1–15–10 Friday
Vol. 75 No. 10 Jan. 15, 2010

Pages 2433–2784

Federal Register

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

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see *www.federalregister.gov.*

The seal of the National Archives and Records Administration authenticates the Federal Register as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge as one of the databases on GPO Access, a service of the U.S. Government Printing Office.

The online edition of the **Federal Register***, www.gpoaccess.gov/nara,* available through GPO Access, is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 59, Number 1 (January 2, 1994) forward.

For more information about GPO Access, contact the GPO Access User Support Team, call toll free 1-888-293-6498; DC area 202-512-1530; fax at 202-512-1262; or via e-mail at *gpoaccess@gpo.gov.* The Support Team is available between 7:00 a.m. and 9:00 p.m. Eastern Time, Monday–Friday, except official holidays.

The annual subscription price for the **Federal Register** paper edition is $749 plus postage, or $808, plus postage, for a combined **Federal Register, Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is $165, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register,** including postage, is based on the number of pages: $11 for an issue containing less than 200 pages; $22 for an issue containing 200 to 400 pages; and $33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for $3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: U.S. Government Printing Office—New Orders, P.O. Box 979050, St. Louis, MO 63197-9000; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see *bookstore.gpo.gov.*

There are no restrictions on the republication of material appearing in the **Federal Register.**

How To Cite This Publication: Use the volume number and the page number. Example: 75 FR 12345.

Postmaster: Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Printing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

SUBSCRIPTIONS AND COPIES

PUBLIC	
Subscriptions:	
Paper or fiche	**202–512–1800**
Assistance with public subscriptions	**202–512–1806**
General online information	**202–512–1530; 1–888–293–6498**
Single copies/back copies:	
Paper or fiche	**202–512–1800**
Assistance with public single copies	**1–866–512–1800 (Toll-Free)**
FEDERAL AGENCIES	
Subscriptions:	
Paper or fiche	**202–741–6005**
Assistance with Federal agency subscriptions	**202–741–6005**

Printed on recycled paper.

Contents

Federal Register

Vol. 75, No. 10

Friday, January 15, 2010

Separate Parts In This Issue

Reader Aids

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

To subscribe to the Federal Register Table of Contents LISTSERV electronic mailing list, go to http://listserv.access.gpo.gov and select Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings); then follow the instructions.

CFR PARTS AFFECTED IN THIS ISSUE

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

6 CFR

Proposed Rules:

27 2445

12 CFR

222 2724

14 CFR

25 (2 documents) 2433, 2434

15 CFR

748 2435

16 CFR

640 2724
698 2724

29 CFR

4022 2437

33 CFR

165 2438

36 CFR

Proposed Rules:

242 2448

40 CFR

52 2440

Proposed Rules:

52 2452

48 CFR

Proposed Rules:

215 2457
234 2457
242 2457
244 2457
252 2457
5132 2463
5136 2463
5152 2463

49 CFR

229 2598
234 2598
235 2598
236 2598

Proposed Rules:

234 2466
395 2467

50 CFR

Proposed Rules:

100 2448
622 2469

Rules and Regulations

Federal Register
Vol. 75, No. 10
Friday, January 15, 2010

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM413; Special Conditions No. 25–401–SC]

Special Conditions: Boeing Model 747–8/–8F Airplanes, Systems and Data Networks Security—Protection of Airplane Systems and Data Networks From Unauthorized External Access

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions.

SUMMARY: These special conditions are issued for the Boeing Model 747–8/–8F airplane. This airplane will have novel or unusual design features associated with the architecture and connectivity capabilities of the airplane's computer systems and networks, which may allow access to external computer systems and networks. Connectivity to external systems and networks may result in security vulnerabilities to the airplane's systems. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for these design features. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: *Effective Date:* February 16, 2010.

FOR FURTHER INFORMATION CONTACT: Will Struck, FAA, Airplane and Flight Crew Interface Branch, ANM–111, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2764; facsimile (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Background

On November 4, 2005, The Boeing Company, P.O. Box 3707, Seattle, WA 98124, applied for an amendment to Type Certificate Number A20WE to include the new Model 747–8 passenger airplane and the new Model 747–8F freighter airplane. The Model 747–8 and the Model 747–8F are derivatives of the 747–400 and the 747–400F, respectively. Both the Model 747–8 and the Model 747–8F are four-engine jet transport airplanes that will have a maximum takeoff weight of 975,000 pounds and new General Electric GEnx–2B67 engines. The Model 747–8 will have two flight crew and the capacity to carry 660 passengers. The Model 747–8F will have two flight crew and a zero passenger capacity, although the FAA has issued a partial grant of exemption to Boeing for the carriage of up to six supernumeraries for the 747–8F.

Type Certification Basis

Under the provisions of Title 14, Code of Federal Regulations (14 CFR) 21.17, Boeing must show that the Model 747–8 and 747–8F (hereafter referred as 747–8/–8F) meet the applicable provisions of part 25, as amended by Amendments 25–1 through 25–120, except for §§ 25.809(a) and 25.812, which will remain at Amendment 25–115. These regulations will be incorporated into Type Certificate No. A20WE after type certification approval of the 747–8/–8F.

In addition, the certification basis includes other regulations, special conditions and exemptions that are not relevant to these special conditions.

If the Administrator finds that the applicable airworthiness regulations (*i.e.,* 14 CFR part 25) do not contain adequate or appropriate safety standards for the 747–8/–8F because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

In addition to the applicable airworthiness regulations and special conditions, the 747–8/–8F must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36.

Special conditions, as defined in § 11.19, are issued under § 11.38, and become part of the type certification basis under § 21.101.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same or similar novel or unusual design feature, or should any other model already included on the same type certificate be modified to incorporate the same or similar novel or unusual design feature, the special conditions would also apply to the other model under § 21.101.

Novel or Unusual Design Features

The Boeing Model 747–8/–8F airplane will incorporate the following novel or unusual design features: digital systems architecture composed of several connected networks. The architecture and network configuration may be used for, or interfaced with, a diverse set of functions, including:

1. Flight-safety related control, communication, and navigation systems (aircraft control domain),
2. Airline business and administrative support (airline information domain),
3. Passenger information and entertainment systems (passenger entertainment domain), and
4. The capability to allow access to or by external network sources.

Discussion

The Model 747–8/–8F architecture and network configuration may allow increased connectivity to and access from external network sources and airline operations and maintenance networks to the aircraft control domain and airline information domain. The aircraft control domain and airline information domain perform functions required for the safe operation and maintenance of the airplane. Previously these domains had very limited connectivity with external network sources.

The architecture and network configuration may allow the exploitation of network security vulnerabilities resulting in intentional or unintentional destruction, disruption, degradation, or exploitation of data, systems, and networks critical to the safety and maintenance of the airplane.

The existing regulations and guidance material did not anticipate these types of airplane system architectures. Furthermore, 14 CFR regulations and current system safety assessment policy and techniques do not address potential security vulnerabilities, which could be exploited by unauthorized access to

airplane networks, data bases, and servers. Therefore, these special conditions and a means of compliance are provided to ensure that the security (*i.e.,* confidentiality, integrity, and availability) of airplane systems is not compromised by unauthorized wired or wireless electronic connections.

Discussion of Comments

Notice of proposed special conditions No. 25–09–09–SC for the Boeing Model 747–8/–8F airplanes was published in the **Federal Register** on October 2, 2009 (74 FR 50926). No comments were received.

Applicability

As discussed above, these special conditions are applicable to Boeing Model 747–8/–8F airplanes. Should Boeing apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design features, these special conditions would apply to that model as well under the provisions of § 21.101.

Conclusion

This action affects only certain novel or unusual design features of the Boeing Model 747–8/–8F airplane. It is not a rule of general applicability.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

■ The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Special Conditions

■ Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for the Boeing Model 747–8/–8F airplanes.

1. The applicant must ensure electronic system security protection for the aircraft control domain and airline information domain from access by unauthorized sources external to the airplane, including those possibly caused by maintenance activity.

2. The applicant must ensure that electronic system security threats from external sources are identified and assessed, and that effective electronic system security protection strategies are implemented to protect the airplane from all adverse impacts on safety, functionality, and continued airworthiness.

Issued in Renton, Washington, on January 5, 2010.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–661 Filed 1–14–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM414; Special Conditions No. 25–402–SC]

Special Conditions: Boeing Model 747–8/–8F Series Airplanes; Design Roll Maneuver Requirement

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions.

SUMMARY: These special conditions are issued for the Boeing Model 747–8/–8F airplane. This airplane will have novel or unusual design features when compared to the state of technology envisioned in the airworthiness standards for transport category airplanes. These design features include an electronic flight control system that provides roll control of the airplane through pilot inputs to the flight computers. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards. Additional special conditions will be issued for other novel or unusual design features of the Boeing 747–8/–8F airplanes.

DATES: *Effective Date:* February 16, 2010.

FOR FURTHER INFORMATION CONTACT: Todd Martin, FAA, Airframe and Cabin Safety Branch, ANM–115, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1178; facsimile (425) 227–1232.

SUPPLEMENTARY INFORMATION: On November 4, 2005, The Boeing Company, PO Box 3707, Seattle, WA 98124, applied for an amendment to Type Certificate Number A20WE to include the new Model 747–8 series passenger airplane and the new Model 747–8F freighter airplane. The Model 747–8 and the Model 747–8F are derivatives of the 747–400 and the 747–400F, respectively. Both the Model 747–8 and the Model 747–8F are four-engine jet transport airplanes that will have a maximum takeoff weight of 975,000 pounds and new General Electric GEnx –2B67 engines. The Model 747–8 will have two flight crew and the capacity to carry 660 passengers.

Type Certification Basis

Under the provisions of Title 14, Code of Federal Regulations (14 CFR) 21.101, Boeing must show that the Model 747–8 and 747–8F (hereafter referred as 747–8/–8F series) meet the applicable provisions of part 25, as amended by Amendments 25–1 through 25–117, except for earlier amendments as agreed upon by the FAA. These regulations will be incorporated into Type Certificate No. A20WE after type certification approval of the 747–8/–8F.

In addition, the certification basis includes other regulations, special conditions and exemptions that are not relevant to these special conditions. Type Certificate No. A20WE will be updated to include a complete description of the certification basis for these airplanes.

If the Administrator finds that the applicable airworthiness regulations (i.e., 14 CFR part 25) do not contain adequate or appropriate safety standards for the 747–8/–8F because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

In addition to the applicable airworthiness regulations and special conditions, the 747–8/–8F series must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36.

Special conditions, as defined in § 11.19, are issued under § 11.38, and become part of the type certification basis under § 21.101.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model or series that incorporates the same or similar novel or unusual design feature, or should any other model or series already included on the same type certificate be modified to incorporate the same or similar novel or unusual design feature, the special conditions would also apply to the other model or series under § 21.101.

New or Unusual Design Features

The Boeing Model 747–8/–8F will incorporate the following novel or unusual design features: An electronic flight control system that provides roll control of the airplane through pilot inputs to the flight computers.

Discussion

The 747–8/–8F is equipped with an electronic flight control system that provides roll control of the airplane through pilot inputs to the flight computers. Current part 25 airworthiness regulations account for "control laws," for which aileron deflection is proportional to control wheel deflection. They do not address any nonlinearities [1] or other effects on aileron and spoiler actuation that may be caused by electronic flight controls. Therefore, the FAA considers the flight control system to be a novel and unusual feature compared to those envisioned when current regulations were adopted. Since this type of system may affect flight loads, and therefore the structural capability of the airplane, special conditions are needed to address these effects.

These special conditions differ from current requirements in that the special conditions require that the roll maneuver result from defined movements of the cockpit roll control as opposed to defined aileron deflections. Also, these special conditions require an additional load condition at design maneuvering speed (V_A), in which the cockpit roll control is returned to neutral following the initial roll input.

These special conditions differ from similar special conditions applied to previous designs. These special conditions are limited to the roll axis only, whereas previous special conditions also included pitch and yaw axes. A special condition is no longer needed for the yaw axis because § 25.351 was revised at Amendment 25–91 to take into account effects of an electronic flight control system. No special condition is needed for the pitch axis because the current requirement (§ 25.331(c)) is adequate.

Discussion of Comments

Notice of proposed special conditions No. 25–09–10–SC for the Boeing Model 747–8/–8F airplanes was published in the **Federal Register** on October 8, 2009 (74 FR 51813). No comments were received.

Applicability

As discussed above, these special conditions are applicable to the Boeing Model 747–8/–8F airplanes. Should Boeing apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design features, these special conditions would apply to that model as well under the provisions of § 21.101.

[1] A nonlinearity is a situation where output does not change in the same proportion as input.

Conclusion

This action affects only certain novel or unusual design features of the Boeing Model 747–8/–8F airplanes. It is not a rule of general applicability.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

■ The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Special Conditions

■ Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for the Boeing Model 747–8/–8F airplanes.

In lieu of compliance with § 25.349(a), the Boeing Model 747–8/–8F must comply with the following special conditions.

The following conditions, speeds, and cockpit roll control motions (except as the motions may be limited by pilot effort) must be considered in combination with an airplane load factor of zero, and separately, two-thirds of the positive maneuvering factor used in design. In determining the resulting control surface deflections, the torsional flexibility of the wing must be considered in accordance with § 25.301(b):

(a) Conditions corresponding to steady rolling velocities must be investigated. In addition, conditions corresponding to maximum angular acceleration must be investigated. For the angular acceleration conditions, zero rolling velocity may be assumed in the absence of a rational time history investigation of the maneuver.

(b) At V_A, sudden movement of the cockpit roll control up to the limit is assumed. The position of the cockpit roll control must be maintained until a steady roll rate is achieved and then must be returned suddenly to the neutral position.

(c) At V_C, the cockpit roll control must be moved suddenly and maintained so as to achieve a roll rate not less than that obtained in paragraph (b).

(d) At V_D, the cockpit roll control must be moved suddenly and maintained so as to achieve a roll rate not less than one third of that obtained in paragraph (b).

