and/or students.

(c) U.S. institutions with limited experience administering study abroad programs may seek to strengthen their study abroad offices or expand their capacity to administer such programs. Proposals submitted in this category should not exceed $60,000.

In each category, awards will support projects that result in increased and broadened opportunities for U.S. undergraduate students to study abroad in quality academic programs that form an integral part of degree-granting programs at accredited U.S. educational institutions at the tertiary level. The Bureau strongly encourages applications focusing on non-traditional study abroad students, non-traditional study abroad destinations and non-traditional fields of study abroad, including science; technology; engineering; mathematics; education; and critical languages (Arabic, Azerbaijani, Bengali, Brazilian Portuguese, Chinese, Dari, Farsi, Hindi, Kazakh, Korean, Kurdish, Kyrgyz, Nepali, Pashto, Punjabi, Russian, Swahili, Tajik, Turkish, Turkmen, Urdu and Uzbek).

Regions of Emphasis: Europe/Eurasia (Turkey and Russia only), North Africa and the Middle East, South Asia and East Asia, South and Central America (including the Caribbean), Sub-Saharan Africa.

The Bureau anticipates funding approximately ten projects at levels averaging $250,000 and not to exceed approximately $500,000 with total Bureau funding not to exceed $2,500,000. Applicants that do not have four years of experience conducting international exchange programs will be limited to $60,000 per item (a) under section III.3. below. Proposals for smaller amounts will be considered.

Approximate Number of Awards: 10.

Approximate Average Award: $250,000.

Ceiling of Award Range: $500,000.

Contact: Bahareh Moradi (*MoradiBX@state.gov*), 202–632–6350; or Carina Klein (*KleinCD@state.gov*), 202–632–9460.

II. Award Information

Type of Award: Grant Agreement.

Fiscal Year Funds: FY–2010.

Approximate Total Funding: $4 million.

Approximate Number of Awards: 13.

Approximate Average Award: $307,692.

Floor of Award Range: Depending upon an organization's length of experience in conducting international exchanges, and proposed activities, grants could be awarded for less than $60,000. See section III.3.a, below.

Ceiling of Award Range: Up to $500,000.

Anticipated Award Date: August 2010.

Anticipated Project Completion Date: Approximately 24–36 months after the start date of the grant.

Additional Information: As stipulated in the legislation, this is a competitive one-time grants program.

III. Eligibility Information

III.1. Eligible applicants

Applications must be submitted by public and private non-profit organizations meeting the provisions described in Internal Revenue Code section 26 U.S.C. 501(c)(3).

Organizations listed in the House Report 111–187 and the Senate Report 111–44 under "Educational and Cultural Exchange Programs" are encouraged to apply.

Per Senate Report 111–44, "The Committee notes that an exchange program that received a one-time grant in a previous year is ineligible for additional one-time funding, but the Committee encourages the Department to consider new proposals from previously funded grantees within discretionary funding if they meet appropriate guidelines." Please see section III.3. Other Eligibility Requirements, below.

III.2. Cost Sharing or Matching Funds

There is no minimum or maximum percentage required for this competition. However, the Bureau encourages applicants to provide the highest possible levels of cost sharing

and funding in support of its projects, noting that cost sharing is one of the criteria for reviewing proposals.

When cost sharing is offered, it is understood and agreed that the applicant must provide the amount of cost sharing as stipulated in its proposal and later included in an approved grant agreement. Cost sharing may be in the form of allowable direct or indirect costs. For accountability, written records must be maintained to support all costs which are claimed as contributions, as well as costs to be paid by the Federal government. Such records are subject to audit. The basis for determining the value of cash and in-kind contributions must be in accordance with OMB Circular A–110, (Revised), Subpart C.23—Cost Sharing and Matching. In the event that the minimum amount of cost sharing is not provided as stipulated in the approved budget, ECA's contribution will be reduced in like proportion.

III.3. Other Eligibility Requirements

(a) Grants awarded to eligible organizations with less than four years of experience in conducting international exchange programs will be limited to $60,000. Therefore, applicants should explain, with examples, their experience in conducting international exchanges, and, if that experience is less than four years, should limit their proposed grant budgets to $60,000.

(b) *Technical Eligibility:* All proposals must comply with the following:

—Eligible applicants may submit only one proposal (total) for one of the two competitions referenced in the Executive Summary Section of this document. If multiple proposals are received from the same applicant, all submissions from that applicant will be declared technically ineligible and will be given no further consideration in the review process. In addition, applicants under this competition (ECA/PE/C–10–One-time-Comp-B or ECA/A–10–One-time-Comp-A) may only apply to administer one of the listed activities (total).

—Proposals requesting funding for infrastructure development activities, sometimes referred to as "bricks and mortar support," are not eligible for consideration under this competition and will be declared technically ineligible and will receive no further consideration in the review process.

—No funding is available exclusively to send U.S. citizens to conferences or conference-type seminars overseas; nor is funding available for bringing foreign nationals to conferences or to standard professional association meetings in the United States.

—An exchange program/activity that was funded under one-time grant competitions in previous years, (FY–2008 Competitive One-time Grants Program—Reference numbers: ECA/A–08–One-time-Comp-A or ECA/PE/C–08–One-time-Comp-B; or the FY–2009 Competitive One-time Grants Program—Reference numbers: ECA/A–09–One-time-Comp-A or ECA/PE/C–09–One-time-Comp-B) is ineligible for additional one-time funding under this competition. However, "previously funded grantees" under previous one-time competitions, referenced above, may submit proposals under this competition, if the proposal is for a new exchange program. Applications submitted by prior-year one-time grant recipients must include in their proposal narrative/submission a narrative description of the specific elements that make their submission under the FY–2010 one-time competition a new exchange program, rather than a repetition or extension of what was funded by ECA under a prior year award. Elements that would contribute to the program's being considered "new" for the purposes of this competition would include: New overseas partner institution(s), a new country and/or world region of activity, a substantially different thematic topic, a new participant profile. Final determination of a proposal's eligibility as a "new" activity will be made by the Bureau of Educational and Cultural Affairs. If the application does not include a narrative explaining how the project qualifies as "new," it will be declared technically ineligible and will receive no further consideration in the review process.

Please refer to the Proposal Submission Instructions (PSI) document for additional requirements.

IV. Application and Submission Information

Note: Please read the complete announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

IV.1. Contact Information To Request an Application Package

Please contact the Office of Academic Exchanges, ECA/A/E, SA–5, 4th floor, U.S. Department of State, 2200 C Street, NW., Washington, DC 20522–0504, tel: 202–632–3238 and fax: 202–632–6490, *PickettVS@state.gov* to request a Solicitation Package. Please refer to Funding Opportunity Number ECA/A–10–One-time-Comp-A also located at the top of this announcement when making your request.

The Solicitation Package contains the Proposal Submission Instructions (PSI) document which consists of required application forms, and standard guidelines for proposal preparation.

Please specify Program Officer Vincent Pickett, and refer to the Funding Opportunity Number ECA/A–10–One-time-Comp-A located at the top of this announcement on all other inquiries and correspondence.

IV.2. To Download a Solicitation Package Via Internet

The entire Solicitation Package may be downloaded from the Bureau's Web site at *http://exchanges.state.gov/education/rfgps/menu.htm,* or the grants.gov Web site. Please read all information before downloading.

IV.3. Content and Form of Submission

Applicants must follow all instructions in the Solicitation Package. The original and seven copies of the application should be sent per the instructions under IV.3e. "Submission Dates and Times" section below.

IV.3a. You are required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number to apply for a grant or cooperative agreement from the U.S. Government. This number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access *http://www.dunandbradstreet.com* or call 1–866–705–5711. Please ensure that your DUNS number is included in the appropriate box of the SF–424 which is part of the formal application package.

IV.3b. All proposals must contain an executive summary, proposal narrative and budget. The summary and narrative must be presented in double-spaced typing.

IV.3c. You must have nonprofit status with the IRS at the time of application. **Please note:** Effective January 7, 2009, all applicants for ECA federal assistance awards must include in their application the names of directors and/or senior executives (current officers, trustees, and key employees, regardless of amount of compensation). In fulfilling this requirement, applicants must submit information in one of the following ways:

(1) Those who file Internal Revenue Service Form 990, "Return of

Organization Exempt From Income Tax," must include a copy of relevant portions of this form.

(2) Those who do not file IRS Form 990 must submit information above in the format of their choice.

In addition to final project reporting requirements, award recipients will also be required to submit a one-page document, derived from their project reports, listing and describing their grant activities. For award recipients, the names of directors and/or senior executives (current officers, trustees, and key employees), as well as the one-page description of grant activities, will be transmitted by the State Department to OMB, along with other information required by the Federal Funding Accountability and Transparency Act (FFATA), and will be made available to the public by the Office of Management and Budget on its USASpending.gov Web site as part of ECA's FFATA reporting requirements.

Please Note: If your organization is a private nonprofit which has not received a grant or cooperative agreement from ECA in the past three years, or if your organization received nonprofit status from the IRS within the past four years, you must submit the necessary documentation to verify nonprofit status as directed in the PSI document. Failure to do so will cause your proposal to be declared technically ineligible.

IV.3d. Please take into consideration the following information when preparing your proposal narrative:

IV.3d.1 Adherence to All Regulations Governing the J Visa

The Bureau of Educational and Cultural Affairs places critically important emphases on the security and proper administration of the Exchange Visitor (J visa) Programs and adherence by award recipients and sponsors to all regulations governing the J visa. Therefore, proposals should demonstrate the applicant's capacity to meet all requirements governing the administration of the Exchange Visitor Programs as set forth in 22 CFR 62, including the oversight of Responsible Officers and Alternate Responsible Officers, screening and selection of program participants, provision of pre-arrival information and orientation to participants, monitoring of participants, proper maintenance and security of forms, recordkeeping, reporting and other requirements.

For the Intensive English Language Program, ECA will be responsible for issuing DS–2019 forms to participants in this program. For the Capacity Building for Undergraduate Study Abroad, the recipient will be responsible for issuing DS–2019 forms to participants in this program.

A copy of the complete regulations governing the administration of Exchange Visitor (J) programs is available at *http://exchanges.state.gov* or from: United States Department of State, Office of Exchange Coordination and Designation, Office of Designation, ECA/EC/D, SA–5, Floor C2, Department of State, Washington, DC 20522–0582.

Please refer to Solicitation Package for further information.

IV.3d.2 Diversity, Freedom and Democracy Guidelines

Pursuant to the Bureau's authorizing legislation, projects must maintain a non-political character and should be balanced and representative of the diversity of American political, social, and cultural life. "Diversity" should be interpreted in the broadest sense and encompass differences including, but not limited to, ethnicity, race, gender, religion, geographic location, socio-economic status, and disabilities. Applicants are strongly encouraged to adhere to the advancement of this principle both in project administration and in project content. Please refer to the review criteria under the 'Support for Diversity' section for specific suggestions on incorporating diversity into your proposal. Public Law 104–319 provides that "in carrying out programs of educational and cultural exchange in countries whose people do not fully enjoy freedom and democracy," the Bureau "shall take appropriate steps to provide opportunities for participation in such programs to human rights and democracy leaders of such countries." Public Law 106–113 requires that the governments of the countries described above do not have inappropriate influence in the selection process. Proposals should reflect advancement of these goals in their project contents, to the full extent deemed feasible.

IV.3d.3. Program Monitoring and Evaluation

Proposals must include a plan to monitor and evaluate the project's success, both as the activities unfold and at the end of the program. The Bureau recommends that your proposal include a draft survey questionnaire or other technique plus a description of a methodology to use to link outcomes to original project objectives. The Bureau expects that the recipient organization will track participants or partners and be able to respond to key evaluation questions, including satisfaction with the program, learning as a result of the program, changes in behavior as a result of the program, and effects of the program on institutions (institutions in which participants work or partner institutions). The evaluation plan should include indicators that measure gains in mutual understanding as well as substantive knowledge.

Successful monitoring and evaluation depend heavily on setting clear goals and outcomes at the outset of a program. Your evaluation plan should include a description of your project's objectives, your anticipated project outcomes, and how and when you intend to measure these outcomes (performance indicators). The more that outcomes are "smart" (specific, measurable, attainable, results-oriented, and placed in a reasonable time frame), the easier it will be to conduct the evaluation. You should also show how your project objectives link to the goals of the program described in this RFGP.

Your monitoring and evaluation plan should clearly distinguish between program outputs and outcomes. Outputs are products and services delivered, often stated as an amount. Output information is important to show the scope or size of project activities, but it cannot substitute for information about progress towards outcomes or the results achieved. Examples of outputs include the number of people trained or the number of seminars conducted. Outcomes, in contrast, represent specific results a project is intended to achieve and is usually measured as an extent of change. Findings on outputs and outcomes should both be reported, but the focus should be on outcomes.

We encourage you to assess the following four levels of outcomes, as they relate to the program goals set out in the RFGP (listed here in increasing order of importance):

1. Participant satisfaction with the program and exchange experience.

2. Participant learning, such as increased knowledge, aptitude, skills, and changed understanding and attitude. Learning includes both substantive (subject-specific) learning and mutual understanding.

3. Participant behavior, concrete actions to apply knowledge in work or community; greater participation and responsibility in civic organizations; interpretation and explanation of experiences and new knowledge gained; continued contacts between participants, community members, and others.

4. Institutional changes, such as increased collaboration and partnerships, policy reforms, new programming, and organizational improvements.

Please note: Consideration should be given to the appropriate timing of data collection

for each level of outcome. For example, satisfaction is usually captured as a short-term outcome, whereas behavior and institutional changes are normally considered longer-term outcomes.

Overall, the quality of your monitoring and evaluation plan will be judged on how well it (1) Specifies intended outcomes; (2) gives clear descriptions of how each outcome will be measured; (3) identifies when particular outcomes will be measured; and (4) provides a clear description of the data collection strategies for each outcome (i.e., surveys, interviews, or focus groups). (Please note that evaluation plans that deal only with the first level of outcomes [satisfaction] will be deemed less competitive under the present evaluation criteria.)

Recipient organizations will be required to provide reports analyzing their evaluation findings to the Bureau in their regular program reports. All data collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

IV.3e. Please take the following information into consideration when preparing the proposal budget:

IV.3e.1. Applicants must submit SF–424A—"Budget Information—Non-Construction Programs" along with a comprehensive budget for the entire project. There must be a summary budget as well as breakdowns reflecting both administrative and program budgets. Applicants may provide separate sub-budgets for each project component, phase, location, or activity to provide clarification.

IV.3e.2. Allowable costs for the project include the following:

(1) Travel. International and domestic airfare; visas; transit costs; ground transportation costs, except where these project activities will be paid directly by ECA, please see the POGI for further information. Please note that all air travel must be in compliance with the Fly America Act. There is no charge for J–1 visas for participants in Bureau-sponsored programs.

(2) *Per Diem.* For U.S.-based programming, organizations should use the published Federal per diem rates for individual U.S. cities. Domestic per diem rates may be accessed at: *http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentId=17943&contentType=GSA_BASIC.*

(3) Please refer to the Solicitation Package for complete budget guidelines and formatting instructions.

Please refer to the Solicitation Package for complete budget guidelines and formatting instructions.

IV.3f. Submission Dates and Times

Application Deadline Date: April 12, 2010.

Methods of Submission:

Applications may be submitted in one of two ways:

(1) In hard-copy, via a nationally recognized overnight delivery service (i.e., Federal Express, UPS, or U.S. Postal Service Express Overnight Mail, etc.), or

(2) electronically through *http://www.grants.gov*.

Along with the Project Title, all applicants must enter the competition Reference Number (ECA/A–10–One-time-Comp. A) in Box 11 on the SF–424 contained in the mandatory Proposal Submission Instructions (PSI) of the solicitation document.

IV.3f.1 Submitting Printed Applications

Applications must be shipped no later than the above deadline. Delivery services used by applicants must have in-place, centralized shipping identification and tracking systems that may be accessed via the Internet and delivery people who are identifiable by commonly recognized uniforms and delivery vehicles. Proposals shipped on or before the above deadline but received at ECA more than seven days after the deadline will be ineligible for further consideration under this competition. Proposals shipped after the established deadlines are ineligible for consideration under this competition. ECA will not notify you upon receipt of application. It is each applicant's responsibility to ensure that each package is marked with a legible tracking number and to monitor/confirm delivery to ECA via the Internet. Delivery of proposal packages may not be made via local courier service or in person for this competition. Faxed documents will not be accepted at any time. Only proposals submitted as stated above will be considered.

Important note: When preparing your submission please make sure to include one extra copy of the completed SF–424 form and place it in an envelope addressed to "ECA/EX/PM".

Applicants must also submit the "Executive Summary" and "Proposal Narrative" and budget sections of the proposal as well as any essential attachments, in Microsoft Word and/or Excel on a CD–ROM. The Bureau will provide these files electronically to the appropriate Public Affairs Sections at the U.S. Embassies for their review.

The original and seven copies of the application should be sent to: U.S. Department of State, Program Management Division, ECA–IIP/EX/PM, Ref.: ECA/A–10–One-time-Comp-A, SA–5, Floor 4, Department of State, 2200 C Street, NW., Washington, DC 20522–0504.

Applicants submitting hard-copy applications must also submit the "Executive Summary" and "Proposal Narrative" and "Budget" sections of the proposal in text (.txt) or Microsoft Word format on a PC-formatted disk. The Bureau will provide these files electronically to the appropriate Public Affairs Section(s) at the U.S. embassy(ies) for its(their) review.

IV.3f.2—Submitting Electronic Applications

Applicants have the option of submitting proposals electronically through Grants.gov (*http://www.grants.gov*). Complete solicitation packages are available at Grants.gov in the "Find" portion of the system.

Please follow the instructions available in the 'Get Started' portion of the site (*http://www.grants.gov/GetStarted*).

Several of the steps in the Grants.gov registration process could take several weeks. Therefore, applicants should check with appropriate staff within their organizations immediately after reviewing this RFGP to confirm or determine their registration status with Grants.gov.

Once registered, 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. In addition, validation of an electronic submission via Grants.gov can take up to two business days.

Therefore, we strongly recommend that you not wait until the application deadline to begin the submission process through Grants.gov.

The Grants.gov Web site includes extensive information on all phases/aspects of the Grants.gov process, including an lengthy section on frequently asked questions, located under the "For Applicants" section of the Web site. ECA strongly recommends that all potential applicants review thoroughly the Grants.gov Web site, well in advance of submitting a proposal through the Grants.gov system. ECA bears no responsibility for data errors resulting from transmission or conversion processes.

Direct all questions regarding Grants.gov registration and submission to:

Grants.gov Customer Support.

Contact Center Phone: 800–518–4726.

Business Hours: Monday–Friday, 7 a.m.–9 p.m. Eastern Time.

E-mail: support@grants.gov

Applicants have until midnight (12 a.m.), Washington, DC time of the closing date to ensure that their entire application has been uploaded to the Grants.gov site. There are no exceptions to the above deadline. Applications uploaded to the site after midnight of the application deadline date will be automatically rejected by the grants.gov system, and will be technically ineligible.

Please refer to the Grants.gov Web site, for definitions of various "application statuses" and the difference between a submission receipt and a submission validation. Applicants will receive a validation e-mail from grants.gov upon the successful submission of an application. Again, validation of an electronic submission via Grants.gov can take up to two business days. Therefore, we strongly recommend that you not wait until the application deadline to begin the submission process through Grants.gov. ECA will *not* notify you upon receipt of electronic applications.

It is the responsibility of all applicants submitting proposals via the Grants.gov web portal to ensure that proposals have been received by Grants.gov in their entirety, and ECA bears no responsibility for data errors resulting from transmission or conversion processes.

V. Application Review Information

V.1. Review Process

The Bureau will review all proposals for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines stated herein and in the Solicitation Package. All eligible proposals will be reviewed by the program office, as well as the Public Diplomacy section of the relevant U.S. Embassy overseas, where appropriate. Eligible proposals will be subject to compliance with Federal and Bureau regulations and guidelines and forwarded to Bureau grant panels for advisory review. Proposals may also be reviewed by the Office of the Legal Adviser or by other Department elements. Final funding decisions are at the discretion of the Department of State's Assistant Secretary for Educational and Cultural Affairs. Final technical authority for assistance awards (grants) resides with the Bureau's Grants Officer.

Review Criteria

Technically eligible applications will be competitively reviewed according to the criteria stated below. These criteria are not rank ordered and all carry equal weight in the proposal evaluation:

1. Quality of the program idea and program planning: Objectives should be reasonable, feasible, and flexible. The proposal should clearly demonstrate how the institution will meet the program's objectives and plan. The proposed program should be creative and well developed, respond to the design outlined in the solicitation, and demonstrate originality. It should be clearly and accurately written, substantive, and with sufficient detail. The program plan should adhere to the program overview and guidelines described above. **Please note:** Proposals submitted by prior-year one-time grant recipients must include in their proposal submission a description of the specific elements that make this submission a new exchange program rather than a repetition or extension of what was funded by ECA under a prior-year award.

2. Ability to achieve program objectives: Objectives should be reasonable, feasible, and flexible. Proposals should clearly demonstrate how the institution will meet the program's objectives and plan.

3. Support of diversity: The proposal should demonstrate the recipient's commitment to promoting the awareness and understanding of diversity in participant selection and exchange program design and content.

4. Institutional capacity and track record: Proposed personnel and institutional resources should be adequate and appropriate to achieve the program goals. The proposal should demonstrate an institutional record, including solid programming and responsible fiscal management. The Bureau will consider the past performance, including compliance with all reporting requirements for past Bureau grants.

5. Program evaluation: The proposal should include a plan to evaluate the program's success, both as the activities unfold and at the end of the program. The proposal should include a draft survey questionnaire or other technique plus description of a methodology to use to link outcomes to original project objectives. Please see Section IV.3d.3. of this announcement for more information.

6. Cost-effectiveness and cost sharing: The applicant should demonstrate efficient use of Bureau funds. The overhead and administrative components of the proposal, including salaries and honoraria, should be kept as low as possible. All other items should be necessary and appropriate. The proposal should maximize cost-sharing through other private sector support as well as institutional direct funding contributions.

VI. Award Administration Information

VI.1a. Award Notices

Final awards cannot be made until funds have been appropriated by Congress, allocated and committed through internal Bureau procedures. Successful applicants will receive a Federal Assistance Award (FAA) from the Bureau's Grants Office. The FAA and the original grant proposal with subsequent modifications (if applicable) shall be the only binding authorizing document between the recipient and the U.S. Government. The FAA will be signed by an authorized Grants Officer, and mailed to the recipient's responsible officer identified in the application.

VI.1b The following additional requirements apply to this project, for assistance awards involving the Palestinian Authority, West Bank, and Gaza:

All awards made under this competition must be executed according to all relevant U.S. laws and policies regarding assistance to the Palestinian Authority, and to the West Bank and Gaza. Organizations must consult with relevant Public Affairs Offices before entering into any formal arrangements or agreements with Palestinian organizations or institutions.

Note: To assure that planning for the inclusion of the Palestinian Authority complies with requirements, please contact Bahareh Moradi, *MoradiBX@state.gov*, 202–632–6350.

VI.2 Administrative and National Policy Requirements

Terms and Conditions for the Administration of ECA agreements include the following:

Office of Management and Budget Circular A–122, "Cost Principles for Nonprofit Organizations".

Office of Management and Budget Circular A–21, "Cost Principles for Educational Institutions".

OMB Circular A–87, "Cost Principles for State, Local and Indian Governments".

OMB Circular No. A–110 (Revised), Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and other Nonprofit Organizations.

OMB Circular No. A–102, Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments.

OMB Circular No. A–133, Audits of States, Local Government, and Non-profit Organizations.

Please refer to the following Web sites for additional information: *http://www.whitehouse.gov/omb/grants*. *http://fa.statebuy.state.gov*.

VI.3. Reporting Requirements

You must provide ECA with a hard copy original plus one copy of the following reports:

(1) A final program and financial report no more than 90 days after the expiration of the award;

(2) A concise, one-page final program report summarizing program outcomes no more than 90 days after the expiration of the award. This one-page report will be transmitted to OMB, and be made available to the public via OMB's USAspending.gov Web site—as part of ECA's Federal Funding Accountability and Transparency Act (FFATA) reporting requirements.

(3) A SF–PPR, "Performance Progress Report" Cover Sheet with all program reports.

(4) Interim program and financial reports after each program phase, as required in the Bureau grant agreement.

Award Recipients will be required to provide reports analyzing their evaluation findings to the Bureau in their regular project reports. (Please refer to IV. Application and Submission Instructions (IV.3.d.3) above for Program Monitoring and Evaluation information.

All data collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

All reports must be sent to the ECA Grants Officer and ECA Program Officer listed in the final assistance award document.

VI.4. Optional Program Data Requirements

Award recipients will be required to maintain specific data on program participants and activities in an electronically accessible database format that can be shared with the Bureau as required. As a minimum, the data must include the following:

(1) Name, address, contact information and biographic sketch of all persons who travel internationally on funds provided by the agreement or who benefit from the award funding but do not travel.

(2) Itineraries of international and domestic travel, providing dates of travel and cities in which any exchange experiences take place. Final schedules for in-country and U.S. activities must be received by the ECA Program Officer at least three work days prior to the official opening of the activity.

VII. Agency Contacts

For questions about this announcement, contact:

1. Intensive English Language Program: Vincent Pickett, *PickettVS@state.gov*, 202–632–3243.

2. Capacity Building for Undergraduate Study Abroad: Contact: Bahareh Moradi, *MoradiBX@state.gov*, 202–632–6350; or Carina Klein, *KleinCD@state.gov*, 202–632–9460.

All correspondence with the Bureau concerning this RFGP should reference the above title and number ECA/A–10–One-time-Comp. A.

Please read the complete **Federal Register** announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

VIII. Other Information

Notice

The terms and conditions published in this RFGP are binding and may not be modified by any Bureau representative. Explanatory information provided by the Bureau that contradicts published language will not be binding. Issuance of the RFGP does not constitute an award commitment on the part of the Government. The Bureau reserves the right to reduce, revise, or increase proposal budgets in accordance with the needs of the program and the availability of funds. Awards made will be subject to periodic reporting and evaluation requirements per section VI.3 above.

Dated: February 24, 2010.

Maura M. Pally,

Acting Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. 2010–4561 Filed 3–3–10; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 6912]

Bureau of Educational and Cultural Affairs (ECA) Request for Grant Proposals (RFGP): One-time Competitive Grants Program—Competition B—Professional, Cultural, and Youth One-time Grants Program

Announcement Type: New Grant.

Funding Opportunity Number: ECA/PE/C–10–One-time-Comp. B.

Catalog of Federal Domestic Assistance Number: 19.014.

Key Dates:

Application Deadline: April 12, 2010.

Executive Summary: This competition is one of two competitions that the Bureau of Educational and Cultural Affairs is conducting per the Conference Report (House Report 111–366) accompanying the Consolidated Appropriations Act, 2010 (Pub. L. 111–117) under Division F of the Department of State, Foreign Operations and Related Programs Appropriation Act 2010, "Educational and Cultural Exchange Programs" in support of a $8 million "One-Time Competitive Grants Program." All applications must be submitted by public or private non-profit organizations, meeting the provisions described in Internal Revenue code section 26 U.S.C. 501(c)(3). Total funding for this "One-Time Competitive Grants Program" is $8 million dollars. Four million will be dedicated to this competition, Competition B—Professional, Cultural and Youth One-time Grants Program—reference number ECA/PE/C–10–One-time-Comp.B, and $4 million will be dedicated to and announced simultaneously in a separate RFGP, Academic Programs One-time Grants Program—reference number ECA/A–10–One-time-Comp.A. **Please note:** The Bureau reserves the right to reallocate funds it has initially allocated to each of these two competitions, based upon factors such as the number of applications received and responsiveness to the review criteria outlined in each of the solicitations.