Issued in Renton, Washington, on January 5, 2010.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–662 Filed 1–14–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 748

[Docket No. 0908111226–91431–01]

RIN 0694–AE70

Addition to the List of Validated End-Users in the People's Republic of China (PRC)

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: In this final rule, the Bureau of Industry and Security (BIS) amends the Export Administration Regulations (EAR) to add an entity to the list of validated end-users for the People's Republic of China (PRC) approved to receive exports, reexports and transfers of certain items under Authorization Validated End-User (VEU). Specifically, this rule amends the EAR to add one additional validated end-user and identifies eligible items for export and reexport and transfer (in-country) to one facility in the PRC. In a final rule published in the **Federal Register** on June 19, 2007, BIS revised and clarified U.S. export control policy for the PRC, establishing Authorization VEU and identifying the PRC as the initial eligible destination.

DATES: This rule is effective January 15, 2010. Although there is no formal comment period, public comments on this regulation are welcome on a continuing basis.

ADDRESSES: You may submit comments, identified by RIN 0694–AE70, by any of the following methods:

E-mail: publiccomments@bis.doc.gov Include "RIN 0694–AE70" in the subject line of the message.

Fax: (202) 482–3355. Please alert the Regulatory Policy Division, by calling (202) 482–2440, if you are faxing comments.

Mail or Hand Delivery/Courier: Sheila Quarterman, U.S. Department of Commerce, Bureau of Industry and Security, Regulatory Policy Division, 14th Street & Pennsylvania Avenue, NW., Room 2705, Washington, DC 20230, *Attn:* RIN 0694–AE70.

Send comments regarding the collection of information associated with this rule, including suggestions for reducing the burden to Jasmeet Seehra, Office of Management and Budget (OMB), by e-mail to *Jasmeet_K._Seehra@omb.eop.gov* or by fax to (202) 395–7285. Comments on this collection of information should be submitted separately from comments on the final rule (i.e., RIN 0694–AE70)—all comments on the latter should be submitted by one of the three methods outlined above.

FOR FURTHER INFORMATION CONTACT: Elizabeth Scott Sangine, Acting Chair, End-User Review Committee, Bureau of Industry and Security, U.S. Department of Commerce, 14th Street & Pennsylvania Avenue, NW., Washington, DC 20230; by telephone (202) 482–3343, or by e-mail to *bscott@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

Background

Authorization Validated End-User (VEU): The List of Approved End-Users, Eligible Items and Destinations in the PRC

Consistent with U.S. Government policy to facilitate trade for civilian end-users in the PRC, BIS amended the EAR in a final rule on June 19, 2007 (72 FR 33646) by creating a new authorization for "validated end-users" located in eligible destinations to which eligible items (commodities, software and technology, except those controlled for missile technology or crime control reasons) may be exported, reexported or transferred under a general authorization instead of a license, in conformance with Section 748.15 of the EAR.

Authorization VEU is a mechanism to facilitate increased high-technology exports to companies in eligible destinations that have a record of using such items responsibly. Currently, there are two eligible destinations, the People's Republic of China (PRC) and India. Validated end-users may obtain eligible items that are on the Commerce Control List without having to wait for their suppliers to obtain export licenses from BIS. A wide range of items are eligible for shipment under Authorization VEU. In addition to U.S. exporters, Authorization VEU may be used by foreign reexporters, and does not have an expiration date.

Additional Validated End-User in the PRC and Its Respective "Eligible Items (By ECCN)" and "Eligible Destination"

This final rule amends Supplement No. 7 to Part 748 of the EAR to identify an additional company with eligible facilities in the PRC as a validated end-user and to identify the items that may be exported, reexported or transferred to it under Authorization VEU. This new entry is for Grace Semiconductor Manufacturing Corporation. It lists Export Control Classification Numbers (ECCNs) 1C350.c.3, 1C350.d.7, 2B230, 2B350.d.2, 2B350.g.3, 2B350.i.4, 3B001.a.1, 3B001.b, 3B001.c, 3B001.d, 3B001.e, 3B001.f, 3B001.h, 3C002, 3C004, 5B002, and 5E002 (limited to production technology for integrated circuits controlled by ECCNs 5A002 or 5A992 that have been successfully reviewed under the encryption review process specified in sections 740.17(b)(2) or 740.17(b)(3) and 742.15 of the EAR; Note also the guidance on cryptographic interfaces (OCI) in section 740.17(b) of the EAR) under "Eligible Items (By ECCN)," and includes the following facility name and address under "Eligible Destination": Grace Semiconductor Manufacturing Corporation, 1399 Zuchongzhi Road, Zhangjiang Hi-Tech Park, Shanghai, PR China 20123.

With the publication of this final rule, the total number of validated end-users in the PRC is six, and the total number of eligible facilities in the PRC is sixteen. The validated end-users listed in Supplement No. 7 to Part 748 were reviewed and approved by the U.S. Government in accordance with the provisions of Section 748.15 and Supplement Nos. 8 and 9 to Part 748 of the EAR.

Approving this new end-user as a validated end-user is expected to further facilitate exports to civil end-users in the PRC. Approval of this company also represents a significant savings of time for suppliers and end-users. Authorization VEU will eliminate the burden on exporters and reexporters of preparing license applications and on BIS for processing such applications, as exports and reexports will be made under general authorization instead of under license. This savings will enable exporters and reexporters to supply validated end-users much more quickly, thus enhancing the competitiveness of the exporters, reexporters, and end-users in the PRC.

To ensure appropriate facilitation of exports and reexports, on-site reviews of the validated end-users may be warranted pursuant to paragraph 748.15(a)(2) and Section 7(iv) of Supplement No. 8 to Part 748 of the EAR. If such reviews are warranted, BIS will inform the PRC Ministry of Commerce.

Since August 21, 2001, the Export Administration Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp., p. 783 (2002)), as extended most recently by the Notice of August 13, 2009 (74 FR 41325 (Aug. 14, 2009)), has continued the EAR in effect under the International Emergency Economic Powers Act. BIS continues to carry out the provisions of the Act, as appropriate and to the extent permitted by law, pursuant to Executive Order 13222.

Rulemaking Requirements

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

2. Notwithstanding any other provisions of law, no person is required to respond to nor be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This rule involves collections previously approved by the OMB under control number 0694–0088, "Multi-Purpose Application," which carries a burden hour estimate of 58 minutes to prepare and submit form BIS–748; and for recordkeeping, reporting and review requirements in connection with Authorization Validated End-User, which carries an estimated burden of 30 minutes per submission. This rule is expected to result in a decrease in license applications submitted to BIS. Total burden hours associated with the Paperwork Reduction Act and Office of Management and Budget control number 0694–0088 are not expected to increase significantly as a result of this rule.

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

4. Pursuant to 5 U.S.C. 553(a)(1), notice of proposed rulemaking, the opportunity for public participation and a delay in effective date are inapplicable because this regulation involves a military and foreign affairs function of the United States. Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this final rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under the Administrative Procedure Act or by any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Therefore, this regulation is issued in

final form. Although there is no formal comment period, public comments on this regulation are welcome on a continuing basis. Comments should be submitted to Sheila Quarterman, Regulatory Policy Division, Bureau of Industry and Security, U.S. Department of Commerce, 14th Street & Pennsylvania Avenue, NW., Room 2705, Washington, DC 20230.

List of Subjects in 15 CFR Part 748

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

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

PART 748—[AMENDED]

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

Authority: 50 U.S.C. app. 2401 et seq.; 50 U.S.C. 1701 *et seq.;* E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 13, 2009, 74 FR 41325 (August 14, 2009).

■ 2. Supplement No. 7 to Part 748 is amended by adding an entry under "China (People's Republic of)" in alphabetical order to read as follows:

SUPPLEMENT NO. 7 TO PART 748—AUTHORIZATION VALIDATED END-USER (VEU); LIST OF VALIDATED END-USERS, RESPECTIVE ITEMS ELIGIBLE FOR EXPORT, REEXPORT AND TRANSFER AND ELIGIBLE DESTINATIONS

Country	Validated end-user	Eligible items (by ECCN)	Eligible destination
China (People's Republic of)			
* * *	* * *	* * *	*
	Grace Semiconductor Manufacturing Corporation.	1C350.c.3, 1C350.d.7, 2B230, 2B350.d.2, 2B350.g.3, 2B350.i.4, 3B001.a.1, 3B001.b, 3B001.c, 3B001.d, 3B001.e, 3B001.f, 3B001.h, 3C002, 3C004, 5B002, and 5E002 (limited to production technology for integrated circuits controlled by ECCNs 5A002 or 5A992 that have been successfully reviewed under the encryption review process specified in sections 740.17(b)(2) or 740.17(b)(3) and 742.15 of the EAR; Note also the guidance on cryptographic interfaces (OCI) in section 740.17(b) of the EAR).	1399 Zuchongzhi Road Zhangjiang Hi-Tech Park Shanghai, PR China 201203.
* * *	* * *	* * *	*

Dated: January 12, 2010.

Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

[FR Doc. 2010–725 Filed 1–14–10; 8:45 am]

BILLING CODE 3510–33–P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4022

Benefits Payable in Terminated Single-Employer Plans; Interest Assumptions for Valuing and Paying Benefits

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: Pension Benefit Guaranty Corporation's regulation on Benefits Payable in Terminated Single-Employer Plans prescribes interest assumptions for valuing and paying certain benefits under terminating single-employer plans. This final rule amends the benefit payments regulation to adopt interest assumptions for plans with valuation dates in February 2010. Interest assumptions are also published on PBGC's Web site (*http://www.pbgc.gov*).

DATES: Effective February 1, 2010.

FOR FURTHER INFORMATION CONTACT: Catherine B. Klion, Manager, Regulatory and Policy Division, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005, 202–326–4024. (TTY/TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION: PBGC's regulations prescribe actuarial assumptions—including interest assumptions—for valuing and paying plan benefits of terminating single-employer plans covered by title IV of the Employee Retirement Income Security Act of 1974. The interest assumptions are intended to reflect current conditions in the financial and annuity markets.

These interest assumptions are found in two PBGC regulations: the regulation on Benefits Payable in Terminated Single-Employer Plans (29 CFR part 4022) and the regulation on Allocation of Assets in Single-Employer Plans (29 CFR part 4044). Assumptions under the asset allocation regulation are updated quarterly; assumptions under the benefit payments regulation are updated monthly. This final rule updates only the assumptions under the benefit payments regulation.

Two sets of interest assumptions are prescribed under the benefit payments regulation: (1) a set for PBGC to use to determine whether a benefit is payable as a lump sum and to determine lump-sum amounts to be paid by PBGC (found in Appendix B to Part 4022), and (2) a set for private-sector pension practitioners to refer to if they wish to use lump-sum interest rates determined using PBGC's historical methodology (found in Appendix C to Part 4022).

This amendment (1) adds to Appendix B to Part 4022 the interest assumptions for PBGC to use for its own lump-sum payments in plans with valuation dates during February 2010, and (2) adds to Appendix C to Part 4022 the interest assumptions for private-sector pension practitioners to refer to if they wish to use lump-sum interest rates determined using PBGC's historical methodology for valuation dates during February 2010.

The interest assumptions that PBGC will use for its own lump-sum payments (set forth in Appendix B to part 4022) will be 2.75 percent for the period during which a benefit is in pay status and 4.00 percent during any years preceding the benefit's placement in pay status. In comparison with the interest assumptions in effect for January 2010, these interest assumptions represent an

increase of 0.25 percent in the immediate annuity rate and are otherwise unchanged. For private-sector payments, the interest assumptions (set forth in Appendix C to part 4022) will be the same as those used by PBGC for determining and paying lump sums (set forth in Appendix B to part 4022).

PBGC has determined that notice and public comment on this amendment are impracticable and contrary to the public interest. This finding is based on the need to determine and issue new interest assumptions promptly so that the assumptions can reflect current market conditions as accurately as possible.

Because of the need to provide immediate guidance for the valuation and payment of benefits in plans with valuation dates during February 2010, PBGC finds that good cause exists for making the assumptions set forth in this amendment effective less than 30 days after publication.

PBGC has determined that this action is not a "significant regulatory action" under the criteria set forth in Executive Order 12866.

Because no general notice of proposed rulemaking is required for this amendment, the Regulatory Flexibility Act of 1980 does not apply. See 5 U.S.C. 601(2).

List of Subjects in 29 CFR Part 4022

Employee benefit plans, Pension insurance, Pensions, Reporting and recordkeeping requirements.

■ In consideration of the foregoing, 29 CFR part 4022 is amended as follows:

PART 4022—BENEFITS PAYABLE IN TERMINATED SINGLE-EMPLOYER PLANS

■ 1. The authority citation for part 4022 continues to read as follows:

Authority: 29 U.S.C. 1302, 1322, 1322b, 1341(c)(3)(D), and 1344.

■ 2. In appendix B to part 4022, Rate Set 196, as set forth below, is added to the table.

Appendix B to Part 4022—Lump Sum Interest Rates for PBGC Payments

* * * * *

Rate set	For plans with a valuation date		Immediate annuity rate (percent)	Deferred annuities (percent)				
	On or after	Before		i_1	i_2	i_3	n_1	n_2
* * *		*	*		*		*	
196	2–1–10	3–1–10	2.75	4.00	4.00	4.00	7	8

■ 3. In appendix C to part 4022, Rate Set 196, as set forth below, is added to the table.

Appendix C to Part 4022—Lump Sum Interest Rates for Private-Sector Payments

* * * * *

Rate set	For plans with a valuation date		Immediate annuity rate (percent)	Deferred annuities (percent)				
	On or after	Before		i_1	i_2	i_3	n_1	n_2
* * *		*	*		*		*	
196	2–1–10	3–1–10	2.75	4.00	4.00	4.00	7	8

Issued in Washington, DC, on this 8th day of January 2010.

Vincent K. Snowbarger,

Acting Director, Pension Benefit Guaranty Corporation.