Applicants may submit only ONE proposal (TOTAL) to ONE of the two competitions referenced above. In addition, applicants under this competition, ECA/PE/C–10–One-time-Comp.B may only apply to administer one of the listed activities (total). If multiple proposals are received from the same applicant, all submissions will be declared technically ineligible and will be given no further consideration in the review process. Eligible applicants are strongly encouraged to read both RFGPs thoroughly, prior to developing and submitting proposals, to ensure that proposed activities are appropriate and responsive to the goals, objectives and criteria outlined in each of the solicitations.

As further directed by the Congress, "The program shall be only for the actual exchange of people and should benefit a population that is not being addressed through existing authorized exchanges."

The Bureau of Educational and Cultural Affairs announces a competition for grants that support international exchanges in order to increase mutual understanding and build relationships, through individuals and organizations, between the people of the United States and their

counterparts in other countries. The Bureau welcomes proposals from organizations that have not had a previous grant from the Bureau as well as from those which have; see eligibility information below and in section III.

I. Funding Opportunity Description

Authority

Overall grant making authority for this program is contained in the Mutual Educational and Cultural Exchange Act of 1961, Public Law 87–256, as amended, also known as the Fulbright-Hays Act. The purpose of the Act is "to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries * * *; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations * * * and thus to assist in the development of friendly, sympathetic and peaceful relations between the United States and the other countries of the world." The funding authority for the program above is provided through legislation.

Background

The Conference Agreement (House Report 111–366) accompanying the Consolidated Appropriations Act, 2010 (Pub. L. 111–117) under Division F of the Department of State, Foreign Operations and Related Programs Appropriation Act 2010, "Educational and Cultural Exchange Programs" provides support for a $8 million One-Time Competitive Grants Program. "The conferees also endorse language in the House and Senate Reports regarding this competitively awarded grants program."

As referenced in the Senate Report 111–44, "* * * an exchange program that received a one-time grant in a previous year is ineligible for additional one-time funding, but the Committee encourages the Department to consider new proposals from previously funded grantees within discretionary funding if they meet appropriate guidelines. Please see eligibility information below and in section III. Programs shall support the actual exchange of people and should benefit a population that is not being addressed through existing authorized exchanges, such as exchanges with developing countries which target community leaders, students and youth with high financial need and minority and ethnic groups.

Grants shall address issues of mutual interest to the United States and other countries, consistent with the program criteria established in Public Law 110–161.

Purpose: ECA anticipates awarding approximately 12–15 grants under this FY 2010 Competition B Professional, Cultural, and Youth One-time Grants Program. Each grant should sponsor an exchange of approximately equal numbers of American participants traveling to the partner country(ies) and participants from the partner country(ies) traveling to the U.S. In addition, the projects should set clear learning objectives for both foreign and American participants, thereby supporting the Fulbright-Hays Act purpose of increasing mutual understanding. Also, the applicant should have the necessary capacity in the partner country through their own overseas offices or a partner institution to carry out the proposed project. Proposals must respond to one specific theme under one of the following programs:

Emerging Youth Leaders: For high school students (ages 15–17) and educators.

1. Democracy and Free Expression in Civil Society.

Emerging Young Professionals: For young adults (ages 22–35).

1. Environmental issues.
2. Post-conflict governing.
3. Development of Grassroots Organizations for Women.
4. Good government/Rule of Law.
5. Community-based Volunteerism.

Emerging Cultural Leaders: "Rooted in the Arts" program for U.S. performing artists (ages 25–35) and teachers.

Please note each of the aforementioned programs is limited to specific countries. More detailed descriptions of these programs, themes and eligible countries are included below.

In order to emphasize ECA's interest in clarity of project purpose and, later, to track projects and to evaluate their results, all proposals must be presented in the following order:

Tab A—Application for Federal Assistance Cover Sheet

Tab B—Executive Summary

In one double-spaced page, provide the following information:

1. Names of the applicant organization and other participating institutions, both American and foreign.
2. Beginning and ending dates of the project.
3. Grant theme being addressed.
4. Numbers of American and foreign participants.
5. Types and approximate dates of project activities and their venues.
6. Total number of exchange days, including only those days when international travelers are in program status in the partnering country.

Tab C—Narrative

In no more than 20 double-spaced, single-sided pages, use the following format to describe the proposed project in detail:

A. Purpose

1. Definition of the overall goal to be pursued through a two-way exchange project. Name the theme from those listed under Emerging Youth Leaders, Emerging Young Professionals, or Emerging Cultural Leaders into which this goal should fit.
2. Country or countries to take part, and why chosen.
3. Category of persons to participate, with explanation of why that category is chosen and how it fits the requirement that it is a population that is not being addressed through existing authorized exchanges.
4. Description of program activities to take place (e.g., workshops, internships, community service, job shadowing, model site visits, cultural activities, etc).

B. *Objectives:* Based on the purpose described above, delineate your project's main objectives (no more than five) and outcomes you expect as a result of your project's activities. For each outcome, please state the time frame for achievement. Your objectives and outcomes should be realistic in scope. They should be guided by one or more of the following questions. (Please see section IV.3d.3. Project Monitoring and Evaluation for assistance in identifying and defining outcomes.)

1. What specifically will participants, U.S. and foreign, learn as a result of this project?
2. What new attitudes will participants, U.S. and foreign, develop, or what new ideas will they encounter as a result of this project?
3. How will the participants' behavior change as a result of this project? What new actions will they take?
4. Will participants be a catalyst for change in their schools, work-places, communities, or institutions? How so?

C. *Evaluation:* The Bureau places high importance on monitoring and evaluation as a means of ensuring and measuring a project's success. Proposals must include a detailed monitoring and evaluation plan that assesses the impact of the project. Please refer to section. IV.3d.3. Project Monitoring and Evaluation below.

Tab D—Budget

Both a summary budget for administrative and programmatic

expenses and a detailed, line-item budget must be presented in the three-column format illustrated in the PSI. Eligible expenses are described in IV.3e of this RFGP and in the PSI. Enough information should be provided so that reviewers can determine how line-item totals were calculated.

Tab E—Letters of Endorsement and Resumes

Resumes should not exceed two pages each.

Tab F—Copy of IRS Notification of Current Tax-exempt Status, SF–424B, and Other Attachments if Applicable

Please refer to the Proposal Submission Instructions (PSI) document for detailed information on proposal structuring and formatting.

Emerging Youth Leaders

Program Contact: Anna Mussman, tel: 202–632–6427, e-mail *MussmanAP@state.gov.*

The Emerging Youth Leaders program provides opportunities for high school students (ages 15–17) and educators in the United States and in Mongolia, Indonesia or Rwanda to participate in two-way exchanges, each three to four weeks in duration. This project explores a specific theme designed to develop critical leadership skills for aspiring young leaders and encourages respect for diversity, fosters mutual understanding, and promotes critical thinking. An essential element of this project is to build mutual understanding and respect among the people of the United States and the people of the exchange partner country.

The overarching goals are:

1. To develop a sense of civic responsibility and commitment to the global community;

2. To instill an appreciation of first amendment ideals, particularly the importance of free expression in a democracy;

3. To promote mutual understanding between the United States and the people of other countries around topics of common interest; and to foster personal and institutional ties between participants and partner countries.

The applicant should present a program plan that allows the participants to thoroughly explore the project themes in a creative, memorable, and practical way. Activities should be designed to be replicable and provide practical knowledge and skills that the participants can apply to school and civic activities at home.

Applicants will manage the design and planning of activities that provide a substantive, educational program on leadership, critical thinking, and youth activism, as well as on the specified theme, through academic, virtual and extracurricular components. Activities should take place in schools, online and in the community. Community service must also be included. It is crucial that programming involve the participants' peers in the host countries whenever possible. The program will also include opportunities for the educators to work with their American peers and other professionals and volunteers to help them foster youth leadership, civic education, new media outreach, and community service programs at home.

A successful project will be one that nurtures a cadre of students and educators to be actively engaged in addressing issues of concern in their schools and communities upon their return home. Project activities will equip youth with the knowledge, skills, and confidence to become citizen activists and ethical leaders, including in cyberspace. Participants will be engaged in a variety of activities such as workshops, community and/or school-based programs, seminars, weblogs and other activities that focus on the fundamentals of free expression that are found in the First Amendment to the U.S. Constitution: Freedom of religion, speech, press, assembly and petition. Multiple opportunities for participants to interact with youth and educators in the host country must be included. Participants will have homestays with local families for the majority of the exchange period, although participants may spend a modest portion of their time as a group in a hotel or dormitory setting. Applicants must outline their plan for recruiting, screening and orienting host families (who will provide both food and lodging), as well as a plan for appropriate supervision of participants in other living arrangements.

Grant recipients will recruit and select the participants in the United States, as well as in the partner country through close consultation with the relevant U.S. Embassy; organize all exchange activities in the participating countries; and implement follow-on activities in which participants may apply at home what they have learned during the exchange.

The project will provide participants with a theoretical framework that will be underpinned by site visits that illustrate methods and strategies of practical implementation. The project will also help the participants develop leadership skills, such as influential public speaking, team-building, and goal-setting, so that they are prepared to take action with what they have learned.

Themes and Eligible Partner Countries:

ECA will accept proposals in the specific theme and corresponding countries as indicated below. A single-country project is a two-way exchange between the United States and a single partner country. Applicants should present a rationale for their approach. Proposals that target countries or themes not listed in this solicitation will be deemed technically ineligible.

(1) Democracy, Free Expression and Governance in Civil Society:

ECA welcomes proposals that will explore the fundamentals of a civil society as related to first amendment ideals, with a special focus on free expression. Proposed programs will promote a respect for transparent governance that is responsive to citizens' concerns and increase participant understanding of first amendment principals so that citizens can improve governance, fight corruption, and ensure accountability.

Geographic Regions and Eligible Countries:

Africa: Rwanda.

East Asia and Pacific: Indonesia (single-country project only, Mongolia (single-country project only)

Proposal narratives must demonstrate the applicant's capacity in the partner country through their own offices or a partner institution to successfully conduct the proposed exchange activities. The requisite capacity overseas includes the ability to organize substantive exchange activities for the American participants, provide follow-on activities, and handle the logistical and financial arrangements.

Applicants should propose the time periods of the two exchanges, but the exact timing of the project may be altered through the mutual agreement of the Department of State and the grant recipient. The program should be no less than three weeks and up to four weeks in duration.

These two-way exchanges should involve the same communities in each country, as the second reciprocal exchange will help reinforce the relationships and program content developed during the first exchange. Project staff should help facilitate regular program-oriented communication among the exchange participants between the two exchanges, including via the Internet, Skype and other new media.

The exchange participants will be high school students between the ages of 15 and 17 who have demonstrated leadership abilities in their schools and/or communities, and have at least one year of high school remaining after the

completion of the exchange. The adult participants will be high school teachers or community leaders who work with youth. They will have a demonstrated interest in youth leadership and will be expected to remain in positions where they can continue to work with youth. The ratio of youth to adults should be between 5:1 and 10:1. Participants will be proficient in the English language.

Emerging Young Professionals

Program Contacts:

For Programs based in:

Africa: Curtis Huff: tel: 202–632–6053, e-mail: *HuffCE@state.gov.*

East Asia and the Pacific: Adam Meier: tel: 202–632–6071, e-mail: *MeierAW2@state.gov*.

Europe: Linnea Allison, tel: 202–632–6060, e-mail: *AllisonLA@state.gov*.

Near East and North Africa: Thomas Johnston: tel: 202–632–6056, e-mail: *JohnstonTA@state.gov*.

South and Central Asia: Brent Beemer: tel: 202–632–6067, e-mail: *BeemerBT@state.gov*.

The Western Hemisphere: Carol Herrera: tel: 202–632–6052, e-mail: *HerreraCA1@state.gov*.

The Emerging Young Professionals program offers opportunities for young adults (approximately 22–35 years old) to participate in two-way exchanges of approximately three to four weeks or more in duration to develop their leadership skills and to increase mutual understanding between their countries and the United States. Exchange projects should build participants' leadership skills, including how to conceptualize and develop projects to reach diverse citizenry, using clear objectives, solid management structures and evaluation feedback mechanisms for projects at the local level. Participants should be community leaders, political leaders, educators, and/or advocates for youth, or persons who show the capacity to become effective in those roles.

Projects should be two-way in purpose and implementation, with approximately equal numbers of participants traveling to and from the United States for approximately equal periods of time. Consistent with this approach, project plans should promote learning and teaching by participants from all countries in the project to promote mutual understanding and build individual and institutional partnerships that are likely to continue beyond the grant project. Proposals that clearly delineate salient objectives in measurable terms and plan activities in a sequence that will progressively lead to achieving those objectives, will be considered more competitive on the review criterion of ability to achieve program objectives.

Themes and Eligible Partner Countries:

ECA will consider proposals for either single-country or multi-country projects. A single-country project is a two-way exchange between the United States and a single partner country. A multi-country project involves participants from more than one country coming to the United States together, and American participants traveling to those countries. The Bureau prefers projects that will engage both Americans and international participants deeply enough that relationships will continue beyond the grant-funded activities. Competitive proposals will be those that demonstrate why any country or group of countries has been identified for a specific project and outline why the specific group of participants to be selected from that country/countries is an effective group to achieve project objectives. Proposals that target countries or themes not listed in this solicitation will be deemed technically ineligible. No guarantee is made or implied that grants will be awarded in all themes and for all countries listed. Organizations should consider current U.S. Department of State travel advisories when selecting the countries with which they would like to work.

1. *Environmental issues:* These projects should focus on a shared environmental issue of the participating countries (*e.g.*, use of natural resources, pollution, sustainable energy, recycling, land management). Participants should jointly examine a problem or group of issues, through study of public interest and government policy statements, and then participate in experiential learning exercises to build mutual approaches to the issue, and develop their own recommendations for addressing it.

Geographic Regions and Eligible Countries

Africa: Nigeria.

East Asia & the Pacific: China.

Europe: Russia.

Near East & North Africa: Egypt, Israel, Jordan, Palestinian Authority.

2. *Post-conflict governance:* These projects are for countries that are emerging from regional or civil war in recent years. Projects should allow participants to experience creative approaches to governing in a post-conflict country. Developing working relationships with colleagues from opposite sides of a past conflict; breaking down barriers to implement governmental administration; and how a new post-conflict government promotes tolerance and diversity should be addressed in these projects. Participants should practice different methods and receive hands-on experiential learning.

Geographic Regions and Eligible Countries

Africa: Angola, Mozambique.

Europe: Republic of Ireland, Northern Ireland (UK) (both must be included).

South/Central Asia: Nepal, Sri Lanka.

3. *Development of Grassroots Organizations for Women:* These projects should work to expand the capacity of grassroots organizations that advocate empowering women. Projects should work to build capacity in practice, giving locally-based leaders opportunities to adopt best practices by doing. Projects might address trafficking, the role and rights of women, domestic violence, and women's empowerment. When possible, joint projects should be developed, implemented, monitored and evaluated by both the U.S. and international sides.

Geographic Regions and Eligible Countries

Africa: Benin, Togo.

Near East and North Africa: Jordan, Palestinian Authority, Syria.

Western Hemisphere: Belize (and at least one of the following countries): Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama.

4. *Good government/Rule of Law:* These projects could address issues of corruption, the need to develop transparent procedures of lawmaking and enforcement, the strengthening of judicial independence, the importance of accountability in law enforcement, or the training of civil servants.

Geographic Regions and Eligible Countries

Africa: Cameroon, Cote d'Ivoire, South Africa.

East Asia and the Pacific: Cambodia, East Timor, Laos.

Europe: Georgia, Russia, Ukraine.

Near East and North Africa: Egypt, Palestinian Authority.

5. *Community-based Volunteerism:* These programs should highlight the benefits, organizations, and implementations of community-based volunteerism programs in the United States and overseas. How these programs are arranged, how volunteers are recruited, and how the projects implementation are done should be covered.

Geographic Regions and Eligible Countries

Africa: Botswana.

Near East and North Africa: Egypt, Jordan, Morocco, Palestinian Authority.

South/Central Asia: Bangladesh, India, Kyrgyzstan, Tajikistan.

Western Hemisphere: Dominican Republic, Haiti (joint projects where applicable).

Proposal narratives must demonstrate the applicant's capacity in the partner country through their own offices or a partner institution to successfully conduct the proposed exchange activities. The requisite capacity overseas includes the ability to organize substantive exchange activities for the American participants, provide follow-on activities, and handle the logistical and financial arrangements.

Emerging Cultural Leaders

Program Contact: Catherine Staples-Randolph, tel: 202–632–6425, e-mail: *StaplesCD@state.gov*.

The 'Rooted in the Arts' program provides opportunities for U.S. musicians (ages 25–35), authors, creative writers, teachers and students to build long-term sustainable linkages with their counterparts in selected countries. The project should connect economically and socially diverse populations of high school and/or college students and their teachers in the U.S. with comparable populations in the selected countries. The project must include two-way physical exchanges of musicians, authors, and teachers (but not students), each two to four weeks in duration. It must also include social media communications technology, such as Internet-based social networking, online learning communities, or videoconferencing to provide the participants with ongoing opportunities to communicate with their counterparts abroad. It is expected that communication via technology will be a core aspect of the project experience for all participants, and that physical exchanges may be available only to a subset of project participants. Projects must present an opportunity for participants to explore and learn about their own and another country's history and culture through music and/or the literary arts. Activities should include artistic performances, workshops, readings, lecture demonstrations, contextual learning, and on-going technology-based dialogues and virtual exchanges.

The overarching goals are:

1. To articulate identity through artistic expression, gain respect for the identity and artistic expression of another culture;

2. To learn about participants' own and another country's history through their music and/or literary arts;

3. To incorporate cultural awareness and build mutual understanding and respect for other countries;

4. To foster continuing personal and institutional ties between participants and partner countries.

A successful project will equip participating musicians, authors, teachers, and college and/or high school students with an understanding of how music and/or the literary arts open a window into a country's history. For the teachers, it will also provide insight on how music and/or the literary arts can be used as a tool to educate students about their country and their culture. During their exchange experience, participants should engage in a variety of activities such as performances, workshops, readings, community- and/or learning-based programs, seminars, and other activities designed to achieve the program's stated goals. We encourage exchange projects that require collaborative work across cultures, that include a public presentation, and that involve public schools and colleges in the U.S. and abroad.

Proposal narratives must demonstrate the applicant's capacity in the partner country through their own offices or a partner institution to successfully conduct the proposed exchange activities. The requisite capacity includes the ability to recruit and select participants in both the United States and the partner countries in close consultation with the relevant U.S. Embassies; to organize substantive exchange activities in the participating countries; to handle the logistical and financial arrangements; and to implement follow-on alumni activities in which participants may locally apply what they learned during the exchange.

Cost sharing provided by the grantee organization may be used for presentation costs in the United States and should be noted in the budget.

Proposals must describe a selection process for American and international participants and demonstrate how the participant group represents an under-served community. For example, an under-served community could be economically disadvantaged, geographically isolated or experience low literacy rates. Selected participants should demonstrate a commitment to leadership in their communities. If participants are not fluent in English, proposals should include provision for interpretation as necessary.

Applicants should identify which literary or musical genres will be included in the exchange and demonstrate how each part of the two-way exchange will accomplish the over-arching goals of this competition. Proposals might focus exclusively on an exchange in one field, such as urban or blues music.

Alternatively, a more community-based project could include artists from various musical and/or literary arts fields, as a well as a representative of a community arts organization. Literature/writing projects should be in the creative writing field. All projects must include an examination of cultural diversity, history and the arts as a means of educational outreach and civic engagement.

Proposed Partner Countries

ECA will accept proposals for either single-country or multi-country projects. We can only accept proposals for projects with the countries listed below. A single-country project is a two-way exchange between the United States and a single partner country. With a multi-country project, participants from the partner countries should travel to the United States together; the American participants' exchange travel may be to just one or to all of the partner countries, depending on the applicant organization's program design and objectives. Applicants should present a rationale for their approach. No guarantee is made or implied that grants will be awarded in all themes and for all countries listed. Organizations should consider current U.S. Department of State travel advisories when selecting the countries with which they would like to work.

Eligible Countries

South Africa, Indonesia, Syria, Mexico, India.

Applicants should propose the period of the two exchange components and explain how together the exchange in each direction will accomplish project objectives. The exact timing of the project may be altered through the mutual agreement of the Department of State and the grant recipient. Each exchange component should be no less than two weeks and up to four weeks in duration. Program development should begin in late summer/early fall 2010. Applicants must include letters of support in their proposals.

II. Award Information

Type of Award: Grant Agreement.

Fiscal Year Funds: FY–2010.

Approximate Total Funding: $4,000,000.

Approximate Number of Awards: 12–15.

Approximate Average Award: $350,000.

Ceiling of Award Range: Up to $500,000 for each award.

Anticipated Award Date: August 2010.

Anticipated Project Completion Date: August 2012.

Additional Information: As stipulated in the legislation, this is a competitive one-time grants program.

III. Eligibility Information

III.1. Eligible applicants: Applications must be submitted by public and private non-profit organizations meeting the provisions described in Internal Revenue Code section 26 USC 501(c)(3).

Organizations listed in the House Report 111–187 and the Senate Report 111–44 under "Educational and Cultural Exchange Programs" are encouraged to apply.

Per Senate Report 111–44, "The Committee notes that an exchange program that received a one-time grant in a previous year is ineligible for additional one-time funding, but the Committee encourages the Department to consider new proposals from previously funded grantees within discretionary funding if they meet appropriate guidelines." Please see section III.3. Other Eligibility Requirements, below.

III.2. Cost Sharing or Matching Funds: There is no minimum or maximum percentage required for this competition. However, the Bureau encourages applicants to provide the highest possible levels of cost sharing and funding in support of its projects, noting that cost sharing is one of the criteria for reviewing proposals.

When cost sharing is offered, it is understood and agreed that the applicant must provide the amount of cost sharing as stipulated in its proposal and later included in an approved grant agreement. Cost sharing may be in the form of allowable direct or indirect costs. For accountability, written records must be maintained to support all costs which are claimed as contributions, as well as costs to be paid by the Federal government. Such records are subject to audit. The basis for determining the value of cash and in-kind contributions must be in accordance with OMB Circular A–110, (Revised), Subpart C.23—Cost Sharing and Matching. In the event that the minimum amount of cost sharing is not provided as stipulated in the approved budget, ECA's contribution will be reduced in like proportion.

III.3. Other Eligibility Requirements:

(a.) Grants awarded to eligible organizations with less than four years of experience in conducting international exchange programs will be limited to $60,000. Therefore, applicants should explain, with examples, their experience in conducting international exchanges, and, if that experience is less than four years, should limit their proposed grant budgets to $60,000.

(b.) Technical Eligibility: All proposals must comply with the following:

—Eligible applicants may submit only ONE proposal (TOTAL) for ONE of the two competitions referenced in the Executive Summary Section of this document. If multiple proposals are received from the same applicant, all submissions from that applicant will be declared technically ineligible and will be given no further consideration in the review process. In addition, applicants under this competition: ECA/PE/C–10–One-time-Comp. B) may only apply to administer one of the listed activities (total).

—Proposals requesting funding for infrastructure development activities, sometimes referred to as "bricks and mortar support," are NOT eligible for consideration under this competition and will be declared technically ineligible and will receive no further consideration in the review process.

—No funding is available exclusively to send U.S. citizens to conferences or conference-type seminars overseas; nor is funding available for bringing foreign nationals to conferences or to routine professional association meetings in the United States.

—An exchange program/activity that was funded under one-time grant competitions in previous years, (FY–2008 Competitive One-time Grants Program—Reference numbers: ECA/A–08–One-time-Comp. A or ECA/PE/C–08–One-time-Comp. B; or the FY–2009 Competitive One-time Grants Program—Reference numbers: ECA/A–09–One-time-Comp. A or ECA/PE/C–09 One-time-Comp. B) is ineligible for additional one-time funding under this competition. However, "previously funded grantees" under previous one–time competitions, referenced above, may submit proposals under this competition, if the proposal is for a new exchange program. Applications submitted by prior–year one-time grant recipients must include in their proposal narrative/submission a narrative description of the specific elements that make their submission under the FY–2010 one-time competition a new exchange program, rather than a repetition, or extension to what was funded by ECA under a prior year award. Elements that would contribute to the program's being considered "new" for the purposes of this competition would include: new overseas partner institution(s), a new country and/or world region of activity, a substantially different thematic topic, a new participant profile. Final determination of a proposal's eligibility as a "new" activity will be made by the Bureau of Educational and Cultural Affairs. If the application does not include a narrative explaining how the project qualifies as "new," it will be declared technically ineligible and will receive no further consideration in the review process.

Please refer to the Proposal Submission Instructions (PSI) document for additional requirements.

IV. Application and Submission Information

Note: Please read the complete announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

IV.1. Contact Information To Request an Application Package:

Please contact David Gustafson, Office of Citizen Exchanges ECA/PE/C, SA–5, Third Floor, U.S. Department of State, 2200 C Street, NW., Washington, DC 20522–0504, (202) 632–6083, fax: (202) 632–9355, *GustafsonDP@state.gov* to request a Solicitation Package. Please refer to Funding Opportunity Number ECA/PE/C–10–One-time-Comp.B also located at the top of this announcement when making your request.

The Solicitation Package contains the Proposal Submission Instructions (PSI) document which consists of required application forms, and standard guidelines for proposal preparation.

Please specify Program Coordinator David Gustafson, and refer to the Funding Opportunity Number ECA/PE/C–10–One-time-Comp.B located at the top of this announcement on all other inquiries and correspondence.

IV.2. To Download a Solicitation Package Via Internet:

The entire Solicitation Package may be downloaded from the Bureau's Web site at *http://exchanges.state.gov/education/rfgps/menu.htm.* Please read all information before downloading.

IV.3. Content and Form of Submission: Applicants must follow all instructions in the Solicitation Package. The original and seven copies of the application should be sent per the instructions under IV.3e. "Submission Dates and Times section" below.

IV.3a. You are required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number to apply for a grant or cooperative agreement from the U.S. Government. This number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access *http://www.dunandbradstreet.com* or call 1–866–705–5711. Please ensure that your DUNS number is included in the appropriate box of the SF–424 which is part of the formal application package.

IV.3b. All proposals must contain an executive summary, proposal narrative and budget. The summary and narrative must be presented in double-spaced typing.

IV.3c. You must have nonprofit status with the IRS at the time of application. **Please note:** Effective January 7, 2009, all applicants for ECA federal assistance awards must include in their application the names of directors and/or senior executives (current officers, trustees, and key employees, regardless of amount of compensation). In fulfilling this requirement, applicants must submit information in one of the following ways:

(1) Those who file Internal Revenue Service Form 990, "Return of Organization Exempt From Income Tax," must include a copy of relevant portions of this form.

(2) Those who do not file IRS Form 990 must submit information above in the format of their choice.

In addition to final project reporting requirements, award recipients will also be required to submit a one-page document, derived from their project reports, listing and describing their grant activities. For award recipients, the names of directors and/or senior executives (current officers, trustees, and key employees), as well as the one-page description of grant activities, will be transmitted by the State Department to OMB, along with other information required by the Federal Funding Accountability and Transparency Act (FFATA), and will be made available to the public by the Office of Management and Budget on its USASpending.gov Web site as part of ECA's FFATA reporting requirements.

Please Note: If your organization is a private nonprofit which has not received a grant or cooperative agreement from ECA in the past three years, or if your organization received nonprofit status from the IRS within the past four years, you must submit the necessary documentation to verify nonprofit status as directed in the PSI document. Failure to do so will cause your proposal to be declared technically ineligible.