[FR Doc. 2010–583 Filed 1–14–10; 8:45 am]

BILLING CODE 7709–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2009–1060]

RIN 1625–AA00

Safety Zone; Havasu Landing Annual Regatta; Colorado River, Lake Havasu Landing, CA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on Lake Havasu, California in support of the Havasu Landing Annual Regatta. This temporary safety zone is necessary to provide for the safety of the participants, crew, spectators, participating vessels, and other vessels and users of the waterway. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port, or his designated representative.

DATES: This rule is effective from 8 a.m. until 4 p.m., on January 16 and 17, 2010.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2009–1060 and are available online by going to *http://www.regulations.gov,* inserting USCG–2009–1060 in the "Keyword" box, and then clicking "Search." They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or e-mail Petty Officer Corey McDonald, Waterways Management, U.S. Coast Guard Sector San Diego, Coast Guard; telephone 619–278–7262, e-mail *Corey.R.McDonald@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it was impracticable since the logistical details of the race were not finalized nor presented to the Coast Guard in enough time to draft and publish an NPRM. As such, the event would occur before the rulemaking process was complete and immediate action is needed to ensure public safety and ensure non-authorized personnel and vessels remain safe by keeping clear of the hazardous area during the regatta activities.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date would be contrary to the public interest, since immediate action is needed to ensure public safety.

Background and Purpose

This temporary safety zone is established in support of the Havasu Landing Annual Regatta, a marine event that includes participating vessels along an established and marked course on Lake Havasu, CA. This temporary safety zone is necessary to provide for the safety of the crews, spectators, and participants of the race and is also necessary to protect other vessels and users of the waterway.

Discussion of Rule

The Coast Guard is establishing a safety zone that will be enforced from 8 a.m. to 4 p.m. on Saturday January 16, and Sunday January 17, 2010. The limits of this safety zone are as follows: From the California shoreline in position 34°29.40′ N 114°24.12′ W to the northern corner 900 yards east in position 34°29.40′ N 114°23.39′ W to the southern corner 1400 yards south in position 34°29.0′ N 114°23.39′ W to the California shoreline in position 34°29.0′ N 114°24.12′ W.

This safety zone is necessary to ensure non-authorized personnel and vessels remain safe by keeping clear of the hazardous area during the training activities. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port, or his designated representative.

Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. The safety zone is of a limited duration, only eight hours per day for a period of two days, and is limited to a relatively small geographic area.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. The safety zone will affect the following entities some of which may be small entities: The owners and operators of pleasure craft engaged in recreational activities and sightseeing. This safety zone will not have a significant economic impact on a substantial number of small entities for several reasons: Vessel traffic can pass safely around the area, vessels engaged in recreational activities have ample space outside of the safety zone to engage in these activities, and this safety zone is limited in scope and duration as it is only in effect for eight hours per day for a period of two days.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

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

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction. This rule involves the establishment of a safety zone.

An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add a new temporary § 165.T11–283 to read as follows:

§ 165.T11–283 Safety Zone; Havasu Landing Annual Regatta; Colorado River, Lake Havasu Landing, CA.

(a) *Location.* The limits of the safety zone will be the navigable waters of the San Diego Bay bounded by the following coordinates:

From the California shoreline in position 34°29.40′ N 114°24.12′ W to the northern corner 900 yards east in position 34°29.40′ N 114°23.39′ W to the southern corner 1400 yards south in position 34°29.0′ N 114°23.39′ W to the California shoreline in position 34°29.0′ N 114°24.12′ W.

(b) *Enforcement Period.* This section will be enforced from 8 a.m. to 4 p.m. on January 16, 2010 and January 17, 2010. If the event concludes prior to the scheduled termination time, the Captain of the Port will cease enforcement of this safety zone and will announce that fact via Broadcast Notice to Mariners.

(c) *Definitions.* The following definition applies to this section: *designated representative,* means any commissioned, warrant, and petty officers of the Coast Guard on board Coast Guard, Coast Guard Auxiliary, and local, State, and Federal law enforcement vessels who have been authorized to act on the behalf of the Captain of the Port.

(d) *Regulations.* (1) Entry into, transit through or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port of San Diego or his designated representative.

(2) Mariners requesting permission to transit through the safety zone may request authorization to do so from the Patrol Commander (PATCOM). The PATCOM may be contacted on VHF–FM Channel 16.

(3) All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or the designated representative.

(4) Upon being hailed by U.S. Coast Guard patrol personnel by siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed.

(5) The Coast Guard may be assisted by other Federal, State, or local agencies.

Dated: January 6, 2010.

T.H. Farris,

Captain, U.S. Coast Guard, Captain of the Port San Diego.

[FR Doc. 2010–763 Filed 1–13–10; 11:15 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2007–0500–200927; FRL–9102–6]

Approval and Promulgation of Implementation Plans; Kentucky: Approval of Revisions to the State Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is correcting the state implementation plan (SIP) for the Commonwealth of Kentucky to remove the "Potentially hazardous matter or toxic substances" rule upon request of the Commonwealth of Kentucky made through the Kentucky Division for Air Quality (KDAQ). EPA has determined that this rule—401 Kentucky Administrative Regulations (KAR) 63:020—was erroneously incorporated into the SIP because the rule is not related to the attainment and maintenance of the national ambient air

quality standards (NAAQS). For this reason, EPA is correcting this error and removing this rule from the approved Kentucky SIP pursuant to section 110(k)(6) of the Clean Air Act (CAA). This final rule also addresses comments made on the proposed rulemaking EPA previously published for this action.

DATES: *Effective Date:* This rule will be effective February 16, 2010.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2007–0500. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the 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. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lynorae Benjamin, Chief, 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. The telephone number is (404) 562–9040. Ms. Benjamin can also be reached via electronic mail at *benjamin.lynorae@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. What Action Is EPA Taking?

EPA is taking final action to remove 401 KAR 63:020 from the Kentucky SIP. EPA has determined that this rule was erroneously incorporated into the SIP because the rule is not related to the attainment and maintenance of the NAAQS. EPA is correcting this error and removing this rule from the approved Kentucky SIP.

II. What Is the Background for the Action?

The CAA requires EPA to establish NAAQS for commonly occurring air pollutants that pose public health and welfare threats. These pollutants are known as criteria pollutants. Currently, NAAQS exist for six criteria pollutants—ozone (ground level), particulate matter, carbon monoxide, sulfur dioxide, lead and nitrogen dioxide. Section 110 of the CAA requires states to adopt, and submit to EPA for approval, SIPs to implement, maintain and enforce the NAAQS. Accordingly, SIPs contain the measures used by states to attain and maintain the NAAQS. Consistent with Section 110 of the CAA, provisions approved by EPA as part of a SIP should be related to attainment and maintenance of the NAAQS for the six criteria pollutants. Other pollutants, such as hazardous air pollutants are covered by other provisions of the CAA, such as Section 112, which provides for the direct Federal regulation of hazardous air pollutants.

The first significant amendments to the CAA occurred in 1970 and 1977. Following these amendments, a large number of SIPs were submitted to EPA to fulfill new Federal requirements. In many cases, states and districts submitted their entire programs, including many elements not required pursuant to the CAA. Due to resource constraints during this timeframe, EPA's review of these submittals focused primarily on the required technical, legal, and enforcement elements of the submittals. At the time, EPA did not perform a detailed review of the numerous provisions submitted to determine if each provision was related to the attainment and maintenance of the NAAQS. As a result, some provisions were approved into SIPs erroneously. To correct such errors, EPA has removed the erroneously incorporated provisions from SIPs under the authority of Section 110(k)(6) of the CAA. See *e.g.,* 73 FR 21546 (removing rules from New York SIP imposing general duty not to cause air pollution or odors); 71 FR 13551 (removing nuisance rule from Georgia SIP); 66 FR 57391 (removing from the Missoula City-County portion of the Montana SIP provisions relating to, among other things, fluoride emission standards); 64 FR 7790 (removing from Michigan SIP a general air pollution rule which had been used primarily to address odors and other nuisances, and had not been used for purposes of attaining or maintaining NAAQS); 61 FR 47058 (removing provisions from Wyoming SIP relating to, among other things, hydrogen sulfide and fluoride ambient standards, and odor control).

After the 1977 CAA Amendments, the Commonwealth of Kentucky included the "Potentially hazardous matter or toxic substances" rule at 401 KAR 63:020 as part of a voluminous SIP submittal to EPA. EPA approved 401 KAR 63:020 as part of the Kentucky SIP on July 12, 1982, with a September 10, 1982, effective date. 47 FR 30059.[1] This Kentucky rule applies to facilities "which emit[] or may emit potentially hazardous matter or toxic substances as defined in Section 2, provided such emissions are not elsewhere subject to the provisions of the regulations of the Division of Air Pollution." 401 KAR 63:020 Section 1. "Potentially hazardous matter or toxic substances" is defined in Section 2 of the rule to mean "matter which may be harmful to the health and welfare of humans, animals, and plants, including, but not limited to, antimony, arsenic, bismuth, lead, silica, tin and compounds of such materials." The rule prohibits emissions of "potentially hazardous matter or toxic substances in such quantities or duration as to be harmful to the health and welfare of humans, animals and plants." 401 KAR 63:020 Section 3.

On May 25, 2007, Kentucky, through KDAQ, requested that EPA correct the Kentucky SIP by deleting this rule. In addition, KDAQ has explained to EPA that 401 KAR 63:020 "has never been used by the Cabinet to regulate emissions of any of the six criteria pollutants in any way that is related to the attainment and maintenance of the NAAQS * * * Nor have any reduction credits ever been claimed under this regulation." (March 31, 2008, letter from John S. Lyons, Director, KDAQ to Beverly Banister, Director, Air, Pesticides, and Toxics Management Division, EPA Region 4) ("March 31st letter"). Instead, Kentucky has "used this rule as a risk-based Screening tool for toxic air emissions and [the rule] has been the authority under which modeling and permit conditions have been imposed." (March 31st letter). Kentucky has not relied on or attributed any emission reductions from this rule to any NAAQS attainment or maintenance plans required under Section 110 of the CAA. (June 15, 2009, letter from John S. Lyons, Director,

[1] The table at 40 CFR 52.920 contains an incorrect **Federal Register** citation for EPA's approval date of 401 KAR 63:020.

KDAQ to Carol L. Kemker, Acting Director, Air, Pesticides, and Toxics Management Division, EPA Region 4) (June 15th letter). In sum, Kentucky has consistently used this rule to address hazardous or toxic air pollutants, and has never used this rule to regulate CAA Section 110 criteria pollutants in any way that is related to the attainment and maintenance of NAAQS. For these reasons, EPA's 1982 approval of this rule into the Kentucky SIP was in error.

EPA is therefore removing the rule from the approved SIP under the authority of section 110(k)(6) of the CAA. EPA is doing so, because it has determined that this rule is not related to the attainment and maintenance of the NAAQS. This Kentucky rule applies to emissions of potentially hazardous matters or toxic substances, *if* such emissions are not *elsewhere* subject to regulation by KDAQ (formerly Division of Air Pollution). However, KDAQ *elsewhere* regulates emissions of pollutants to attain and maintain the NAAQS. For example 401 KAR Chapters 51 and 53 regulate emissions of criteria pollutants, and emissions affecting criteria pollutants such as precursors. Because other KDAQ uses other regulations to regulate emissions of criteria pollutants to attain and maintain the NAAQS, and because KDAQ has confirmed that 401 KAR 63:020 "has never been used by the Cabinet to regulate emissions of any of the six criteria pollutants in any way that is related to the attainment and maintenance of the NAAQS . . . Nor have any reduction credits ever been claimed under this regulation," (March 31st letter), EPA has concluded that 401 KAR 63:020 does *not* apply to emissions relevant to the attainment and maintenance of the NAAQS. As stated above, under Section 110 of the CAA, SIPs should contain provisions relevant to attaining and maintaining the NAAQS. Kentucky rule 401 KAR 63:020 is not relevant to attaining and maintaining the NAAQS and was erroneously included in the SIP.

Section 110(k)(6) provides a process for EPA to correct such errors. Specifically, it provides that: "[w]henever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation, revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public." As stated above, EPA previously has relied on Section 110(k)(6) of the CAA to remove provisions that were erroneously incorporated from SIPs.

On October 29, 2007 (72 FR 61087), EPA proposed to remove 401 KAR 63:020 from the approved SIP under the authority of section 110(k)(6) of the CAA. EPA subsequently received comments from one commenter who opposed the proposed correction. In this action, EPA is addressing the adverse comments received and taking final action as described in Section I and Section IV for this rulemaking.

III. Response to Comments

On May 25, 2007, the Commonwealth of Kentucky, through KDAQ, requested that EPA correct the Kentucky SIP to remove 401 KAR 63:020. In an action published on October 31, 2007 (72 FR 61589), EPA proposed to correct the Kentucky SIP through removal of 401 KAR 63:020 from the Kentucky SIP. EPA received comments from one commenter on the October 31, 2007, proposal. The comments are summarized below with EPA responses. EPA is now taking final action under Section 110(k)(6) to remove 401 KAR 63:020 from the Kentucky SIP.

Comment: The commenter states that 401 KAR 63:020 is not limited in scope to antimony, bismuth, lead, silica, tin and compounds of such materials, but is a narrative backstop regulation broadly applicable to any matter emitted in such quantity to be potentially hazardous. The regulation, the commenter continues, "is applicable to the six criteria pollutants in those instances where the emission of those pollutants is not otherwise addressed by regulation, such as instances where such emissions * * * come from a source which is classified as "minor" but has significant localized impacts."