IV.3d. Please take into consideration the following information when preparing your proposal narrative:

IV.3d.1. Adherence to All Regulations Governing the J Visa

The Office of Citizen Exchanges of the Bureau of Educational and Cultural Affairs is the official program sponsor of the exchange program covered by this RFGP, and an employee of the Bureau will be the "Responsible Officer" for the program under the terms of 22 CFR 62, which covers the administration of the Exchange Visitor Program (J visa program). Under the terms of 22 CFR 62, organizations receiving awards (either a grant or cooperative agreement) under this RFGP will be third parties "cooperating with or assisting the sponsor in the conduct of the sponsor's program." The actions of recipient organizations shall be "imputed to the sponsor in evaluating the sponsor's compliance with" 22 CFR 62. Therefore, the Bureau expects that any organization receiving an award under this competition will render all assistance necessary to enable the Bureau to fully comply with 22 CFR 62 *et seq.*

The Bureau of Educational and Cultural Affairs places critically important emphases on the secure and proper administration of Exchange Visitor (J visa) Programs and adherence by recipient organizations and program participants to all regulations governing the J visa program status. Therefore, proposals should explicitly state in writing that the applicant is prepared to assist the Bureau in meeting all requirements governing the administration of Exchange Visitor Programs as set forth in 22 CFR 62. If your organization has experience as a designated Exchange Visitor Program Sponsor, the applicant should discuss their record of compliance with 22 CFR 62 *et seq.,* including the oversight of their Responsible Officers and Alternate Responsible Officers, screening and selection of program participants, provision of pre-arrival information and orientation to participants, monitoring of participants, proper maintenance and security of forms, recordkeeping, reporting and other requirements.

The Office of Citizen Exchanges of ECA will be responsible for issuing DS–2019 forms to participants in this program.

A copy of the complete regulations governing the administration of Exchange Visitor (J) programs is available at *http://exchanges.state.gov* or from: Office of Designation, ECA/EC/D, SA–5, Floor C2, Department of State, Washington, DC 20522–0582.

IV.3d.2. Diversity, Freedom and Democracy Guidelines

Pursuant to the Bureau's authorizing legislation, projects must maintain a non-political character and should be balanced and representative of the diversity of American political, social, and cultural life. "Diversity" should be interpreted in the broadest sense and encompass differences including, but not limited to, ethnicity, race, gender, religion, geographic location, socio-economic status, and disabilities. Applicants are strongly encouraged to adhere to the advancement of this principle both in project administration and in project content. Please refer to the review criteria under the 'Support for Diversity' section for specific suggestions on incorporating diversity into your proposal. Public Law 104–319 provides that "in carrying out programs of educational and cultural exchange in countries whose people do not fully enjoy freedom and democracy," the Bureau "shall take appropriate steps to provide opportunities for participation in such programs to human rights and democracy leaders of such countries." Public Law 106—113 requires that the governments of the countries described above do not have inappropriate influence in the selection process. Proposals should reflect advancement of these goals in their project contents, to the full extent deemed feasible.

IV.3d.3. Program Monitoring and Evaluation

Proposals must include a plan to monitor and evaluate the project's success, both as the activities unfold and at the end of the program. The Bureau recommends that your proposal include a draft survey questionnaire or other technique plus a description of a methodology to use to link outcomes to original project objectives. The Bureau expects that the recipient organization will track participants or partners and be able to respond to key evaluation questions, including satisfaction with the program, learning as a result of the program, changes in behavior as a result of the program, and effects of the program on institutions (institutions in which participants work or partner institutions). The evaluation plan should include indicators that measure gains in mutual understanding as well as substantive knowledge.

Successful monitoring and evaluation depend heavily on setting clear goals and outcomes at the outset of a program. Your evaluation plan should include a description of your project's objectives,

your anticipated project outcomes, and how and when you intend to measure these outcomes (performance indicators). The more that outcomes are "smart" (specific, measurable, attainable, results-oriented, and placed in a reasonable time frame), the easier it will be to conduct the evaluation. You should also show how your project objectives link to the goals of the program described in this RFGP.

Your monitoring and evaluation plan should clearly distinguish between program *outputs* and *outcomes. Outputs* are products and services delivered, often stated as an amount. Output information is important to show the scope or size of project activities, but it cannot substitute for information about progress towards outcomes or the results achieved. Examples of outputs include the number of people trained or the number of seminars conducted. *Outcomes,* in contrast, represent specific results a project is intended to achieve and is usually measured as an extent of change. Findings on outputs and outcomes should both be reported, but the focus should be on outcomes.

We encourage you to assess the following four levels of outcomes, as they relate to the program goals set out in the RFGP (listed here in increasing order of importance):

1. *Participant satisfaction* with the program and exchange experience.

2. *Participant learning,* such as increased knowledge, aptitude, skills, and changed understanding and attitude. Learning includes both substantive (subject-specific) learning and mutual understanding.

3. *Participant behavior,* concrete actions to apply knowledge in work or community; greater participation and responsibility in civic organizations; interpretation and explanation of experiences and new knowledge gained; continued contacts between participants, community members, and others.

4. *Institutional changes,* such as increased collaboration and partnerships, policy reforms, new programming, and organizational improvements.

Please note: Consideration should be given to the appropriate timing of data collection for each level of outcome. For example, satisfaction is usually captured as a short-term outcome, whereas behavior and institutional changes are normally considered longer-term outcomes.

Overall, the quality of your monitoring and evaluation plan will be judged on how well it (1) Specifies intended outcomes; (2) gives clear descriptions of how each outcome will be measured; (3) identifies when particular outcomes will be measured; and (4) provides a clear description of the data collection strategies for each outcome (*i.e.,* surveys, interviews, or focus groups). (Please note that evaluation plans that deal only with the first level of outcomes [satisfaction] will be deemed less competitive under the present evaluation criteria.)

Recipient organizations will be required to provide reports analyzing their evaluation findings to the Bureau in their regular program reports. All data collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

IV.3e. Please take the following information into consideration when preparing the proposal budget:

IV.3e.1. Applicants must submit SF–424A—"Budget Information—Non-Construction Programs" along with a comprehensive budget for the entire project. There must be a summary budget as well as breakdowns reflecting both administrative and program budgets. Applicants may provide separate sub-budgets for each project component, phase, location, or activity to provide clarification.

IV.3e.2. Allowable costs for the project include the following:

(1) *Travel.* International and domestic airfare; visas; transit costs; ground transportation costs. Please note that all air travel must be in compliance with the Fly America Act. There is no charge for J–1 visas for participants in Bureau-sponsored programs.

(2) *Per Diem.* For U.S.-based programming, organizations should use the published Federal per diem rates for individual U.S. cities. Domestic per diem rates may be accessed at: *http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentId=17943&contentType=GSA_BASIC*.

Living costs during foreign-based activities must not exceed USG-approved per diem rates, which can be found at *http://Aoprals.State.Gov/Content.Asp?Content_Id=184&Menu_Id=81*.

Please refer to the Solicitation Package for complete budget guidelines and formatting instructions.

IV.3f. Submission Dates and Times

Application Deadline Date: April 12, 2010.

Methods of Submission:

Applications may be submitted in one of two ways:

(1.) In hard-copy, via a nationally recognized overnight delivery service (*i.e.,* Federal Express, UPS, or U.S. Postal Service Express Overnight Mail, *etc.*), or

(2.) Electronically through *http://www.grants.gov*.

Along with the Project Title, all applicants must enter the competition Reference Number ECA/PE/C–10–One-time-Comp.B in Box 11 on the SF–424 contained in the mandatory Proposal Submission Instructions (PSI) of the solicitation document.

IV.3f.1—Submitting Printed Applications

Applications must be shipped no later than the above deadline. Delivery services used by applicants must have in-place, centralized shipping identification and tracking systems that may be accessed via the Internet and delivery people who are identifiable by commonly recognized uniforms and delivery vehicles. Proposals shipped on or before the above deadline but received at ECA more than seven days after the deadline will be ineligible for further consideration under this competition. Proposals shipped after the established deadlines are ineligible for consideration under this competition. ECA will *not* notify you upon receipt of application. It is each applicant's responsibility to ensure that each package is marked with a legible tracking number and to monitor/confirm delivery to ECA via the Internet. Delivery of proposal packages *may not* be made via local courier service or in person for this competition. Faxed documents will not be accepted at any time. Only proposals submitted as stated above will be considered.

Important note: When preparing your submission please make sure to include one extra copy of the completed SF–424 form and place it in an envelope addressed to "ECA/EX/PM".

Applicants must also submit the "Executive Summary" and "Proposal Narrative" and budget sections of the proposal as well as any essential attachments, in Microsoft Word and/or Excel on a CD–ROM. The Bureau will provide these files electronically to the appropriate Public Affairs Sections at the U.S. Embassies for their review.

The original and seven copies of the application should be sent to: U.S. Department of State, Program Management Division, ECA–IIP/EX/PM, Ref.: ECA/PE/C–10–One-time-Comp.B, SA–5, Floor 4, Department of State, 2200 C Street, NW., Washington, DC 20522–0504.

Applicants submitting hard-copy applications must also submit the "Executive Summary" and "Proposal Narrative" and "Budget" sections of the

proposal in text (.txt) or Microsoft Word format on a PC-formatted disk. The Bureau will provide these files electronically to the appropriate Public Affairs Section(s) at the U.S. embassy(ies) for its(their) review.

IV.3f.2—Submitting Electronic Applications

Applicants have the option of submitting proposals electronically through Grants.gov (*http://www.grants.gov*). Complete solicitation packages are available at Grants.gov in the "Find" portion of the system.

Please follow the instructions available in the 'Get Started' portion of the site (*http://www.grants.gov/GetStarted*).

Several of the steps in the Grants.gov registration process could take several weeks. Therefore, applicants should check with appropriate staff within their organizations immediately after reviewing this RFGP to confirm or determine their registration status with Grants.gov.

Once registered, 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. In addition, validation of an electronic submission via Grants.gov can take up to two business days.

Therefore, we strongly recommend that you not wait until the application deadline to begin the submission process through Grants.gov.

The Grants.gov Web site includes extensive information on all phases/aspects of the Grants.gov process, including a lengthy section on frequently asked questions, located under the "For Applicants" section of the Web site. ECA strongly recommends that all potential applicants review thoroughly the Grants.gov Web site, well in advance of submitting a proposal through the Grants.gov system. ECA bears no responsibility for data errors resulting from transmission or conversion processes.

Direct all questions regarding Grants.gov registration and submission to:

Grants.gov Customer Support.

Contact Center Phone: 800–518–4726.

Business Hours: Monday–Friday, 7 a.m.–9 p.m. Eastern Time.

E-mail: *support@grants.gov.*

Applicants have until midnight (12 a.m.), Washington, DC time of the closing date to ensure that their entire application has been uploaded to the Grants.gov site. There are no exceptions to the above deadline. Applications uploaded to the site after midnight of the application deadline date will be automatically rejected by the grants.gov system, and will be technically ineligible.

Please refer to the Grants.gov Web site, for definitions of various "application statuses" and the difference between a submission receipt and a submission validation. Applicants will receive a validation e-mail from grants.gov upon the successful submission of an application. Again, validation of an electronic submission via Grants.gov can take up to two business days. Therefore, we strongly recommend that you not wait until the application deadline to begin the submission process through Grants.gov. ECA will *not* notify you upon receipt of electronic applications.

It is the responsibility of all applicants submitting proposals via the Grants.gov Web portal to ensure that proposals have been received by Grants.gov in their entirety, and ECA bears no responsibility for data errors resulting from transmission or conversion processes.

IV.3g. Intergovernmental Review of Applications: Executive Order 12372 does not apply to this program.

V. Application Review Information

V.1. Review Process

The Bureau will review all proposals for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines stated herein and in the Solicitation Package. All eligible proposals will be reviewed by the program office, as well as the Public Diplomacy section of the relevant U.S. Embassy overseas, where appropriate. Eligible proposals will be subject to compliance with Federal and Bureau regulations and guidelines and forwarded to Bureau grant panels for advisory review. Proposals may also be reviewed by the Office of the Legal Adviser or by other Department elements. Final funding decisions are at the discretion of the Department of State's Assistant Secretary for Educational and Cultural Affairs. Final technical authority for assistance awards (grants) resides with the Bureau's Grants Officer.

Review Criteria

Technically eligible applications will be competitively reviewed according to the criteria stated below. These criteria are not rank ordered and all carry equal weight in the proposal evaluation:

1. *Quality of the project idea and project planning:*

The project's purpose should clearly fit one of the eligible themes described above, and the proposal should clearly demonstrate how the institution plans to pursue the project's objectives. The proposed project should be creative and well developed, respond to the design outlined in the solicitation, and demonstrate originality. It should be clearly and accurately written, substantive, and with sufficient detail to ensure practical success. The project plan should adhere to the program overview and guidelines described above. Please note: Proposals submitted by prior-year one-time grant recipients must include in their proposal submission a description of the specific elements that make this submission a new exchange program rather than a repetition or extension of what was funded by ECA under a prior-year award.

2. *Ability to achieve project objectives:* Objectives should be reasonable, feasible, and relevant to the proposed theme. Proposals should clearly plan activities in a sequence that will progressively lead to achieving those objectives.

3. *Support of diversity:* The proposal should acknowledge ECA's policy on diversity and should demonstrate the recipient's commitment to promoting the awareness and understanding of diversity in participant selection and exchange project design and content.

4. *Institutional capacity and track record:* Proposed personnel and institutional resources should be adequate and appropriate to achieve the project goals. The proposal should demonstrate an institutional record, including solid programming and responsible fiscal management. The Bureau will consider past performance, including compliance with all reporting requirements for past Bureau grants.

5. *Project evaluation:* The proposal should include a plan to evaluate the project's success, both as the activities unfold and at the end of the program. The proposal should include a draft survey questionnaire or other data-collection technique plus description of a methodology to link outcomes to original project objectives. Please see Section IV.3d.3. of this announcement for more information.

6. *Cost-effectiveness and cost sharing:* The applicant should demonstrate efficient use of Bureau funds. The overhead and administrative components of the proposal, including salaries and honoraria, should be kept as low as possible. All other items should be necessary and appropriate. The proposal should maximize cost-sharing through other private sector support as well as institutional direct funding contributions.

VI. Award Administration Information

VI.1a. Award Notices

Final awards cannot be made until funds have been appropriated by Congress, allocated and committed through internal Bureau procedures. Successful applicants will receive a Federal Assistance Award (FAA) from the Bureau's Grants Office. The FAA and the original grant proposal with subsequent modifications (if applicable) shall be the only binding authorizing document between the recipient and the U.S. Government. The FAA will be signed by an authorized Grants Officer, and mailed to the recipient's responsible officer identified in the application.

Prohibition on the use of Federal Funds to Promote, Support, or advocate for the legalization or practice of Prostitution.

The U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons. None of the funds made available under this agreement may be used to promote, support, or advocate the legalization or practice of prostitution. Nothing in the preceding sentence shall be construed to preclude assistance designed to ameliorate the suffering of, or health risks to, victims while they are being trafficked or after they are out of the situation that resulted from such victims being trafficked. The recipient shall insert the foregoing provision in all sub-agreements under this award.

This provision includes express terms and conditions of the agreement and any violation of it shall be grounds for unilateral termination of the agreement by the Department of State prior to the end of its term.

Awards With the Palestinian Authority

All awards made under this competition must be executed according to all relevant U.S. laws and policies regarding assistance to the Palestinian Authority, and to the West Bank and Gaza. Organizations must consult with relevant Public Affairs Offices before entering into any formal arrangements or agreements with Palestinian organizations or institutions.

Note: To assure that planning for the inclusion of the Palestinian Authority complies with requirements, please contact: Thomas Johnston, Office of Citizen Exchanges, (202) 632–6087; *JohnstonTJ@state.gov* for additional information.

VI.2. Administrative and National Policy Requirements

Terms and Conditions for the Administration of ECA agreements include the following:

Office of Management and Budget Circular A–122, "Cost Principles for Nonprofit Organizations".

Office of Management and Budget Circular A–21, "Cost Principles for Educational Institutions".

OMB Circular A–87, "Cost Principles for State, Local and Indian Governments".

OMB Circular No. A–110 (Revised), Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and other Nonprofit Organizations.

OMB Circular No. A–102, Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments.

OMB Circular No. A–133, Audits of States, Local Government, and Non-profit Organizations.

Please refer to the following Web sites for additional information: *http://www.whitehouse.gov/omb/grants. http://fa.statebuy.state.gov.*

VI.3. Reporting Requirements: You must provide ECA with a hard copy original plus 10 copies of the following reports:

(1.) A final program and financial report no more than 90 days after the expiration of the award;

(2.) A concise, one-page final program report summarizing program outcomes no more than 90 days after the expiration of the award. This one-page report will be transmitted to OMB, and be made available to the public via OMB's USAspending.gov Web site—as part of ECA's Federal Funding Accountability and Transparency Act (FFATA) reporting requirements.

(3.) A SF–PPR, "Performance Progress Report" Cover Sheet with all program reports.

Award Recipients will be required to provide reports analyzing their evaluation findings to the Bureau in their regular project reports. (Please refer to IV. Application and Submission Instructions (IV.3.d.3) above for Program Monitoring and Evaluation information.

All data collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

All reports must be sent to the ECA Grants Officer and ECA Program Officer listed in the final assistance award document.

VII. Agency Contacts

For questions about this announcement, contact: Brent Beemer, ECA/PE/C, SA–5, Third Floor, 2200 C Street, NW., Washington, DC 20522–0503, tel 202–632–6067, fax 202–632–9355, *BeemerBT@state.gov.*

All correspondence with the Bureau concerning this RFGP should reference the above title and number ECA/PE/C–10–One-time-Comp.B.

Please read the complete **Federal Register** announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

VIII. Other Information

Notice

The terms and conditions published in this RFGP are binding and may not be modified by any Bureau representative. Explanatory information provided by the Bureau that contradicts published language will not be binding. Issuance of the RFGP does not constitute an award commitment on the part of the Government. The Bureau reserves the right to reduce, revise, or increase proposal budgets in accordance with the needs of the program and the availability of funds. Awards made will be subject to periodic reporting and evaluation requirements per section VI.3 above.

Dated: February 26, 2010.

Maura M. Pally,

Acting Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. 2010–4557 Filed 3–3–10; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA 2010–0018]

Agency Information Collection Activities: Request for Comments; Renewed Approval of Information Collection; State Right-of-Way Operations Manuals, OMB Control Number: 2125–0586

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice and request for comments.

SUMMARY: The FHWA invites public comments about our intention to request the Office of Management and Budget's (OMB) approval for a new information collection, which is summarized below

under **SUPPLEMENTARY INFORMATION**. We published a **Federal Register** Notice with a 60-day public comment period on this information collection on October 5, 2009. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995.

DATES: Please submit comments by April 5, 2010.

ADDRESSES: You may submit comments identified by DOT Docket ID Number FHWA–2010–0018, by any of the following methods:

Web Site: For access to the docket to read background documents or comments received go to the Federal eRulemaking Portal: at *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Fax: 1–202–493–2251.

Mail: Docket Management Facility, U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

Hand Delivery or Courier: Docket Management Facility, U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Kathleen Facer, 785–228–2544, Office of Real Estate Services, Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

Title: State Right-of-Way Operations Manuals, OMB Control Number 2125–0586.

Background: It is the responsibility of each State Department of Transportation (State) to acquire, manage and dispose of real property in compliance with the legal requirements of State and Federal laws and regulations. Part of providing assurance of compliance is to describe in a right-of-way procedural (operations) manual the organization, policies and procedures of the State to such an extent that these guide State employees, local acquiring agencies, and contractors who acquire and manage real property that is used for a federally funded transportation project. Procedural manuals assure the FHWA that the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act (Uniform Act) will be met. The State responsibility to prepare and maintain an up-to-date right-of-way procedural manual is set out in 23 CFR 710.201(c). The regulation allows States flexibility in determining how to meet the manual requirement. This flexibility allows States to prepare manuals in the format of their choosing, to the level of detail necessitated by State complexities. Each State decides how it will provide service to individuals and businesses affected by Federal or federally-assisted projects, while at the same time reducing the burden of government regulation. States are required to update manuals to reflect changes in Federal requirements for programs administered under Title 23 U.S.C. The State manuals may be submitted to FHWA electronically or made available by posting on the State web site.

Respondents: State Departments of Transportation (52, including the District of Columbia and Puerto Rico).

Frequency: Once initially, then States update their operations manuals for review.

Estimated Average Burden per Response: 75 hours per respondent.

Estimated Total Annual Burden Hours: 75 hours for each of the 52 State Departments of Transportation. The total is 3,900 burden hours annually.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the FHWA oversight of the right-of-way program; (2) the accuracy of the estimated burden; (3) ways for the FHWA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.48.

Issued On: February 26, 2010.

Juli Huynh,

Chief, Management Programs and Analysis Division.

[FR Doc. 2010–4532 Filed 3–3–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Availability for Qualified RNP SAAAR Approval Consultants

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of availability for qualified RNP SAAAR Approval Consultants to aid operators in the RNP SAAAR approval process.

SUMMARY: The Federal Aviation Administration (FAA) announced today that it is seeking to identify additional qualified industry consultants to assist 14 Code of Federal Regulations (14 CFR) part 91; 121, 125, 129, 135 operators as they pursue approval to conduct Required Navigation Performance (RNP) Special Aircraft and Aircrew Authorization Required (SAAAR) approaches. Provisions for gaining those approvals are contained within FAA Advisory Circular (AC) 90–101, Approval Guidance for RNP Procedures with SAAAR. Applicants who meet certain qualifications will be permitted to enter into an agreement with the FAA to be listed as RNP SAAAR Approval Consultants.

SUPPLEMENTARY INFORMATION: RNP SAAAR criteria provide unprecedented flexibility in the design of instrument approach procedures. Performance requirements to conduct an approach are defined, and aircraft are qualified against these requirements. RNP SAAAR approaches include unique characteristics that require special aircraft and aircrew capabilities and authorization. The AC 90–101 RNP SAAAR approval process can be complex and success in the process depends on the quality of the application. The FAA will continue to develop and maintain a list of qualified AC 90–101 RNP SAAAR Approval Consultants to assist in the approval process and expedite operator applications.

(a) *Eligibility Requirements:* To be identified as an FAA-qualified RNP SAAAR Approval Consultant, the following qualifications must be met:

(1) Have understanding of AC 90–101, as revised, to include the individual appendices. This includes a thorough understanding of the approval process.

(2) At least two years experience working with RNP SAAAR or equivalent procedures.

(3) Upon selection for the program, successfully complete an RNP SAAAR Approval Process seminar.

(4) Have operations and airworthiness personnel qualified through training, experience, and expertise in 14 CFR part 91,121,125,129 and/or 135 operations, or equivalent experience.

(b) *Required Documentation:* An applicant to become an RNP SAAAR Approval Consultant must submit a formal letter of request in addition to the following documents:

(1) Statement substantiating that the RNP SAAAR Approval Consultant applicant meets eligibility requirements as stated in item (a) above.

(2) Supplemental statement including the names, signatures, and titles of those

persons who will perform the authorized functions, and substantiating that they meet the eligibility requirements.

(3) RNP SAAAR Approval Consultant Operations Manual.

(4) References.

(5) Certification that, to the best of its knowledge and belief, the persons serving as management of the organization have not been convicted of, or had a civil or administrative finding rendered against, them for: Commission of fraud, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property.

(c) *How to Apply:* An RNP SAAAR Consultant applicant must submit all required documents for consideration before being identified as an FAA-qualified RNP SAAAR Approval Consultant to: Mr. Mark Steinbicker, Federal Aviation Administration, Flight Technologies and Procedures Division, AFS–400, 470 L'Enfant Plaza, Suite 4102, Washington, DC 20024.

(d) Application Process*: Upon receipt of the application, AFS–400, will:*

(1) Ensure the RNP SAAAR Approval Consultant application package contains all the required documents as listed in item (b) above.

(2) Evaluate documents for accuracy.

(3) Ensure the RNP SAAAR consultant application package contains all the eligibility requirements as listed in item (a) above.

(4) Contact the applicant's personal references.

(5) Conduct a personal interview with the applicant; including those persons within organizations, if any, who will perform authorized functions.

(e) See the following Web site for additional information, *http://0frwebgate.access.gpo.gov.library.colby.edu/cgibin/leaving.cgi?from=leavingFR.html&log=linklog&to=http://www.faa.gov/about/office_org/headquarters_offices/avs/offices/afs/afs400/afs47O/rnp/.*

Authority: The FAA is authorized to enter into this Agreement by 49 U.S.C. 106(1), (6) and (m).

ADDRESSES: The FAA will accept a formal letter of application for Qualified RNP SAAAR Approval Consultants and must be received on or before March 31, 2010. The formal letter of application must be sent to: Mr. Mark Steinbicker, Federal Aviation Administration, Flight Technologies and Procedures Division, AFS–400, 470 L'Enfant.Plaza, Suite 4102, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Steinbicker, Federal Aviation Administration, Flight Technologies and Procedures Division, AFS–400, 470 L'Enfant Plaza, Suite 4102, Washington, DC 20024, (202) 385–4586.

Issued in Washington DC on February 16, 2010.

John M. Allen,

Director, Flight Standards Service.

[FR Doc. 2010–4385 Filed 3–3–10; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on the Interchange of State Loop 1604 and United States Highway 281 in Texas

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of limitation on claims for judicial review of actions by FHWA and other Federal agencies.

SUMMARY: This notice announces actions taken by the FHWA and other Federal agencies that are final within the meaning of 23 U.S.C. 139(l)(1). The actions relate to a proposed highway project, the interchange of Texas State Loop 1604 (LP 1604) with United States Highway 281 (US 281). Project limits on LP 1604 are from Bitters Road to Redland Road and on US 281 are from LP 1604 to Bitters Road in Bexar County in the State of Texas. Those actions grant licenses, permits, and approvals for the project.

DATES: By this notice, the FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before August 31, 2010. If the Federal law that authorizes judicial review of a claim provides a time period of less than 180 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Mr. Salvador Deocampo, District Engineer, Federal Highway Administration, 300 E. 8th Street, Rm. 826, Austin, Texas 78701; telephone: (512) 536–5950; e-mail: *salvador.deocampo@dot.gov.* The FHWA Texas Division Office's normal business hours are 7:45 a.m. to 4:15 p.m. You may also contact Ms. Lisa Adelman, Alamo Regional Mobility Authority, 1222 N. Main Avenue, Suite 1000, San Antonio, Texas 78212; telephone: (210) 495–5256.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the FHWA and other Federal agencies have taken final agency actions by issuing licenses, permits, and approvals for the following highway project in the State of Texas: The interchange of Texas State Loop 1604 (LP 1604) with United States Highway 281 (US 281). Project limits on LP 1604 are from Bitters Road to Redland Road and on US 281 are from LP 1604 to Bitters Road in Bexar County. The project will be approximately 8.7 miles long and will construct four (4) direct connector ramps between LP 1604 and US 281 to the south. The project also includes construction of auxiliary lanes, turn around bridges, ramp relocations and pedestrian facilities within the project limits. The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Categorical Exclusion (CE) for the project, dated February 2010, and in other documents in the FHWA project records. The CE and other documents in the FHWA project records file are available by contacting the FHWA or the Alamo Regional Mobility Authority at the addresses provided above. This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. General: National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 109].

2. Air: Clean Air Act, 42 U.S.C. 7401–7671(q).

3. Land: Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303, 23 CFR 774].

4. Wildlife: Endangered Species Act [16 U.S.C. 1531–1544 and Section 1536], Migratory Bird Treaty Act [16 U.S.C. 703–712].

5. Historic and Cultural Resources: Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–11]; Archeological and Historic Preservation Act [16 U.S.C. 469–469(c)].