Response: Pursuant to Section 110 of the CAA, SIPs contain measures used by states to attain and maintain the NAAQS for the six criteria pollutants. Air toxics, on the other hand, are regulated pursuant to other parts of the CAA, including Section 112. The Kentucky rule, by its terms, applies to emissions of hazardous air pollutants, *not elsewhere regulated* by Kentucky. The applicability provision for 401 KAR 63:020, Section 1, states that the rule applies "to each affected facility which emits or may emit potentially hazardous matter or toxic substances as defined in Section 2 of this administrative regulation, provided such emissions *are not elsewhere subject to the provisions of the administrative regulations of the Division for Air Quality.*" 401 KAR 63:020 Section 1 (emphasis added). KDAQ *elsewhere* regulates emissions of pollutants to attain and maintain the NAAQS and KDAQ has confirmed that it has never used 401 KAR 63:020 to regulate criteria pollutants in any way related to attaining or maintaining the NAAQS. Examples of other rules used by KDAQ to regulate emissions relevant to attainment and maintenance of the NAAQS include 401 KAR Chapters 51 and 53, regulating emissions of criteria pollutants and emissions affecting criteria pollutants such as precursors. Kentucky's rules also include various provisions regarding minor sources, such as 401 KAR 52:040. Therefore, by its terms, 401 KAR 63:020, does *not* apply to emissions relevant to the attainment and maintenance of the NAAQS.

As was explained above, the purpose of SIP-approved rules, consistent with section 110 of the CAA, is to implement a program to attain and maintain the NAAQS. The rule, 401 KAR 63:020, is not directed at attainment or maintenance of any NAAQS. Kentucky uses other rules to regulate criteria pollutants to attain and maintain the NAAQS, and KDAQ has confirmed that it has never used 401 KAR 63:020 to regulate criteria pollutants in any way related to attaining and maintaining the NAAQS. Thus, the commenter's statement that 63:020 "is broadly applicable to any matter emitted in such quantity to be potentially hazardous" does not consider the language in the Kentucky rule which limits its applicability to such emissions that "*are not elsewhere subject to the provisions of the administrative regulations of the Division for Air Quality.*" 401 KAR 63:020 Section 1.

The March 31, 2008, and June 15, 2009, letters, and other information provided by KDAQ to EPA responding to comments raised in response to EPA's October 29, 2007, proposal to remove 401 KAR 63:020 from the SIP are available in the docket for the current final action. This information is consistent with KDAQ's position in submitting the May 25, 2007, SIP revision requesting that the rule be removed. In its letters, KDAQ confirmed that this rule has never been used "to regulate the emissions of any of the six criteria pollutants in any way that is related to the attainment and maintenance of the NAAQS" under Section 110 of the CAA.

It should also be noted that EPA's current action does not affect the enforceability or applicability of the rule as a matter of state law. Nothing in today's action in any way alters the

status of 401 KAR 63:020 as a Kentucky law or Kentucky's ability to use the rule impose requirements into enforceable permits for sources to which the rule applies.

Comment: The commenter states that this regulation has been utilized in many instances during the years it has been part of the SIP, as a risk-based screening tool and that it has been the authority under which the state has required modeling of pollutants and imposed permit conditions for such emissions, including volatile organic compounds that are both potential air toxics and are criteria pollutant ozone precursors. The commenter further states that the regulation has been utilized to require further reductions beyond those categorically applicable to emissions, including criteria pollutant emissions.

Response: In its March 31, 2008, letter and repeated in its June 15, 2009, letter, KDAQ explained that 63:020 has been used as a risk-based screening tool for *toxic air emissions,* and "to the extent that a particular emission is both an air toxic and a criteria pollutant," the application of this rule "has only been concerned with the toxic impacts of the pollutant." (March 31st letter). In addition, as stated above, Kentucky explained that it "has never used this regulation to regulate criteria pollutants in any way that is related to the attainment and maintenance of NAAQS; and "never claimed any NAAQS reduction credits under this regulation." (March 31st letter; June 15th letter).

This statement by KDAQ confirms its historical usage of the rule as separate from regulation of criteria pollutants for the purpose of attaining and maintaining the NAAQS, and supports KDAQ's intent in submitting the May 25, 2007, SIP submission. This statement explains that 401 KAR 63:020 was erroneously incorporated into the SIP because it does not relate to the implementation, maintenance, and enforcement of the NAAQS in Kentucky.

EPA is reasonable in relying on information provided by KDAQ about the use of its rule, and has relied on similar information from other states to delete erroneously incorporated provisions from SIPs. See *e.g.,* 71 FR 13551 (EPA relied on information provided by Georgia in deleting a nuisance rule from Georgia SIP); 63 FR 27492 and 64 FR 7790 (EPA relied on information provided by Michigan in deleting a rule used to address odors and nuisances from Michigan SIP).

Comment: The commenter states that Kentucky has previously proposed to repeal this regulation and replace it with a "safety net" regulation.

Response: Kentucky's authority over its administrative rules is separate from EPA's SIP process and is not relevant to this rulemaking. The current action will have no effect on the status of 401 KAR 63:020 as a rule as a matter of the law of the Commonwealth of Kentucky.

Comment: The commenter states that the removal of this rule is not authorized under 110(k)(6) because this rule is related to attainment and maintenance of the SIP since it has been the regulatory mechanism for requiring reductions of emissions of criteria pollutants. By removing this rule from the SIP, EPA is removing a regulatory tool that Kentucky has utilized to control criteria pollutants. The commenter also requests that EPA withdraw the proposed rule and request documentation from Kentucky of all instances in which emissions, operating conditions, or limits have been imposed and where applicants have accepted such limits to avoid imposition of conditions arising from the application of this rule. The commenter argues that if the application of 401 KAR 63:020 has resulted in control of criteria pollutants from major or area sources, then unless the Commonwealth submits a formal SIP revision providing offsetting reductions and demonstrates that removal of this regulation will not result in or interfere with continued maintenance and achievement of such reductions, the removal of 401 KAR 63:020 is inappropriate and cannot be undertaken by EPA.

Response: KDAQ's March 31, 2008, and June 15, 2009, letters to EPA confirmed that 401 KAR 63:020 has never been used by KDAQ to regulate the emissions of the six criteria pollutants in any way that is related to attainment and maintenance of the NAAQS. EPA is also not aware of any such use by Kentucky.

IV. Final Action

EPA is now taking final action to remove Kentucky rule 401 KAR 63:020 from the Kentucky SIP pursuant to section 110(k)(6) of the CAA.

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the 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 CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

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

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

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and

the Comptroller General of the United States prior to publication of the rule in the **Federal Register.** A major rule cannot take effect until 60 days after it is published in the **Federal Register.** This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 16, 2010. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See, section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Lead, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides, Volatile organic compounds.

Dated: January 4, 2010.

Beverly H. Banister,

Acting Regional Administrator, Region 4.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart S—Kentucky

■ 2. In § 52.920(c) Table 1 is amended under Chapter 63—General Standards of Performance by removing the entry for "401 KAR 63:020" "Potentially hazardous matter or toxic substances".

[FR Doc. 2010–587 Filed 1–14–10; 8:45 am]

BILLING CODE 6560–50–P

Proposed Rules

Federal Register

Vol. 75, No. 10

Friday, January 15, 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 HOMELAND SECURITY

6 CFR Part 27

[DHS 2009–0141]

Chemical Facility Anti-Terrorism Standards

AGENCY: Department of Homeland Security, National Protection and Programs Directorate.

ACTION: Request for comments; withdrawal.

SUMMARY: The Department of Homeland Security (DHS or the Department) invites public comment on issues related to certain regulatory provisions in the Chemical Facility Anti-Terrorism Standards (CFATS) that apply to facilities that store gasoline in aboveground storage tanks. In addition, we are withdrawing the version of this document published in the **Federal Register**, at 75 FR 1552, on January 12, 2010, because the footnotes in that document were misplaced. This document supersedes the January 12 document.

DATES: Written comments must be submitted on or before March 16, 2010.

ADDRESSES: You may submit comments, identified by docket number DHS–2009–0141, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the online instructions for submitting comments.
- *Mail:* U.S. Department of Homeland Security, National Protection and Programs Directorate, Office of Infrastructure Protection, Infrastructure Security Compliance Division, Mail Stop 8100, Washington, DC 20528.

FOR FURTHER INFORMATION CONTACT: Todd Klessman, Office of Infrastructure Protection, Infrastructure Security Compliance Division, Mail Stop 8100, Washington, DC 20528, telephone number (703) 235–5263.

SUPPLEMENTARY INFORMATION:

Abbreviations and Terms Used in This Document

ASP—Alternative Security Program
CFATS—Chemical Facility Anti-Terrorism Standards
COI—Chemical(s) of Interest
CVI—Chemical-Terrorism Vulnerability Information
DHS—Department of Homeland Security
EPA—Environmental Protection Agency
RMP—Risk Management Program
SSP—Site Security Plan
STQ—Screening Threshold Quantity
SVA—Security Vulnerability Assessment
VCE—Vapor Cloud Explosion

I. Comments Invited

A. In General

DHS invites interested persons to submit written comments, data, or views. For each comment, please identify the document number and agency name for this notice. DHS encourages commenters to provide their names and addresses. You may submit comments and materials electronically or by mail as provided under the **ADDRESSES** section. DHS will file in the public docket all comments received by DHS, except for comments containing confidential information, sensitive information, or Chemical-terrorism Vulnerability Information (CVI) as defined in 6 CFR 27.400(b).

B. Handling of Confidential and Sensitive Information and Chemical-Terrorism Vulnerability Information (CVI)

Do not submit comments that include trade secrets, confidential commercial information, Chemical-terrorism Vulnerability Information (CVI) or other sensitive information to the public docket. Please submit such comments separate from other non-sensitive comments regarding this notice. Specifically, please mark any confidential or sensitive comments as containing such information and submit them by mail to the individual listed in the **FOR FURTHER INFORMATION CONTACT** section. Any comments containing CVI should be marked and handled in accordance with the requirements of 6 CFR 27.400(f).

DHS will not place any confidential or sensitive comments in the public docket; rather, DHS will handle them in accordance with applicable safeguards and restrictions on access. *See, e.g.*, 6 CFR 27.400. *See also* the DHS CVI Procedural Manual ("Safeguarding Information Designated as CVI," September 2008, located on the DHS Web site at *http://www.dhs.gov/chemicalsecurity*). DHS will hold any such comments in a separate file to which the public does not have access, and place a note in the public docket that DHS has received such materials from the commenter.

C. Reviewing Comments in the Docket

For access to the docket to read the public comments received and relevant background documents referred to in this notice, go to *http://www.regulations.gov*.

II. Background

A. Chemical Facility Security Rulemaking

Section 550 of the Homeland Security Appropriations Act of 2007 (Pub. L. 109–295, Oct. 2006) required the Department to issue, within six months, interim final regulations for the security of chemical facilities that, "in the Secretary's discretion, present high levels of security risk." Under that authority, the Department promulgated the Chemical Facility Anti-Terrorism Standards, 6 CFR part 27 (CFATS), on April 9, 2007. *See* 72 FR 17688.

The CFATS interim final rule sought public comment on Appendix A, a tentative list of over 300 chemicals of interest (COI) with the potential to create significant human life or health consequences if released, stolen or, diverted, or sabotaged. Section 27.200(b)(2) of the CFATS regulation requires any chemical facility that possesses any COI at or above the applicable screening threshold quantity (STQ) specified in Appendix A to complete and submit an online data collection (the Top-Screen) to DHS. The Department uses the facility's Top-Screen and, where applicable, other available information to perform a preliminary assessment of the facility's capacity to cause significant adverse consequences if targeted for a terrorist attack.[1] DHS uses that preliminary

[1] In this notice, the terms "consequence" or "consequentiality" refer to the potential adverse effects on human life or health from a successful terrorist incident at a chemical facility. *See generally* 72 FR 17696, 17700–17701. DHS also has authority to determine that a facility is high-risk based on potential consequences to national security or critical economic assets. *See* 6 CFR 27.105; 72 FR 17700–17701.

consequence assessment to make an *initial* high-risk determination for the facility. *See* 6 CFR 27.200–27.210.

The Department assigns each facility that is initially determined to be high-risk to a preliminary risk-based tier level (Tiers 1–4, with Tier 1 representing the highest risk) and notifies the facility that it must submit a Security Vulnerability Assessment (SVA) to DHS. The Department uses the SVA to make a final high-risk and tiering determination. Only those facilities that are *finally* determined to be high-risk are subject to the full scope of the regulations and required to submit, for DHS approval, Site Security Plans (SSPs) or Alternative Security Programs (ASPs) that satisfy the risk-based performance standards specified in the CFATS regulations. *See* 6 CFR 27.220–27.225.

DHS issued the final Appendix A on November 20, 2007. *See* 72 FR 65396. The November 2007 rule clarified that chemicals of interest listed in Appendix A due to potential risks related to "release" are classified as Release-Explosives, Release-Flammables, or Release-Toxics, according to the type of potential harm they may cause. *See* 72 FR 65397. In response to comments on the tentative Appendix A, DHS also added provisions to CFATS to clarify under what circumstances [2] and in what manner facilities must calculate the quantities of certain types of COI under Appendix A to determine if they are required to submit Top-Screens. *See* 72 FR 65397–65398.

B. Special Provisions for Counting COI in Mixtures

Among other clarifications made in November 2007, DHS added § 27.203, which instructs facilities on when and how to calculate the STQ for certain types of chemicals of interest. With respect to chemicals in gasoline, § 27.203(b)(1)(v) requires facilities to count release-flammable COI (such as butane and pentane) contained

in gasoline, diesel, kerosene or jet fuel (including fuels that have flammability hazard ratings of 1,2, 3 or 4, as determined by using National Fire Protection Association (NFPA) [standard] 704 * * *) stored in aboveground tank farms, including tank farms that are part of pipeline systems.

In response to comments requesting that DHS clarify whether and how facilities should count COI in mixtures when calculating whether a facility meets or exceeds the applicable STQ under Appendix A, the November 2007 rule also added § 27.204. That section specifies how to calculate the amount of Release-Toxic, Release-Flammable and Release-Explosive COI (as well as Theft-COI) in chemical mixtures. *See* 72 FR 65399, 65416. In particular, § 27.204(a)(2) (the "flammable mixtures rule") clarified how to calculate the quantity of Release-Flammable COI contained in chemical mixtures, including gasoline [3] and the other fuels specified in § 27.203(b)(1)(v), for purposes of Appendix A.