6. Social and Economic: Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209].

7. Wetlands and Water Resources: Clean Water Act, 33 U.S.C. 1251–1377 (Section 404, Section 401, Section 319).

8. Executive Orders: E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13175 Consultation and Coordination with Indian Tribal

Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(l)(1)

Issued on: February 26, 2010.

Achille Alonzi,

Assistant Division Administrator, Austin, Texas.

[FR Doc. 2010–4509 Filed 3–3–10; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2010–05]

Petition for Exemption; Summary of Petition Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATE: Comments on this petition must identify the petition docket number involved and must be received on or before March 24, 2010.

ADDRESSES: You may send comments identified by Docket Number FAA–2009–1087 using any of the following methods:

• *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.

• *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.

• *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.

• *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. Using the search function of our docket web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Docket: To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Brenda Sexton, Program Analyst, Office of Rulemkaing—Aircraft and Airport Rules Division, 202–267–3664. This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on March 1, 2010.

Pamela Hamilton-Powell,

Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2009–1087.

Petitioner: Terrafugia, Inc.

Section of 14 CFR Affected: 14 CFR part 1 § 1.1.

Description of Relief Sought: Petition for exemption from the Federal Aviation Regulations, 14 CFR 1.1, definition of a light-sport aircraft (LSA) to permit an additional weight allowance for a four wheel LSA with folding wings intended for operation on public roadways (*i.e.*, roadable aircraft). For their roadable design to meet the applicable Federal Motor Vehicle Safety Standards (FMVSS) and still maintain an equivalent useful load to other LSA, the petitioner has requested a maximum takeoff weight (MTOW) of 1474 pounds (670 kg). This petition is significantly different than previous requests for exemption to the LSA weight limitations, as the vehicle design is unique and must simultaneously meet both sets of dissimilar standards for LSA and road vehicles.

[FR Doc. 2010–4496 Filed 3–3–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2010–02]

Petition for Exemption; Summary of Petitions Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of two petitions seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petitions or their final disposition.

DATES: Comments on these petitions must identify the petition docket number involved and must be received on or before March 24, 2010.

ADDRESSES: You may send comments identified by Docket Number FAA–2009–1217 and FAA–2009–0966 using any of the following methods:

• *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.

• *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.

• *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.

• *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Docket: To read background documents or comments received, go to

http://www.regulations.gov at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Tyneka L. Thomas, 202–267–7626, or Ralen Gao, 202–267–3168, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC on February 22, 2010.

Pamela Hamilton-Powell,

Director, Office of Rulemaking.

Petitions for Exemption

To assist the FAA in analysis of the safety impact of these petitions, commenters should provide information and data that relate to the equipment, procedural practices, alternatives, and aeromedical factors involved in granting such an exemption. In particular, the FAA is interested in receiving data and information relating to the following issues:

- The risk of oxygen deficiency when operating at flight altitudes above flight level 250.
- Aircraft vessel reliability.
- Human physiology.
- Life support equipment capabilities vs. aircraft operating altitude performance capability.
- Crew emergency training and passenger protection.
- Potential failure modes that would require the use of emergency breathing equipment.
- Human response times in the event of decompression.

The FAA is also interested in receiving input on what alternative actions could be taken that would provide an equivalent level of safety.

Docket No.: FAA–2009–1217.

Petitioner: FedEx Express.

Section of 14 CFR Affected: § 121.333(c)(3).

Description of Relief Sought

FedEx Express seeks an exemption from 14 CFR 121.333(c)(3) which requires that if for any reason at any time it is necessary for one pilot to leave his station at the controls of the airplane when operating at flight altitudes above flight level 250, the remaining pilot at the controls shall put on and use his oxygen mask until the other pilot has returned to his duty station. An exemption would allow one pilot to leave his or her station at the controls of the airplane when operating at flight altitudes above flight level 250, while the remaining pilot at the controls shall remove his or her oxygen mask from the stowage unit and have it in his or her lap until the other pilot has returned to his or her duty station. The petitioner believes that granting this exemption will mitigate the potential exposure for flight crewmembers to contract H1N1.

Docket No.: FAA–2009–0966.

Petitioner: FedEx Express and Air Line Pilots Association (ALPA).

Section of 14 CFR Affected: § 121.333(c)(3).

Description of Relief Sought

FedEx Express and ALPA seeks temporary suspension of Section 121.333(c)(3) which would allow one pilot to leave his (her) station at the controls of the airplane when operating at flight altitudes above flight level 250.

[FR Doc. 2010–4497 Filed 3–3–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

March 1, 2010.

The Department of the Treasury will submit the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13, on or after the publication date of this notice. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before April 5, 2010 to be assured of consideration.

Bureau of Public Debt (BPD)

OMB Number: 1535–0120.

Type of Review: Extension of a previously approved collection.

Title: FHA New Account Request, Transition Request, and Transfer Request.

Form: 5354, 5367, PD F 5366.

Description: Used to establish account, change information on account, and transfer ownership.

Respondents: Individuals or Households.

Estimated Total Burden Hours: 50 hours.

Clearance Officer: Bruce Sharpe (304) 480–8150. Bureau of the Public Debt, 200 Third Street, Parkersburg, West Virginia 26106.

OMB Reviewer: Shagufta Ahmed (202) 395–7873, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Celina Elphage,

Treasury PRA Clearance Officer.

[FR Doc. 2010–4626 Filed 3–3–10; 8:45 am]

BILLING CODE 4810–39–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form SS–8

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form SS–8, Determination of Worker Status for Purpose of Federal Employment Taxes and Income Tax Withholding.

DATES: Written comments should be received on or before May 3, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Allan Hopkins at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–6665, or through the internet at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding.

OMB Number: 1545–0004.

Form Number: SS–8.

Abstract: Form SS–8 is used by employers and workers to furnish information to IRS in order to obtain a determination as to whether a worker is an employee for purposes of Federal

employment taxes and income tax withholding. IRS uses the information on Form SS–8 to make the determination.

Current Actions: There are no changes being made to the Form SS–8 at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, individuals, not-for-profit institutions, Federal government, farms, and state, local or tribal governments.

Estimated Number of Respondents: 4,554.

Estimated Time per Respondent: 22 hours, 17 minutes.

Estimated Total Annual Burden Hours: 101,464.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 29, 2010.

R. Joseph Durbala,

Supervisory Tax Analyst.

[FR Doc. 2010–4469 Filed 3–3–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 1041 and Related Schedules D, J, and K–1

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 1041 and related Schedules D, J, and K–1, U.S. Income Tax Return for Estates and Trusts.

DATES: Written comments should be received on or before May 3, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Allan Hopkins at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–6665, or through the internet at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: U.S. Income Tax Return for Estates and Trusts (Form 1041), Capital Gains and Losses (Schedule D), Accumulation Distribution for Certain Complex Trusts (Schedule J), and Beneficiary's Share of Income, Deductions, Credits, etc. (Schedule K–1).

OMB Number: 1545–0092.

Form Number: 1041 and related Schedules D, J, and K–1.

Abstract: IRC section 6012 requires that an annual income tax return be filed for estates and trusts. The data is used by the IRS to determine that the estates, trusts, and beneficiaries filed the proper returns and paid the correct tax.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations and individuals.

Estimated Number of Respondents: 10,513,150.

Estimated Time per Response: 35 hours, 41 minutes.

Estimated Total Annual Burden Hours: 375,066,476.

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: February 22, 2010.

R. Joseph Durbala,

Supervisory Tax Analyst.

[FR Doc. 2010–4471 Filed 3–3–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Notice 98–1 and REG–108639–99

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and

other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13(44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Notice 98–1, Nondiscrimination Testing, and final regulation, REG–108639–99 (TD 1969), Retirement Plans; Cash or Deferred Arrangements Under Section 401(k) and Matching Contributions or Employee Contributions Under Section 401(m) (§§ 401(k) and 401(m)).

DATES: Written comments should be received on or before May 3, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the notice and regulation should be directed to Dawn Bidne, at (202) 622–3933, or at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or at or through the Internet at *Dawn.E.Bidne@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Nondiscrimination Testing (Notice 98–1) and Retirement Plans; Cash or Deferred Arrangements Under Section 401(k) and Matching Contributions or Employee Contributions Under Section 401(m) (REG–108639–99).

OMB Number: 1545–1579.

Notice Number: Number: Notice 98–1.

Regulation Project Number: REG–108639–99 (TD 9169).

Abstract: Notice 98–1 and REG–108639–99 provides guidance for discrimination testing under section 401(k) and (m) of the Internal Revenue Code as amended by section 1433(c) and (d) of the Small Business job Protection Act of 1996. The guidance is directed to employers maintaining retirement plans subject to these Code sections.

Current Actions: There are no changes being made to the notice and regulation at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, and not-for-profit institutions.

Estimated Number of Respondents: 147,000.

Estimated Time per Respondent: 20 min.

Estimated Total Annual Burden Hours: 49,000.

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: February 19, 2010.

R. Joseph Durbala,

IRS Supervisory Tax Analyst.

[FR Doc. 2010–4459 Filed 3–3–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[REG–109704–97]

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)). Currently, the IRS is soliciting comments concerning an existing notice of proposed rulemaking and temporary regulations, REG–109704–97 (TD 8471), HIPAA Mental Health Parity Act (§ 54.9812).

DATES: Written comments should be received on or before May 3, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, 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 Allan Hopkins at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–6665, or through the Internet at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: HIPPAA Mental Health Parity Act.

OMB Number: 1545–1577.

Regulation Project Number: Reg–109704–97.

Abstract: The regulations provide guidance for group health plans with mental health benefits about requirements relating to parity in the dollar limits imposed on mental health benefits and medical/surgical benefits.

Current Actions: There are no changes being made to these existing regulations.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, state, local or tribal governments, and not-for-profit institutions.

Estimated Number of Respondents: 7,053.

Estimated Time per Respondent: 28 min.

Estimated Total Annual Burden Hours: 3,280.

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: February 22, 2010.

R. Joseph Durbala,

Supervisory Tax Analyst.

[FR Doc. 2010–4461 Filed 3–3–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[INTL–24–94]

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)). Currently, the IRS is soliciting comments concerning an existing final regulation, INTL–24–94 (TD 8671), Taxpayer Identifying Numbers (TINs) (§ 301.6109–1).

DATES: Written comments should be received on or before May 3, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be directed to Allan Hopkins, at (202) 622–6665, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Taxpayer Identifying Numbers (TINs).

OMB Number: 1545–1461.

Regulation Project Number: INTL–24–94.

Abstract: This regulation relates to requirements for furnishing a taxpayer identifying number on returns, statements, or other documents. Procedures are provided for requesting a taxpayer identifying number for certain alien individuals for whom a social security number is not available. The regulation also requires foreign persons to furnish a taxpayer identifying number on their tax returns.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals.

The burden for the collection of information is reflected in the burden for Form W–7, Application for IRS Individual Tax Identification Number (For Non-U.S. Citizens or Nationals).

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: February 22, 2010.

R. Joseph Durbala,

Supervisory Tax Analyst.

[FR Doc. 2010–4463 Filed 3–3–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Proposed Information Collection; Comment Request

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995. An agency 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 OCC is soliciting comment concerning an extension of OMB approval of the information collection titled, "Lending Limits—12 CFR 32."

DATES: Comments should be submitted by May 3, 2010.

ADDRESSES: Communications Division, Office of the Comptroller of the Currency, Mailstop 2–3, Attention: 1557–0221, 250 E Street, SW., Washington, DC 20219. In addition, comments may be sent by fax to (202) 874–5274, or by electronic mail to *regs.comments@occ.treas.gov.* You may personally inspect and photocopy comments at the OCC, 250 E Street, SW., Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 874–4700. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

Additionally, you should send a copy of your comments to OCC Desk Officer, 1557–0221, by mail to U.S. Office of Management and Budget, 725 17th Street, NW., #10235, Washington, DC 20503, or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: You may request additional information from Mary H. Gottlieb, Clearance Officer, (202) 874–5090, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION:

Title: Lending Limits—12 CFR 32.

Type of Review: Extension, without revision, of a currently approved collection.

OMB Control Number: 1557–0221.

Description: Twelve CFR 32.7(a) provides special lending limits for 1–4 family residential real estate loans, small business loans, and small farm loans for eligible national banks. National banks that seek to use these special lending limits must apply to the OCC, under 12 CFR 32.7(b), and receive approval before using the exceptions. The OCC needs the information in the application to evaluate whether a bank is eligible to use the special lending limits and to ensure that the bank's safety and soundness will not be jeopardized.

Affected Public: Businesses or other for-profit.

Burden Estimates:

Estimated Number of Respondents: 40.

Estimated Number of Responses: 40.

Estimated Annual Burden: 1,040 hours.

Frequency of Response: On occasion.

Comments: Comments submitted in response to this notice will be summarized and 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 OCC, including whether the information has practical utility;

(b) The accuracy of the OCC's estimate of the information collection burden;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

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

Dated: February 26, 2010.

Michele Meyer,

Assistant Director, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency.

[FR Doc. 2010–4541 Filed 3–3–10; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Proposed Information Collection; Comment Request

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995. An agency 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 OCC is soliciting comment concerning an extension of OMB approval of the information collection titled "Consumer Protections for Depository Institution Sales of Insurance."

DATES: Comments must be submitted on or before May 3, 2010.

ADDRESSES: Communications Division, Office of the Comptroller of the Currency, Mailstop 2–3, Attention: 1557–0220, 250 E Street, SW., Washington, DC 20219. In addition, comments may be sent by fax to (202) 874–5274 or by electronic mail to *regs.comments@occ.treas.gov.* You may personally inspect and photocopy the comments at the OCC, 250 E Street, SW., Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 874–4700. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

Additionally, you should send a copy of your comments to OCC Desk Officer, 1557–0220, by mail to U.S. Office of Management and Budget, 725 17th Street, NW., #10235, Washington, DC 20503, or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: You may request additional information or a copy of the collection and supporting documentation submitted to OMB by contacting: Mary H. Gottlieb, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION:

Title: Consumer Protections for Depository Institution Sales of Insurance—12 CFR part 14.