The CFATS flammable mixtures rule generally parallels the rules previously adopted by the U.S. Environmental Protection Agency (EPA) under the Clean Air Act's Risk Management Program (RMP) for counting—or excluding—flammable chemicals contained in mixtures that may be inadvertently or accidentally released.[4] *See* 72 FR 65402. As explained in the preamble to the November 2007 rule, however, given the different purposes, scope, and applicability of CFATS and the EPA RMP rules, there are several important differences between the CFATS and RMP mixture regulations. *See* 72 FR 65398–65399, 65401–65402.

One such difference is that the CFATS flammable mixtures rule requires that Release-Flammable COI (such as butane or pentane) contained in gasoline (and other fuels specified in § 27.203(b)(1)(v)) must be counted under Appendix A, even though EPA does not count the flammable chemicals in gasoline under the terms of the RMP "mixtures rule," 42 CFR 68.115(b)(2).[5] *See* 72 FR 65399 and n. 8. The November 2007 rule explained that, while EPA's RMP rules are premised solely on accidental releases of chemicals, the COI in these flammable mixtures, including gasoline, should be counted under Appendix A because of the potential consequences to human life or health of an *intentional* terrorist attack. *See* 72 FR 65399.

C. Implementation of CFATS

Over 36,000 facilities have submitted Top-Screens to DHS and about 6,500 of those facilities were preliminarily determined by DHS to be high-risk and required to submit SVAs. DHS is now in the process of notifying those facilities that, based on review of their SVAs, DHS has finally determined to be high-risk and thus required to submit SSPs. On June 29, 2009, DHS issued final high-risk notifications to 10 aboveground gasoline storage tank facilities (*i.e.*, terminals).[6] Subsequently, DHS extended the SSP due dates for those facilities to allow the Department to coordinate further actions regarding terminals as a group. This extension is indefinite, pending the Department's consideration of certain technical issues and questions raised during the initial high-risk determination process for those facilities, as discussed below.

III. Issues Raised by the Gasoline Terminals Industry

A. Petition From International Liquid Terminals Association

Soon after promulgation of the November 2007 Appendix A final rule, several trade associations representing gasoline terminals raised both technical and procedural issues related to the applicability of Appendix A and the Top-Screen requirement to those facilities. Procedurally, those associations claimed that DHS did not provide advance notice and opportunity to comment on the provisions of §§ 27.203 and 27.204 related to aboveground fuel storage facilities that DHS added to CFATS in November 2007. Technically, the industry associations claimed that DHS had overestimated the potential consequences of a terrorist attack on gasoline terminals by relying on a model that calculates the impacts of a "vapor cloud explosion" from release of flammable liquids from aboveground storage tanks, which the industry asserted is unrealistic for gasoline terminals.

On May 13, 2009, the International Liquid Terminals Association (ILTA) submitted a petition to DHS under the Administrative Procedure Act requesting that DHS exempt gasoline

[2] Among other things, the November 2007 rule provided additional criteria related to the physical state (liquid, gas, or solid), concentration levels, and forms of packaging applicable to various chemicals of interest that must be counted under Appendix A.

[3] There is no single chemical composition for the mixture typically called "gasoline," which varies in content and blending components from company to company, region to region, and season to season. All formulations of gasoline, however, contain a significant percentage of certain release-flammable chemicals (*e.g.*, pentane, butane) and typically have a National Fire Protection Association (NFPA) flammability hazard rating of 3.

[4] *See* 40 CFR Part 68.

[5] EPA's exclusion of flammable chemicals in gasoline from the RMP rules was mandated by the Chemical Safety, Information, Site Security and Fuels Regulatory Relief Act, Pub. L. 106–40. *Cf.* 72 FR 65410 (EPA RMP program excludes flammable fuels). In addition, EPA agreed to delete gasoline from the original version of the RMP mixture rule, which had included gasoline, in settlement of litigation with the gasoline industry. *See* 63 FR 640 (Jan. 6, 1998). The RMP exclusion for gasoline and other flammable fuels was codified by EPA at 40 CFR 68.126.

[6] This notice will refer to all facilities with aboveground gasoline storage tanks, including facilities (such as petroleum refineries) that may possess other chemicals that trigger the Top-Screen requirement, as "gasoline terminals" or "terminals." Approximately 4,000 terminals submitted Top-Screens and DHS initially identified 405 of those facilities as high-risk.

from CFATS and remove all references to gasoline terminals from § 27.203(b)(1)(v) and the CFATS flammable mixtures rule (§ 27.204(a)(2)).[7] Through this notice, DHS invites comments on certain technical issues related to the applicability of CFATS to gasoline terminals.

B. Modeling of Potential Consequences From Aboveground Gasoline Storage Tanks

In deciding to add provisions to CFATS for counting chemicals of interest in aboveground gasoline storage tanks, DHS considered several possible methods for modeling the potential consequences of terrorist incidents directed at such facilities—*i.e.,* the vapor cloud explosion (VCE) model and the "pool fire" model.

1. Modified VCE Model for Gasoline Terminals

In essence, a VCE model calculates the maximum distance at which a vapor cloud produced by release of flammable chemicals would be harmful or lethal to persons in or near the cloud (the "distance to endpoint"), based on the amount of flammable liquid chemical available, the estimated amount of the liquid that would convert to vapor, and the distance the vapor cloud could spread before becoming too "lean" to explode when exposed to an ignition source.

Since EPA had already developed a VCE model for estimating the consequences of accidental releases of flammable chemicals, including flammable mixtures, under the RMP regulations, DHS used the EPA VCE model as a starting point for modeling potential VCE consequences for all Release-Flammable COIs, including those at gasoline terminals.[8] DHS modified the EPA VCE model, however, to account for certain differences between gasoline and other flammable liquids mixtures, as explained below. DHS believes the modified VCE model reflects a plausible worst-case scenario for terminals and is an appropriate tool for assessing the potential consequences of a terrorist attack against gasoline terminals.

Specifically, DHS refined the EPA VCE model to provide an even more plausible estimate of the potential consequences of a terrorist attack on gasoline terminals in particular. While EPA's VCE model assumes that (up to) ten percent of a given amount of a flammable liquid will participate in the explosion (the "yield factor"), DHS assumes that only one percent of gasoline will participate, based on gasoline's combustion properties and its storage at ambient conditions.[9] This modification results in a reduction of the potential consequences calculated by the model, as compared to EPA's model, and appears to be consistent with the consequences from prior vapor cloud explosions involving gasoline, as discussed below. Therefore, the modified VCE model allows DHS to reasonably estimate the number of plausible worst-case casualties resulting from a successful attack on a gasoline terminal.

DHS understands that the formation of a gasoline vapor cloud with the potential to cause significant harm to human life and health requires that a number of natural and man-made circumstances combine in a certain way, and that accidental gasoline vapor cloud explosions are therefore uncommon. DHS has determined, however, that those necessary conditions are more likely to exist in the event of an intentional terrorist incident than in the context of an accident, and thus, that it is reasonable and within the Secretary's discretion under Section 550 to apply the modified VCE model to gasoline terminals. *See generally* 72 FR 65399.

For example, in 2005 (long after EPA excluded gasoline from the RMP rule, *see* n. 5, *supra*), a vapor cloud explosion resulting from an unintentional overflow of a gasoline storage tank at the Buncefield Oil Storage Depot in Hertfordshire, UK caused significant injuries and other damage. Several gasoline storage trade associations have asserted that the combination of specific circumstances resulting in the Buncefield incident—*e.g.,* accidental but prolonged and undetected overflow of the tank, failure of detection devices, congestion from nearby obstacles, weather conditions favoring accumulation rather than dispersal of the vapor cloud [10]—are so rare that DHS should disregard the possibility of such explosions at gasoline terminals.[11]

DHS has concluded, however, that a terrorist seeking to cause such an explosion could target a facility where the necessary physical conditions exist (or are likely to occur at some point in time). In order to maximize the consequences of the explosion, such a terrorist could attempt to cause gasoline to leak or overflow from the targeted tank(s) in such a way as to make formation of a vapor cloud more likely than it would be in an accident like the Buncefield explosion.

Nonetheless, DHS invites public comment on the modified VCE model and on any alternatives to the specific modification made by DHS to the yield factor in the model.

2. "Pool Fire" Models

DHS considered other options for evaluating the potential consequences of a release from such facilities. Specifically, DHS considered an existing model that calculates the potential consequences from the radiated heat of a "pool fire" caused by ignition of liquid gasoline suddenly released from one or more aboveground tanks, but that implicitly assumes the pool fire is confined within dikes or other secondary containment surrounding the tank(s).[12] The gasoline industry asserts that this "contained pool fire" scenario is more realistic for terrorist incidents involving gasoline terminals (*e.g.,* attacks using explosive devices or weapons) than the VCE scenario. The industry also asserts that the potential consequences of such contained pool fires do not warrant subjecting terminals to any CFATS requirements.

DHS did not rely on the "contained pool fire" scenario, however, because any model that assumes the effectiveness of secondary containment does not represent a plausible, worst-case terrorist scenario, since an adversary seeking to maximize the consequences of attacking a terminal would also attempt to breach the secondary containment.[13]

[7] The ILTA petition is included in the public docket for this notice and available for review at *http://www.regulations.gov.*

[8] EPA's VCE model is available in Appendix C of EPA's "RMP Guidance for Offsite Consequence Analysis" (April 1999) at *http://www.epa.gov/OEM/docs/chem/oca-all.pdf.*

[9] *See* Letter dated December 10, 2008, from Sue Armstrong, DHS, to Robin Rorick, American Petroleum Institute, *et al.,* which is available in the public docket for this notice.

[10] The ignition of such a vapor cloud, and the resulting explosion, would be relatively easy to cause once the other circumstances were in place.

[11] *See* "Buncefield Major Incident Investigation Board: The Buncefield Incident," 11 December 2005 Final Report (2008), available at *http://www.buncefieldinvestigation.gov.uk/reports.* DHS does not believe that it is necessary or appropriate to detail all the circumstances of that incident, or to respond to every facet of the gasoline terminals industry analyses of those circumstances, in this notice.

[12] The pool fire model is described in EPA's "RMP Guidance for Offsite Consequence Analysis" (April 1999) at *http://www.epa.gov/OEM/docs/chem/oca-all.pdf.* As is true for the VCE model, EPA's RMP pool fire model reflects assumptions that may be appropriate for worst-case *accidental* release scenarios but that are not necessarily appropriate for plausible, worst-case *intentional* release scenarios.

[13] *See* letter dated December 10, 2008, from Sue Armstrong, DHS, to Robin Rorick, American Petroleum Institute, *et al.,* available in the public docket for this notice. The mitigating effects, if any,

Continued

DHS is currently considering, however, and seeks comments on, whether it is feasible to refine existing models or develop a new model for *uncontained* pool fires (*i.e.,* where the contents of one or more gasoline storage tanks escape from secondary containment),[14] so that such a model could be used for future consequence assessments for gasoline terminals—in lieu of or in addition to the modified VCE model.

IV. Issues for Commenters

Comments that will provide the most assistance to DHS should address the following issues and questions. Commenters should include explanations and relevant supporting materials with their comments whenever possible.

a. Comments on the inclusion of 6 CFR 27.203(b)(1)(v) (counting of Release-COI in gasoline, diesel, kerosene, or jet fuel in aboveground storage tanks) and 6 CFR 27.204(a)(2) (the flammable mixtures rule), as they apply to gasoline terminals.

b. Comments on the applicability of the modified VCE model to gasoline terminals, including: Whether the reduction of the vapor yield for gasoline from ten percent (as in EPA's VCE model) to one percent reasonably reflects the potential consequences for a vapor cloud explosion from gasoline (as compared to other liquid flammable chemicals); and whether a different yield factor adjustment might better reflect the potential consequences for a vapor cloud explosion from gasoline.

c. Comments on whether a reasonable model exists or should be developed for future use that would allow DHS to estimate the plausible worst-case consequences of an uncontained pool fire resulting from a successful attack on gasoline terminals.

of secondary containment may be taken into account, however, during the Department's determination as to whether a covered facility's Site Security Plan satisfies the CFATS risk-based performance standards.

[14] Models currently available for calculating the consequences of an uncontained pool fire include assumptions that may be appropriate for releases from certain small sources (*e.g.,* a gasoline tank truck) but that are not realistic or appropriate for worst-case modeling of large-scale releases (*e.g.,* a sudden release from an aboveground gasoline storage tank). For example, the current EPA RMP model assumes that the surface upon which the gasoline has been released is perfectly flat and non-permeable. See EPA's "RMP Guidance for Offsite Consequence Analysis" (April 1999) at *http://www.epa.gov/OEM/docs/chem/oca-all.pdf.*

Dated: January 12, 2010.

Rand Beers,

Under Secretary for National Protection and Programs.

[FR Doc. 2010–738 Filed 1–14–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 242

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 100

[Docket No. FWS–R7–SM–2009–0061; 70101–1261–0000L6]

RIN 1018–AW71

Subsistence Management Regulations for Public Lands in Alaska—2011–12 and 2012–13 Subsistence Taking of Fish and Shellfish Regulations

AGENCIES: Forest Service, Agriculture; Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: This proposed rule would establish regulations for fishing seasons, harvest limits, methods and means related to taking of fish and shellfish for subsistence uses during the 2011–2012 and 2012–2013 regulatory years. The Federal Subsistence Board is presently on a schedule of completing the process of revising subsistence taking of fish and shellfish regulations in odd-numbered years and subsistence taking of wildlife regulations in even-numbered years; public proposal and review processes take place during the preceding year. The Board also addresses customary and traditional use determinations during the applicable cycle. When final, the resulting rulemaking will replace the existing subsistence fish taking regulations, which expire on March 31, 2011. Future rules will not have expiration dates but will be revised according to the applicable cycle. This rule would also amend the customary and traditional use determinations of the Federal Subsistence Board and the general regulations on subsistence taking of fish and wildlife.