OMB Control No.: 1557–0220.

Type of Review: Extension, without revision, of a currently approved collection.

Description: This information collection requires national banks and other covered persons involved in insurance sales to make two separate disclosures to consumers. Under 12 CFR 14.40, a respondent must provide, orally and in writing, certain disclosures to a consumer: (1) Before the completion of the initial sale of an insurance product or annuity to the consumer; and (2) at the time of the consumer's application for the extension of credit if insurance products or annuities are sold, solicited, advertised, or offered in connection with an extension of credit.

Affected Public: Businesses or other for-profit.

Burden Estimates:

Estimated Number of Respondents: 717.

Estimated Number of Responses: 717.

Estimated Annual Burden Hours: 3,585 hours.

Frequency of Response: On occasion.

Comments: Comments submitted in response to this notice will be summarized and 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 OCC, including whether the information has practical utility;

(b) The accuracy of the OCC's estimate of the information collection burden;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

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

Dated: February 26, 2010.

Michele Meyer,

Assistant Director, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency.

[FR Doc. 2010–4538 Filed 3–3–10; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request For Form 4804

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 4804, Transmittal of Information Returns Reported Magnetically.

DATES: Written comments should be received on or before May 3, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Allan Hopkins at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–6665, or through the Internet at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Transmittal of Information Returns Reported Magnetically.

OMB Number: 1545–0367.

Form Number: Form 4804.

Abstract: Under Internal Revenue Code sections 6041 and 6042, all persons engaged in a trade or business and making payments of taxable income must file reports of this income with the IRS. In certain cases, this information must be filed on magnetic media. Form 4804 is a transmittal form for the magnetic media, which indicates the payer, type of document, and total payee records.

Current Actions: There are no changes being made to this form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals, business or other for-profit organizations, not-for-profit institutions, farms, and Federal, state, local or tribal governments.

Estimated Number of Responses: 71,058.

Estimated Time per Response: 17 minutes.

Estimated Total Annual Burden Hours: 20,902.

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: February 22, 2010.

R. Joseph Durbala,

Supervisory Tax Analyst.

[FR Doc. 2010–4467 Filed 3–3–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 990 and Schedules A and B

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 990, Return of Organization Exempt From Income Tax Under Section 501(c), 527, or 4947(a)(1) of the Internal Revenue Code (except black lung benefit trust or private foundation), Schedule A, Organization Exempt Under Section 501(c)(3) (Except Private Foundation), and Section 501(e), 501(f), 501(k), 501(n), or Section 4947(a)(1) Nonexempt Charitable Trust, and Schedule B, Schedule of Contributors.

DATES: Written comments should be received on or before May 3, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the forms and instructions should be directed to Allan Hopkins at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–6665, or through the Internet at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Return of Organization Exempt From Income Tax Under Section 501(c), 527, 4947(a)(1) of the Internal Revenue Code (except black lung benefit trust or private foundation) (Form 990), Organization Exempt Under Section 501(c)(3) (Except Private Foundation), and Section 501(e), 501(f), 501(k), 501(n), or Section 4947(a)(1) Nonexempt Charitable Trust (Schedule A), and Schedule of Contributors (Schedule B).

OMB Number: 1545–0047.

Form Number: 990, and Schedules A and B (Form 990).

Abstract: Form 990 is needed to determine that Code section 501(a) tax-exempt organizations fulfill the operating conditions of their tax exemption. Schedule A (Form 990) is used to elicit special information from section 501(c)(3) organizations. Schedule B is used by tax-exempt organizations to list contributors and allows the IRS to distinguish and make public disclosure of the contributors list within the requirements of Code section 527. IRS uses the information from these forms to determine if the filers are operating within the rules of their exemption.

Current Actions: There are no changes being made to the forms at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Not-for-profit institutions.

Estimated Number of Respondents: 403,068.

Estimated Time per Respondent: 63 hrs., 47 min.

Estimated Total Annual Burden Hours: 25,710,979.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 29, 2010.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. 2010–4466 Filed 3–3–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[FI–59–89]

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)). Currently, the IRS is soliciting comments concerning an existing final regulation, FI–59–89 (T.D. 8394), Proceeds of Bonds Used for Reimbursement (§ 1.150–2(e) (originally contained in § 1.104–18(c)).

DATES: Written comments should be received on or before May 3, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Proceeds of Bonds Used for Reimbursement.

OMB Number: 1545–1226.

Regulation Project Number: FI–59–89.

Abstract: This regulation clarifies when the allocation of bond proceeds to reimburse expenditures previously made by an issuer of the bond is treated as an expenditure of the bond proceeds. The issuer must express a reasonable official intent, on or prior to the date of payment, to reimburse the expenditure in order to assure that the reimbursement is not a device to evade requirements imposed by the Internal Revenue Code with respect to tax exempt bonds.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: State, local or tribal governments, and not-for-profit institutions.

Estimated Number of Respondents: 2,500.

Estimated Time per Respondent: 2 hours, 24 minutes.

Estimated Total Annual Burden Hours: 6,000.

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: February 22, 2010.

R. Joseph Durbala,

Supervisory Tax Analyst.

[FR Doc. 2010–4464 Filed 3–3–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8610 and Schedule A (Form 8610)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8610, Annual Low-Income Housing Credit Agencies Report, and Schedule A

(Form 8610), Carryover Allocation of Low-Income Housing Credit.

DATES: Written comments should be received on or before May 3, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the forms and instructions should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Form 8610, Annual Low-Income Housing Credit Agencies Report, and Schedule A (Form 8610), Carryover Allocation of Low-Income Housing Credit.

OMB Number: 1545–0990.

Form Number: Form 8610 and Schedule A (Form 8610).

Abstract: State housing credit agencies (Agencies) are required by Code section 42(l)(3) to report annually the amount of low-income housing credits that they allocated to qualified buildings during the year. Agencies report the amount allocated to the building owners and to the IRS in Part I of Form 8609. Carryover allocations are reported to the Agencies in carryover allocation documents. The Agencies report the carryover allocations to the IRS on Schedule A (Form 8610). Form 8610 is a transmittal and reconciliation document for Forms 8609, Schedule A (Form 8610), binding agreements, and election statements.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: State, local or tribal governments.

Estimated Number of Respondents: 53.

Estimated Time per Respondent: 105 hours, 38 minutes.

Estimated Total Annual Burden Hours: 5,599.

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: February 22, 2010.

R. Joseph Durbala,

Supervisory Tax Analyst.

[FR Doc. 2010–4462 Filed 3–3–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 1128

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 1128, Application to Adopt, Change, or Retain a Tax Year.

DATES: Written comments should be received on or before May 3, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Application to Adopt, Change, or Retain a Tax Year.

OMB Number: 1545–0134.

Form Number: 1128.

Abstract: Section 442 of the Internal Revenue Code requires that a change in a taxpayer's annual accounting period be approved by the Secretary. Under regulation section 1.442–1(b), a taxpayer must file Form 1128 to secure prior approval unless the taxpayer can automatically make the change. The IRS uses the information on the form to determine whether the application should be approved.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, Individuals, Not-for-profit institutions, and Farms.

Estimated Number of Respondents: 9,788.

Estimated Time Per Respondent: 23 hours, 43 minutes.

Estimated Total Annual Burden Hours: 232,066.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request For Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of

information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 29, 2010.

R. Joseph Durbala,

Supervisory Tax Analyst.

[FR Doc. 2010–4460 Filed 3–3–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[LR–200–76]

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)). Currently, the IRS is soliciting comments concerning an existing final regulation, LR–200–76 (T.D. 8069), Qualified Conservation Contributions (§ 1.170A–14).

DATES: Written comments should be received on or before May 3, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, 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 Allan Hopkins at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–6665, or through the Internet at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Qualified Conservation Contributions.

OMB Number: 1545–0763.

Regulation Project Number: LR–200–76.

Abstract: Internal Revenue Code section 170(h) describes situations in which a taxpayer is entitled to a deduction for a charitable contribution for conservation purposes of a partial interest in real property. This regulation requires a taxpayer claiming a deduction to maintain records of (1) the fair market value of the underlying property before and after the donation and (2) the conservation purpose of the donation.

Current Actions: There are no changes being made to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households, business or other for-profit organizations, not-for-profit institutions, farms, and Federal, State, local or tribal governments.

Estimated Number of Respondents: 1,000.

Estimated Time per Respondent: 1 hour 15 minutes.

Estimated Total Annual Burden Hours: 1,250.

The following paragraph applies to all 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: February 22, 2010.

R. Joseph Durbala,

Supervisory Tax Analyst.

[FR Doc. 2010–4473 Filed 3–3–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Forms 8038, 8038–G, and 8038–GC

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8038, Information Return for Tax-Exempt Private Activity Bond Issues, Form 8038–G, Information Return for Tax-Exempt Governmental Obligation, and Form 8038–GC, Information Return for Small Tax-Exempt Governmental Bond Issues, Leases, and Installment Sales.

DATES: Written comments should be received on or before May 3, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the forms and instructions should be directed to Allan Hopkins at Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–6665, or through the Internet at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Information Return for Tax-Exempt Private Activity Bond Issues (Form 8038), Information Return for Tax-Exempt Governmental Obligation (Form 8038–G), and Information Return for Small Tax-Exempt Governmental Bond Issues, Leases, and Installment Sales (Form 8038–GC).

OMB Number: 1545–0720.

Form Number: 8038, 8038–G, and 8038–GC.

Abstract: Issuers of state or local bonds must comply with certain information reporting requirements contained in Internal Revenue Code section 149 to qualify for tax exemption. The information must be reported by the issuers about bonds issued by them

during each preceding calendar quarter. Forms 8038, 8038–G, and 8038–GC are used to provide the IRS with the information required by Code section 149 and to monitor the requirements of Code sections 141 through 150.

Current Actions: There are no changes being made to the forms at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: State, Local or Tribal Governments and not-for-profit institutions.

Estimated Number of Respondents: 39,491.

Estimated Time per Response: 21 hours, 4 minutes.

Estimated Total Annual Burden Hours: 831,714.

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: February 22, 2010.

R. Joseph Durbala,

Supervisory Tax Analyst.

[FR Doc. 2010–4474 Filed 3–3–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Notice 89–61

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Notice 89–61, Imported Substances; Rules for Filing a Petition.

DATES: Written comments should be received on or before May 3, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Imported Substances; Rules for Filing a Petition.

OMB Number: 1545–1117.

Notice Number: Notice 89–61.

Abstract: Section 4671 of the Internal Revenue Code imposes a tax on the sale or use of certain imported taxable substances by the importer. Code section 4672 provides an initial list of taxable substances and provides that importers and exporters may petition the Secretary of the Treasury to modify the list. Notice 89–61 sets forth the procedures to be followed in petitioning the Secretary.

Current Actions: There are no changes being made to the notice at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 100.

Estimated Time per Respondent: 1 hour.

Estimated Total Annual Burden Hours: 100.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 22, 2010.

R. Joseph Durbala,

Supervisory Tax Analyst.

[FR Doc. 2010–4472 Filed 3–3–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Forms W–2, W–2c, W–2AS, W–2GU, W–2VI, W–3, W–3c, W–3cPR, W–3PR, and W–3SS

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information

collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Forms W–2, W–2c, W–2AS, W–2GU, W–2VI, W–3, W–3c, W–3cPR, W–3PR, and W–3SS.

DATES: Written comments should be received on or before May 3, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Allan Hopkins at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–6665, or through the Internet at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: W–2 (Wage and Tax Statement), W–2c (Corrected Wage and Tax Statement). W–2AS (American Samoa Wage and Tax Statement), W–2GU (Guam Wage and Tax Statement), W–2VI (U.S. Virgin Islands Wage and Tax Statement), W–3 (Transmittal of Wage and Tax Statements), W–3c (Transmittal of Corrected Wage and Tax Statements), W–3PR (Informe de Comprobantes de Retencion), W–3cPR (Transmission de Comprobantes de Retencion Corregidos), and W–3SS (transmittal of Wage and Tax Staements).

OMB Number: 1545–0008.

Form Number: Forms W–2, W–2c, W–2AS, W–2GU, W–2VI, W–3, W–3c, W–3cPR, W–3PR, and W–3SS.

Abstract: Employers report income and withholding information on Form W–2. Forms W–2AS, W–2GU and W–2VI are variations of Form W–2 for use in U.S. possessions. The Form W–3 series is used to transmit W–2 series forms to the Social Security Administration. Forms W–2c, W–3c and W–3cPR are used to correct previously filed Forms W–2, W–3, and W–3PR. Individuals use Form W–2 to prepare their income tax returns.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations and individuals, or households, not-for-profit institutions, farms, and Federal, state local or tribal governments.

Estimated Number of Respondents: 253,007,121

Estimated Time per Response: Varies.

Estimated Total Annual Burden Hours: 1.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 29, 2010.

R. Joseph Durbala,

Supervisory Tax Analyst.

[FR Doc. 2010–4470 Filed 3–3–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0495]

Proposed Information Collection (Marital Status Questionnaire) Activity: Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on the information needed to determine whether surviving spouses are entitled to dependency and indemnity compensation (DIC) benefits.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before May 3, 2010.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail to *nancy.kessinger@va.gov.* Please refer to "OMB Control No. 2900–0495" in any correspondence. During the comment period, comments may be viewed online through the FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 461–9769 or Fax (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Marital Status Questionnaire, VA Form 21–0537.

OMB Control Number: 2900–0495.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 21–0537 is used to confirm the marital status of a surviving spouse receiving dependency and

indemnity compensation benefits (DIC). If a surviving spouse remarries, he or she is no longer entitled to DIC unless the marriage began after age 57 or has been terminated.

Affected Public: Individuals or households.

Estimated Annual Burden: 189 hours.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 2,270.

Dated: March 1, 2010.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2010–4508 Filed 3–3–10; 8:45 am]

BILLING CODE 8320–01–P

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H.R. 4691/P.L. 111–144

Temporary Extension Act of 2010 (Mar. 2, 2010; 124 Stat. 42)

Last List March 3, 2010

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