DATES: *Public meetings:* The Federal Subsistence Regional Advisory Councils will hold public meetings to receive comments and make proposals to change this proposed rule on several dates between February 15 and March 26, 2010, and then hold another round of public meetings to discuss and receive comments on the proposals, and make recommendations on the proposals to the Federal Subsistence Board, on several dates between August 24 and October 15, 2010. The Board will discuss and evaluate proposed regulatory changes during a public meeting in Anchorage, AK, on January 18, 2011. *See* **SUPPLEMENTARY INFORMATION** for specific information on dates and locations of the public meetings.

Public comments: Comments and proposals to change this proposed rule must be received or postmarked by March 24, 2010.

ADDRESSES: *Public meetings:* The Federal Subsistence Board and the Regional Advisory Councils' public meetings will be held at various locations in Alaska. *See* **SUPPLEMENTARY INFORMATION** for specific information on dates and locations of the public meetings.

Public comments: You may submit comments by one of the following methods:

- *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov* and search for FWS–R7–SM–2009–0061, which is the docket number for this rulemaking.
- *By hard copy:* U.S. mail or hand-delivery to: USFWS, Office of Subsistence Management, 1011 East Tudor Road, MS 121, Attn: Theo Matuskowitz, Anchorage, AK 99503–6199, or hand delivery to the Designated Federal Official attending any of the Federal Subsistence Regional Advisory Council public meetings. *See* **SUPPLEMENTARY INFORMATION** for additional information on locations of the public meetings.

We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (*see* the Public Review Process section below for more information).

FOR FURTHER INFORMATION CONTACT: Chair, Federal Subsistence Board, c/o U.S. Fish and Wildlife Service, Attention: Peter J. Probasco, Office of Subsistence Management; (907) 786–3888 or *subsistence@fws.gov.* For questions specific to National Forest System lands, contact Calvin H. Casipit, Acting Regional Subsistence Program Leader, USDA, Forest Service, Alaska Region; (907) 586–7918.

SUPPLEMENTARY INFORMATION:

Background

Under Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA) (16 U.S.C. 3111–3126), the Secretary of the Interior and the

Secretary of Agriculture (Secretaries) jointly implement the Federal Subsistence Management Program. This program provides a preference for subsistence uses of fish and wildlife resources on Federal public lands and waters in Alaska. The Secretaries first published regulations to carry out this program in the **Federal Register** on May 29, 1992 (57 FR 22940). The Program has subsequently amended these regulations a number of times. Because this program is a joint effort between Interior and Agriculture, these regulations are located in two titles of the Code of Federal Regulations (CFR): Title 36, "Parks, Forests, and Public Property," and Title 50, "Wildlife and Fisheries," at 36 CFR 242.1–28 and 50 CFR 100.1–28, respectively. The regulations contain subparts as follows: Subpart A, General Provisions; Subpart B, Program Structure; Subpart C, Board Determinations; and Subpart D, Subsistence Taking of Fish and Wildlife.

Consistent with subpart B of these regulations, the Secretaries established a Federal Subsistence Board to administer the Federal Subsistence Management Program. The Board is made up of:

- A Chair appointed by the Secretary of the Interior with concurrence of the Secretary of Agriculture;
- The Alaska Regional Director, U.S. Fish and Wildlife Service;
- The Alaska Regional Director, U.S. National Park Service;
- The Alaska State Director, U.S. Bureau of Land Management;
- The Alaska Regional Director, U.S. Bureau of Indian Affairs; and
- The Alaska Regional Forester, U.S. Forest Service.

Through the Board, these agencies participate in the development of regulations for subparts A, B, and C, which set forth the basic program, and the subpart D regulations, which, among other things, set forth specific harvest seasons and limits.

In administering the program, the Secretaries divided Alaska into 10 subsistence resource regions, each of which is represented by a Regional Council. The Regional Councils provide a forum for rural residents with personal knowledge of local conditions and resource requirements to have a meaningful role in the subsistence management of fish and wildlife on Federal public lands in Alaska. The Regional Council members represent varied geographical, cultural, and user diversity within each region.

Public Review Process—Comments, Proposals, and Public Meetings

The Regional Councils have a substantial role in reviewing this proposed rule and making recommendations for the final rule. The Federal Subsistence Board, through the Regional Councils, will hold meetings on this proposed rule at the following locations in Alaska, on the following dates:

Region 1—Southeast Regional Council	Ketchikan	March 16, 2010.
Region 2—Southcentral Regional Council	Anchorage	March 10, 2010.
Region 3—Kodiak/Aleutians Regional Council	TBD	March 23, 2010.
Region 4—Bristol Bay Regional Council	Togiak	March 3, 2010.
Region 5—Yukon-Kuskokwim Delta Regional Council	Bethel	March 2, 2010.
Region 6—Western Interior Regional Council	Fairbanks	February 23, 2010.
Region 7—Seward Peninsula Regional Council	Nome	March 9, 2010.
Region 8—Northwest Arctic Regional Council	Kotzebue	February 19, 2010.
Region 9—Eastern Interior Regional Council	Fairbanks	February 23, 2010.
Region 10—North Slope Regional Council	Barrow	February 16, 2010.

During April 2010, the written proposals to change the subpart D, take of fish and shellfish, regulations and subpart C, customary and traditional use, determinations will be compiled and distributed for public review.

During the 30-day public comment period, which is presently scheduled to end on May 14, 2010, written public comments will be accepted on the distributed proposals.

The Board, through the Regional Councils, will hold a second series of meetings in August through October 2010, to receive comments on specific proposals and to develop recommendations to the Board at the following locations in Alaska, on the following dates:

Region 1—Southeast Regional Council	Sitka	September 28, 2010.
Region 2—Southcentral Regional Council	Cordova	October 13, 2010.
Region 3—Kodiak/Aleutians Regional Council	TBA	September 21, 2010.
Region 4—Bristol Bay Regional Council	Naknek	September 22, 2010.
Region 5—Yukon-Kuskokwim Delta Regional Council	Quinhagak	September 30, 2010.
Region 6—Western Interior Regional Council	McGrath	October 5, 2010.
Region 7—Seward Peninsula Regional Council	Nome	October 13, 2010.
Region 8—Northwest Arctic Regional Council	Kotzebue	September 1, 2010.
Region 9—Eastern Interior Regional Council	Central	October 13, 2010.
Region 10—North Slope Regional Council	Barrow	August 24, 2010.

A notice will be published of specific dates, times, and meeting locations in local and statewide newspapers prior to both series of meetings. Locations and dates may change based on weather or local circumstances. The amount of work on each Regional Council's agenda determines the length of each Regional Council meeting.

The Board will discuss and evaluate proposed changes to the subsistence management regulations during a public meeting scheduled to be held in Anchorage, AK, on January 18, 2011. The Council Chairs, or their designated representatives, will present their respective Councils' recommendations at the Board meeting. Additional oral testimony may be provided on specific proposals before the Board at that time. At that public meeting, the Board will deliberate and take final action on proposals received that request changes to this proposed rule.

Proposals to the Board to modify fisheries harvest regulations and customary and traditional use determinations must include the following information:

a. Name, address, and telephone number of the requestor;

b. Each section and/or paragraph designation in this proposed rule for which changes are suggested;

c. A statement explaining why each change is necessary;

d. Proposed wording changes; and

e. Any additional information that you believe will help the Board in evaluating the proposed change.

The Board rejects proposals that fail to include the above information, or proposals that are beyond the scope of authorities in § ____.24, subpart C (the regulations governing customary and traditional use determinations), and §§ ____.27, and ____.28, subpart D (the specific regulations governing the subsistence take of fish and shellfish). During the January 18, 2011 meeting, the Board may defer review and action on some proposals to allow time for local cooperative planning efforts, or to acquire additional needed information. The Board may elect to defer taking action on any given proposal if the workload of staff, Regional Councils, or the Board becomes excessive. These deferrals may be based on recommendations by the affected Regional Council(s) or staff members, or on the basis of the Board's intention to do least harm to the subsistence user and the resource involved. The Board may consider and act on alternatives that address the intent of a proposal while differing in approach.

Tribal Consultation and Comment

As expressed in Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," the Federal officials that have been delegated authority by the Secretaries are committed to honoring the unique government-to-government political relationship that exists between the Federal Government and Federally Recognized Indian Tribes (Tribes) as listed in 73 FR 18553 (April 4, 2008). The Alaska National Interest Lands Conservation Act does not specifically provide rights to Tribes for the subsistence taking of wildlife, fish, and shellfish. However, because Tribal members are affected by subsistence fishing, hunting, and trapping regulations, the Secretaries have elected to provide Tribes an opportunity to consult on this rule.

The Secretaries will engage in outreach efforts for this rule, including a notification letter, to ensure that Tribes are advised of the mechanisms by which they can participate. The Board provides a variety of opportunities for consultation: Proposing changes to the existing rule; commenting on proposed changes to the existing rule; engaging in dialogue at the Regional Advisory Council meetings; engaging in dialogue at the Board's meetings; and providing input in person, by mail, e-mail, or phone at any time during the rulemaking process. The Secretaries will commit to efficiently and adequately reviewing the government-to-government consultation process with regard to subsistence rulemaking.

The Board will consider Tribes' information, input, and recommendations, and address their concerns as much as practicable. However, in keeping with ANILCA § 805(c), the Board will follow recommendations of the Regional Advisory Councils for the taking of fish and wildlife unless their recommendation is determined to be not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs. The Board will inform the Tribes how their recommendations were considered.

Developing the 2011–13 Fish and Shellfish Seasons and Harvest Limit Regulations

Subpart D regulations are subject to periodic review and revision. The Federal Subsistence Board currently completes the process of revising subsistence take of fish and shellfish regulations in odd-numbered years and subsistence take of wildlife regulations in even-numbered years; public proposal and review processes take place during the preceding year. The Board also addresses customary and traditional use determinations during the applicable cycle.

The text of the final rule published March 30, 2009 (74 FR 14049) for the 2009–11 subparts C and D regulations is the text of this proposed rule. The regulations established in that final rule are set to expire March 31, 2011. However, those regulations will remain in effect on April 1, 2011, unless subsequent Board action changes elements as a result of the public review process outlined above in this document.

Compliance With Statutory and Regulatory Authorities

National Environmental Policy Act

A Draft Environmental Impact Statement that described four alternatives for developing a Federal Subsistence Management Program was distributed for public comment on October 7, 1991. The Final Environmental Impact Statement (FEIS) was published on February 28, 1992. The Record of Decision (ROD) on Subsistence Management for Federal Public Lands in Alaska was signed April 6, 1992. The selected alternative in the FEIS (Alternative IV) defined the administrative framework of an annual regulatory cycle for subsistence regulations.

A 1997 environmental assessment dealt with the expansion of Federal jurisdiction over fisheries and is available at the office listed under **FOR FURTHER INFORMATION CONTACT.** The Secretary of the Interior, with concurrence of the Secretary of Agriculture, determined that expansion of Federal jurisdiction does not constitute a major Federal action significantly affecting the human environment and, therefore, signed a Finding of No Significant Impact.

Section 810 of ANILCA

An ANILCA Section 810 analysis was completed as part of the FEIS process on the Federal Subsistence Management Program. The intent of all Federal subsistence regulations is to accord subsistence uses of fish and wildlife on public lands a priority over the taking of fish and wildlife on such lands for other purposes, unless restriction is necessary to conserve healthy fish and wildlife populations. The final section 810 analysis determination appeared in the April 6, 1992, ROD and concluded that the Federal Subsistence Management Program, under Alternative IV with an annual process for setting subsistence regulations, may have some local impacts on subsistence uses, but will not likely restrict subsistence uses significantly.

During the subsequent environmental assessment process for extending fisheries jurisdiction, an evaluation of the effects of this rule was conducted in accordance with section 810. That evaluation also supported the Secretaries' determination that the rule will not reach the "may significantly restrict" threshold that would require notice and hearings under ANILCA section 810(a).

Paperwork Reduction Act

An agency may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. This proposed rule does not contain any new collections of information that require OMB approval. OMB has reviewed and approved the following collections of information associated with the subsistence regulations at 36 CFR 242 and 50 CFR 100:

(1) Subsistence hunting and fishing applications, permits, and reports (OMB Control No. 1018–0075 expires December 31, 2009).

(2) Federal Subsistence Regional Advisory Council Membership

Application/Nomination and Interview Forms (OMB Control No. 1018–0120, expires March 31, 2012).

Regulatory Planning and Review (Executive Order 12866)

The Office of Management and Budget (OMB) has determined that this rule is not significant and has not reviewed this rule under Executive Order 12866. OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires preparation of flexibility analyses for rules that will have a significant effect on a substantial number of small entities, which include small businesses, organizations, or governmental jurisdictions. In general, the resources to be harvested under this rule are already being harvested and consumed by the local harvester and do not result in an additional dollar benefit to the economy. However, we estimate that 2 million pounds of meat are harvested by subsistence users annually and, if given an estimated dollar value of $3.00 per pound, this amount would equate to about $6 million in food value statewide. Based upon the amounts and values cited above, the Departments certify that this rulemaking will not have a significant economic effect on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

Small Business Regulatory Enforcement Fairness Act

Under the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 801 *et seq.*), this rule is not a major rule. It does not have an effect on the economy of $100 million or more, will not cause a major increase in costs or prices for consumers, and does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Executive Order 12630

Title VIII of ANILCA requires the Secretaries to administer a subsistence priority on public lands. The scope of this program is limited by definition to certain public lands. Likewise, these regulations have no potential takings of private property implications as defined by Executive Order 12630.

Unfunded Mandates Reform Act

The Secretaries have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.,* that this rulemaking will not impose a cost of $100 million or more in any given year on local or State governments or private entities. The implementation of this rule is by Federal agencies and there is no cost imposed on any State or local entities or Tribal governments.

Executive Order 12988

The Secretaries have determined that these regulations meet the applicable standards provided in Sections 3(a) and 3(b)(2) of Executive Order 12988, regarding civil justice reform.

Executive Order 13132

In accordance with Executive Order 13132, the rule does not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment. Title VIII of ANILCA precludes the State from exercising subsistence management authority over fish and wildlife resources on Federal lands unless it meets certain requirements.

Executive Order 13175

The Alaska National Interest Lands Conservation Act does not specifically provide rights to Tribes for the subsistence taking of wildlife, fish, and shellfish. However, the Secretaries have elected to provide Tribes an opportunity to consult on this rule. The Board will provide a variety of opportunities for consultation through: proposing changes to the existing rule; commenting on proposed changes to the existing rule; engaging in dialogue at the Regional Advisory Council meetings; engaging in dialogue at the Board's meetings; and providing input in person, by mail, e-mail, or phone at any time during the rulemaking process.

Executive Order 13211

This Executive Order requires agencies to prepare Statements of Energy Effects when undertaking certain actions. However, this rule is not a significant regulatory action under E.O. 13211, affecting energy supply, distribution, or use, and no Statement of Energy Effects is required.

Drafting Information

Theo Matuskowitz drafted these regulations under the guidance of Peter J. Probasco of the Office of Subsistence Management, Alaska Regional Office, U.S. Fish and Wildlife Service, Anchorage, Alaska. Additional assistance was provided by:

- Daniel Sharp, Alaska State Office, Bureau of Land Management;
- Sandy Rabinowitch and Nancy Swanton, Alaska Regional Office, National Park Service;
- Drs. Warren Eastland and Glenn Chen, Alaska Regional Office, Bureau of Indian Affairs;
- Jerry Berg and Carl Jack, Alaska Regional Office, U.S. Fish and Wildlife Service; and
- Calvin H. Casipit, Alaska Regional Office, U.S. Forest Service.

List of Subjects

36 CFR Part 242

Administrative practice and procedure, Alaska, Fish, National forests, Public lands, Reporting and recordkeeping requirements, Wildlife.

50 CFR Part 100

Administrative practice and procedure, Alaska, Fish, National forests, Public lands, Reporting and recordkeeping requirements, Wildlife.

For the reasons set out in the preamble, the Federal Subsistence Board proposes to amend 36 CFR 242 and 50 CFR 100 for the 2011–12 and 2012–13 regulatory years. The text of the proposed amendments to 36 CFR 242.24, 242.27, and 242.28 and 50 CFR 100.24, 100.27, and 100.28 is the final rule for the 2009–11 regulatory period (74 FR 14049; March 30, 2009), as modified by any subsequent Federal Subsistence Board action.

Dated: November 20, 2009.

Peter J. Probasco,

Acting Chair, Federal Subsistence Board.

Dated: November 23, 2009.

Calvin H. Casipit,

Acting Subsistence Program Leader, USDA-Forest Service.

[FR Doc. 2010–688 Filed 1–14–10; 8:45 am]

BILLING CODE 3410–11–P; 4310–55–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2009–0712; FRL–9103–9]

Approval and Promulgation of Air Quality Implementation Plans; Delaware; Reasonable Further Progress Plan, 2002 Base Year Inventory, Reasonably Available Control Measures, Contingency Measures, and Transportation Conformity Budgets for the Delaware Portion of the Philadelphia 1997 8-Hour Ozone Moderate Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a revision to the Delaware State Implementation Plan (SIP) to meet the reasonable further progress (RFP) requirements of the Clean Air Act (CAA) for the Delaware portion of the Philadelphia 1997 8-hour ozone moderate nonattainment area. EPA is also proposing to approve the RFP motor vehicle emissions budgets (MVEBs), the 2002 base year emissions inventory, contingency measures, and the reasonably available control measure (RACM) analysis associated with this revision. EPA is proposing to approve the SIP revision because it satisfies RFP, emissions inventory, contingency measures, RFP transportation conformity, and RACM requirements for the 1997 8-hour ozone national ambient air quality standard (NAAQS) nonattainment areas classified as moderate and demonstrates further progress in reducing ozone precursors. EPA is proposing to approve the SIP revision pursuant to section 110 and part D of the CAA and EPA's regulations.

DATES: Written comments must be received on or before February 16, 2010.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2009–0712 by one of the following methods:

A. *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *E-mail: fernandez.cristina@epa.gov.*

C. *Mail:* EPA–R03–OAR–2009–0712, Cristina Fernandez, Associate Director, Office of Air Program Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2009–0712. 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.

Docket: All documents in the electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Delaware Department of Natural Resources & Environmental Control, 89 Kings Highway, P.O. Box 1401, Dover, Delaware 19901.

FOR FURTHER INFORMATION CONTACT: Rose Quinto, (215) 814–2182, or by e-mail at *quinto.rose@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, whenever "we," "us," or "our" is used, we mean EPA.

The following is provided to aid in locating information in this document.

I. What Action Is EPA Taking?

EPA is proposing to approve a revision to the Delaware SIP submitted by the Delaware Department of Natural Resources and Environmental Control (DNREC) on June 13, 2007, to meet the emissions inventory and RFP requirements of the CAA for the Delaware portion of the Philadelphia 1997 8-hour ozone moderate nonattainment area. EPA is proposing to approve the 2002 base year emissions inventory, the 15 percent RFP plan, the RFP 2008 MVEBs, contingency measures, and RACM analysis. The RFP plan demonstrates that emissions will be reduced 15 percent for the period of 2002 through 2008. The volatile organic compound (VOC) MVEBs is 21.84 tons per day (tpd) and the nitrogen oxides (NOx) MVEBs is 43.89 tpd. EPA is proposing to approve the SIP revision pursuant to section 110 and part D of the CAA and EPA regulations.

II. What Is the Background for This Action?

In 1997, EPA revised the health-based NAAQS for ozone, setting it at 0.08 parts per million (ppm) averaged over an 8-hour time frame. EPA set the 8-hour ozone standard based on scientific evidence demonstrating that ozone causes adverse health effects at lower ozone concentrations and over longer periods of time, than was understood when the pre-existing 1-hour ozone standard was set. EPA determined that the 8-hour standard would be more protective of human health, especially children and adults who are active outdoors, and individuals with a pre-existing respiratory disease, such as asthma.

On April 30, 2004 (69 FR 23951), EPA finalized its attainment/nonattainment designations for areas across the country with respect to the 8-hour ozone standard. These actions became effective on June 15, 2004. Among those nonattainment areas is the Philadelphia-Wilmington-Atlantic City (PA–NJ–MD–DE) moderate nonattainment area

(NAA). This NAA includes the three counties in Delaware, five counties in eastern Pennsylvania, one county in Maryland and eight counties in southern New Jersey.

These designations triggered the CAA's section 110(a)(1) requirement that States must submit attainment demonstrations for their nonattainment areas to EPA by no later than three years after the promulgation of a NAAQS. Accordingly, EPA's Phase 1 8-hour ozone implementation rule (Phase 1 rule), published on April 30, 2004 (69 FR 23951) specifies that States must submit attainment demonstrations for their nonattainment areas to EPA by no later than three years from the effective date of designation, that is, by June 15, 2007.

Pursuant to the Phase 1 rule, an area was classified under subpart 2 of the CAA based on its 8-hour design value if that area had a 1-hour design value at or above 0.121 ppm (the lowest 1-hour design value in Table 1 of subpart 2). Based on this criterion, Delaware, as part of the Philadelphia nonattainment area was classified under subpart 2 as a moderate nonattainment area. On November 29, 2005 (70 FR 71612), as revised on June 7, 2007 (72 FR 31727), EPA published the Phase 2 final rule for implementation of the 8-hour standard (Phase 2 rule) that addressed the RFP control and planning obligations as they apply to areas designated nonattainment for the 1997 8-hour ozone NAAQS. The Phase 1 and 2 rules outline the SIP requirements and deadlines for various requirements in areas designated as moderate nonattainment. For such areas, reasonably available control technology (RACT) plans were due by September 2006 (40 CFR 51.912(a)(2)). The rules further require that modeling and attainment demonstrations, RFP plans, RACM, projection year emission inventories, motor vehicle emissions budgets, and contingency measures were all due by June 15, 2007 (40 CFR 51.908(a), (c)).

Section 182(b)(1) of the CAA and EPA's 1997 8-hour ozone implementation rule (40 CFR 51.910) require each 8-hour ozone nonattainment area designated moderate and above to submit an emissions inventory and RFP Plan, for review and approval into its SIP, that describes how the area will achieve actual emissions reductions of VOC and NOx from a baseline emissions inventory.

III. What Is EPA's Evaluation of the Revision?

EPA's analysis and findings are discussed in this proposed rulemaking and a more detailed discussion is contained in the Technical Support Document for this Proposal which is available on line at *http://www.regulations.gov*, Docket number EPA–R03–OAR–2009–0712.

After completing the appropriate public notice and comment procedures, Delaware made several submittals in order to address the CAA's 8-hour ozone attainment requirements. On October 2, 2006, Delaware submitted a RACT SIP revision which certifies that all relevant RACT controls have been implemented in Delaware for attaining the 8-hour ozone standard. EPA approved Delaware's 8-hour RACT SIP revision on July 23, 2008 (73 FR 42681). On May 2, 2007, Delaware submitted a new VOC control from crude oil lightering operations. EPA approved this rule on September 13, 2007 (72 FR 52285). On June 13, 2007, Delaware submitted a comprehensive 8-hour ozone SIP. The SIP submittal included an attainment demonstration plan, RFP plans for 2008 and 2009, RACM analysis, contingency measures, on-road motor vehicle emission budgets, and the 2002 base year emissions inventory. These SIP revisions were subject to notice and comment by the public and the State addressed the comments received on the proposed SIPs. All sections of this SIP submittal with the exception of the attainment demonstration plan will be discussed in this rulemaking. The attainment demonstration plan sections of this SIP submittal will be discussed in a separate rulemaking.

A. Base Year Emissions Inventory

An emissions inventory is a comprehensive, accurate, current inventory of actual emissions from all sources and is required by section 172(c)(3) of the CAA. For ozone nonattainment areas, the emissions inventory needs to contain VOC and NO_X emissions because these pollutants are precursors to ozone formation. EPA recommended 2002 as the base year emissions inventory, and is therefore the starting point for calculating RFP. Delaware submitted its 2002 base year emissions inventory on June 13, 2007. A summary of the 2002 base year VOC and NO_X emissions inventory, in tons per day (tpd), are included in Tables 1 and 2 of this document.

TABLE 1—DELAWARE 2002 BASE YEAR VOC EMISSIONS

Source sector	Kent	New Castle	Sussex	State total
Point	0.49	9.42	13.35	23.26
Stationary Area	5.75	20.02	7.31	33.08
Non-Road Mobile	5.17	12.24	9.36	26.77
On-Road Mobile	5.45	16.98	9.95	32.38
Total Emissions	16.86	58.66	39.97	115.49

TABLE 2—DELAWARE 2002 BASE YEAR NO_X EMISSIONS

Source sector	Kent	New Castle	Sussex	State total
Point	5.06	44.09	24.95	74.10
Stationary Area	0.45	1.95	0.77	3.17
Non-Road Mobile	15.02	24.62	13.15	52.79
On-Road Mobile	13.97	36.56	18.50	69.03
Total Emissions	34.50	107.22	57.37	199.09

B. Adjusted Base Year Inventory and 2008 RFP Target Levels

The process for determining the emissions baseline from which the RFP reductions are calculated, is described in section 182(b)(1) of the CAA and 40 CFR 51.910. This baseline value has been determined to be the 2002 adjusted base year inventory. Sections 182(b)(1)(B) and (D) require the exclusion from the base year inventory of emissions benefits resulting from the Federal Motor Vehicle Control Program (FMVCP) regulations promulgated by January 1, 1990, and the Reid Vapor Pressure (RVP) regulations promulgated June 11, 1990 (55 FR 23666). The FMVCP and RVP emissions reductions are determined by the State using EPA's on-road mobile source emissions modeling software, MOBILE6. The FMVCP and RVP emission reductions are then removed from the base year inventory by the State, resulting in an adjusted base year inventory. The emission reductions needed to satisfy the RFP requirement are then calculated from the adjusted base year inventory. These reductions are then subtracted from the adjusted base year inventory to establish the emissions target for the RFP milestone year (2008).

For moderate areas like the Philadelphia nonattainment area, the CAA specifies a 15 percent reduction in ozone precursor emissions over an initial six year period. In the Phase 2 rule, EPA interpreted this requirement for areas that were also designated nonattainment and classified as moderate or higher for the 1-hour ozone standard. Also in the Phase 2 rule, EPA provided that an area classified as moderate or higher that has the same boundaries as an area, or is entirely composed of several areas or portions of areas, for which EPA fully approved a 15 percent plan for the 1-hour NAAQS, is considered to have met the requirements of section 182(b)(1) of the CAA for the 8-hour NAAQS. In this situation, a moderate nonattainment area is subject to RFP under section 172(c)(2) of the CAA and shall submit, no later than 3 years after designation for the 8-hour NAAQS, a SIP revision that meets the requirements of 40 CFR 51.910(b)(2). The RFP SIP revision must provide for a 15 percent emission reduction (either NO_X and/or VOC) accounting for any growth that occurs during the six year period following the baseline emissions inventory year, that is, 2002–2008. The sections 182 and 172 requirements differ in that section 182(b)(1) specifies that it must be a 15 percent VOC reduction, where section 172(c)(2) provides that the 15 percent reduction can be either a VOC and/or NO_X reduction.

According to EPA's Phase 2 rule, Delaware must achieve 15 percent VOC emission reduction in Sussex County from its 2002 baseline level, and 15 percent VOC and/or NO_X emission reduction in Kent and New Castle Counties from their combined 2002 baseline level before the end of 2008.

According to section 182(b)(1)(D) of the CAA, emission reductions that resulted from the FMVCP and RVP rules promulgated prior to 1990 are not creditable for achieving RFP emission reductions. Therefore, the 2002 base year inventory is adjusted by subtracting the VOC and NO_X emission reductions that are expected to occur between 2002 and the future milestone years due to the FMVCP and RVP rules. The FMVCP/RVP VOC and NO_X emission reductions that are expected to occur between 2002 and 2008 were determined using EPA's MOBILE6.2 model. The input and output files for MOBILE6.2 runs for the adjustments, the emission factors generated, and the calculations for emission projections are found in Appendix 4–1 of the Delaware SIP submittal. The adjustments, in tpd, are presented in Table 3 for Sussex County and Table 4 for Kent and New Castle Counties.

TABLE 3—MOBILE SOURCE FMVCP/RVP ADJUSTMENTS FOR SUSSEX COUNTY

	VOC	NO_X	Note
Adjusted On-Road Mobile Source Emissions:			
Adjusted for 2002	16.66	20.24	A
Adjusted for 2008	15.51	18.81	B_{2008}
Mobile Source Adjustments for 2002 Baseline:			
2002–2008	1.15	1.42	$C_{2008} = A - B_{2008}$

TABLE 4—MOBILE SOURCE FMVCP/RVP ADJUSTMENTS FOR KENT AND NEW CASTLE COUNTIES

	VOC	NO_X	Note
Adjusted On-Road Mobile Source Emissions:			
Adjusted for 2002	42.16	56.02	a
Adjusted for 2008	39.18	51.64	b_{2008}
Mobile Source Adjustments for 2002 Baseline:			
2002–2008	2.98	4.38	$c_{2008} = a - b_{2008}$

The mobile source adjustments in Tables 3 and 4 are the non-creditable emission reductions due to the pre-1990 FMVCP and RVP rules. Subtracting these adjustments from the 2002 base year emissions inventory (*i.e.*, the State total emissions in Tables 1 and 2) will give the 2002 adjusted base year emissions inventory relative to the subject milestone year, as presented in Table 5 for Sussex County and Table 6 for Kent and New Castle Counties.

TABLE 5—THE 2002 ADJUSTED BASE YEAR EMISSIONS INVENTORY FOR SUSSEX COUNTY

	VOC	NO_X	Note
2002 Base Year Emissions Inventory	39.97	57.37	E
Mobile Source Adjustments for 2002–2008	1.15	1.42	C_{2008}
2002 Adjusted Baseline Relative to 2008	38.82	55.95	$F_{2008} = E - C_{2008}$

TABLE 6—THE 2002 ADJUSTED BASE YEAR EMISSIONS INVENTORY FOR KENT AND NEW CASTLE COUNTIES

	VOC	NO_X	Note
2002 Base Year Emissions Inventory	75.52	141.72	e
Mobile Source Adjustments for 2002–2008	2.98	4.38	c_{2008}
2002 Adjusted Baseline Relative to 2008	72.54	137.34	$f_{2008} = e - c_{2008}$

By the end of 2008, Delaware is required to reduce 15 percent in its 2002 adjusted base year emissions inventory. According to the Phase 2 rule, Sussex County must achieve this 15 percent reduction in its VOC emission, since it did not have a 15 percent VOC rate-of-progress plan approved by EPA under the 1-hour ozone standard. For Kent and New Castle Counties, their 15 percent emission reductions can be achieved form VOC emissions and/or from NO_X emissions.

The 15 percent VOC emission reduction and emission target in 2008 in Sussex County are calculated as follows:

Sussex 2002 adjusted VOC baseline relative to 2008 is 38.82 tpd.

Required 15 percent emission reduction: 38.82×15 percent = 5.82 tpd.

2008 VOC emission target: 38.83 − 5.82 = 33.00 tpd.

The 15 percent VOC emission reduction and emission target in 2008 in Kent and New Castle Counties are calculated as follows:

Kent/New Castle 2002 adjusted VOC baseline relative to 2008 is 72.54 tpd.

Required 15 percent emission reduction: 72.54×15 percent = 10.88 tpd.

2008 VOC emission target: 72.54 − 10.88 = 61.66 tpd.

C. Control Measures and Emission Reductions for RFP

The only post-2002 point source VOC control in Sussex County is Regulation No. 24, Section 46, Control of Crude Oil Lightering Operations. Since there will be no new VOC controls for point sources, non-point source sector, and non-road mobile source sector for VOC emissions between 2008 and 2009, Delaware's 2008 emission reductions and projections are estimated by interpolating the 2002 base year emissions and the 2009 projections. Kent and New Castle Counties applied for and obtained total VOC and NO_X emission reductions from facility/unit shutdown or modification. The 2008 on-road mobile source VOC emissions were projected using EPA's MOBILE6.2 for obtaining factors and the Peninsula Travel Demand Model (PTDM) for predicting future vehicle miles traveled (VMT). Tables 7 and 8 summarize the total 2008 VOC emission projections, in tpd, for the RFP requirements for Sussex County and Kent/New Castle Counties, respectively.

TABLE 7—SUSSEX COUNTY TOTAL VOC EMISSION PROJECTION

[tpd]

Point Source Sector	10.71
Area Source Sector	6.32
Non-Road Mobile Sector	8.01
On-Road Mobile Sector	7.09
Total 2008 Emission Projection	32.13

The total VOC emission projection meets the 2008 emission target under the 15 percent RFP requirements (33.00 tpd). Therefore, the 2008 RFP in Sussex County is demonstrated.

TABLE 8—KENT AND NEW CASTLE COUNTIES TOTAL VOC EMISSION PROJECTION

[tpd]

Point Source Sector	10.51
Area Source Sector	21.64
Non-Road Mobile Sector	13.81
On-Road Mobile Sector	14.75
Total 2008 Emission Projection	60.71

The total VOC emission projection meets the 2008 emission target under the 15 percent RFP requirements (61.66 tpd). Therefore, the 2008 RFP in Kent and New Castle Counties is demonstrated.

D. Contingency Measures

The CAA requires States with nonattainment areas to implement specific control measures if the area fails to make reasonable further progress. This CAA provision is a requirement for States with moderate and above ozone nonattainment areas to include sufficient contingency measures in their RFP so that, upon implementation of such measures, additional emission reductions of at least 3 percent of the adjusted 2002 baseline emissions would be achieved. Under the same provision of the CAA, EPA also requires that the contingency measures must be fully adopted control measures or rules, so that upon failure to meet milestone requirements, the contingency measures can be implemented without any further rulemaking activities by the States and/or EPA. For more information on contingency measures, see the April 16, 1992 General Preamble (57 FR 13512) and the November 29, 2005 Phase 2 8-hour ozone implementation rule (70 FR 71612).

To meet the requirements for contingency emission reductions, EPA allows States to use NO_X emission reductions to substitute for VOC emission reductions in their contingency plans. The condition set forth by EPA for NO_X substitution is that States must achieve a minimum of 0.3 VOC reductions of the total 3 percent contingency reduction, and the remaining 2.7 percent reduction can be achieved through NO_X emission controls. Delaware included both VOC and NO_X emission controls as contingency measures in this 8-hour ozone RFP.

Based on the CAA and EPA requirements on contingency measures, the contingency VOC reduction for Delaware for the 2008 milestone year is as follows: the 2002 VOC baseline (statewide) adjusted to 2008 (see Tables 6 and 7 in this document) is 111.36 tpd, therefore, contingency VOC emission reduction in 2008 is 111.36 multiplied by 3 percent = 3.34 tpd.

Analysis in Chapter 5.5, page 29 of the Delaware SIP, indicates that the three counties in Delaware will have a VOC emission reduction surplus of 1.82 tpd in 2008 [*i.e.,* (33.00 + 61.66) − (32.13 + 60.71) = (94.66 − 92.84) = 1.82]. Therefore there is 3.34 − 1.82 = 1.52 tpd contingency VOC reduction shortfall in 2008.

Delaware's 2002 VOC-to-NO_X baseline (with respect to 2008) ratio is (38.82 + 72.54): (55.95 + 137.34) = 111.36:193.29 = 1:1.74 (Section 4, Tables 4–3 and 4–4 in the Delaware SIP). Therefore, the contingency VOC reduction shortfall is equivalent to $1.52 \times 1.74 = 2.64$ tpd NO_X reduction shortfall.

Delaware has implemented numerous controls leading to NO_X reductions in 2008 that are greater than the identified 2.64 contingency shortfall (see subsections 5.4 and 6.4 of the Delaware SIP). Therefore, there is no need to specify additional contingency measures for the 2008 milestone year.

E. RACM Analysis

Pursuant to section 172(c)(1) of the CAA, States are required to implement all RACM as expeditiously as practicable. Specifically, section 172(c)(1) states the following: "In general—Such plan provisions shall provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology) and shall provide for attainment of the national primary ambient air quality standards."

Furthermore, in EPA's Phase 2 rule, EPA describes how States must include with their attainment demonstration a RACM analysis (70 FR 71659). The purpose of the RACM analysis is to determine whether or not reasonably available control measures exist that would advance the attainment date for nonattainment areas. Control measures that would advance the attainment date are considered RACM and must be included in the SIP. RACM are necessary to ensure that the attainment date is achieved "as expeditious as practicable."

Control measures under RACT constitute a major group of RACM control measures for stationary sources. To meet the CAA's RACT requirements under the 8-hour ozone standard, Delaware submitted a RACT SIP revision on October 2, 2006, which certifies that all relevant RACT controls have been implemented in Delaware for attaining the 8-hour ozone standard. EPA approved Delaware's 8-hour RACT SIP revision on July 23, 2008 (73 FR 42681). On May 2, 2007, Delaware submitted a new VOC control from crude oil lightering operations. EPA approved this rule on September 13, 2007 (72 FR 52285). In addition to those RACT control measures, Delaware adopted a number of other VOC and NO_X RACM measures. These measures include the tightening of Delaware's Open Burning Regulation, Control of Stationary Generator Emissions, restrictions on Excessive Idling of Heavy Duty Vehicles, Control of Stationary Combustion Turbine Emissions, and the Brandywine School Districts Clean School Bus USA grant, and voluntary and mandatory Ozone Action Day initiatives. There are no additional RACM measures or group of RACM measures that Delaware could adopt to advance the attainment date from 2009 to 2008, therefore Delaware has met the RACM requirements of the CAA.

F. Transportation Conformity Budgets

Section 176 of the CAA requires that highway transportation activities in ozone nonattainment areas must: (1) Establish in their SIP, mobile source VOC and NO_X emission budgets for each of the milestone years up to the attainment year and submit the mobile budgets to EPA for approval; (2) upon adequacy determination or approval of EPA, States must conduct transportation conformity analysis for their Transportation Improvement Programs (TIPs) and long range transportation plans to ensure highway vehicle emissions will not exceed relevant mobile budgets; and (3) failure of demonstrating such transportation conformity lapses resulting in freezing of Federal highway funds and all Federal highway projects in the lapsed area.

The mobile emission budgets for 2008 RFP milestone are based on the projected 2008 mobile source emissions, accounting for all relevant mobile source controls including all Federal controls and Delaware specific controls. The 2008 mobile emissions are projected using EPA's MOBILE6.2 for obtaining emission factors and the "Peninsula Travel Demand Model" for predicting future VMT. Table 9 is a summary of the 2008 VOC and NO_X motor vehicle emissions budgets for the three counties in Delaware.

TABLE 9—MOTOR VEHICLE EMISSION BUDGETS FOR 2008

County	FIPS	2008 Emissions (tpd)	
		VOC	NO_X
Kent	10001	4.14	9.68
New Castle	10003	10.61	21.35
Sussex	10005	7.09	12.86
State Total	.....	21.84	43.89

On March 21, 2008, EPA posted the availability of these budgets for Delaware on EPA's conformity Web site for the purpose of soliciting public comments. The public comment period closed on April 21, 2008 and no comments were received. On December 19, 2008 (73 FR 77682), EPA published a notice of adequacy for the Delaware 2008 RFP MVEBs. In this notice, EPA found that Delaware's RFP MVEBs are adequate for transportation conformity purposes. As a result of EPA's finding, Delaware shall use the MVEBs from the June 13, 2007 RFP plan for future conformity determinations for the 8-hour standard.

IV. What Are EPA's Conclusions?

EPA is proposing approval of the Delaware's SIP revision to meet the RFP requirements of the CAA for the Delaware portion of the Philadelphia 1997 8-hour ozone moderate nonattainment area. EPA is also proposing approval of the RFP MVEBs, the 2002 base year emissions inventory, contingency measures, and RACM analysis associated with this revision. EPA is proposing approval of the SIP revision because it satisfies RFP, emissions inventory, RFP transportation conformity, contingency measures, and RACM requirements for the 1997 8-hour ozone nonattainment areas classified as moderate and demonstrates further progress in reducing ozone precursors.

V. What Are Statutory and Executive Order Reviews?

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

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under

Executive Order 12866 (58 FR 51735, October 4, 1993);

• Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

• Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

• Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

• Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule pertaining to Delaware's RFP Plan, 2002 base year emissions inventory, contingency measures, RACM analysis, and transportation conformity budgets, 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, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: January 6, 2010.

William C. Early,

Acting Regional Administrator, Region III.

[FR Doc. 2010–745 Filed 1–14–10; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 215, 234, 242, 244, and 252

RIN 0750–AG58

Defense Federal Acquisition Regulation Supplement; Business Systems—Definition and Administration (DFARS Case 2009–D038)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule with request for comments.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to improve the effectiveness of DoD oversight of contractor business systems.

DATES: Interested parties should submit comments in writing to the address shown below on or before March 16, 2010.

ADDRESSES: You may submit comments, identified by DFARS Case 2009–D038, using any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

E-mail: dfars@osd.mil. Include DFARS Case 2009–D038 in the subject line of the message.

Fax: 703–602–0350.

Mail: Defense Acquisition Regulations System, Attn: Mr. Mark Gomersall, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062.

Hand Delivery/Courier: Defense Acquisition Regulations System, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202–3402.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Gomersall, 703–602–0302.

SUPPLEMENTARY INFORMATION:

A. Background

Contractor business systems and internal controls are the first line of defense against waste, fraud, and abuse. Weak control systems increase the risk of unallowable and unreasonable costs on Government contracts. To improve the effectiveness of Defense Contract Management Agency (DCMA) and Defense Contract Audit Agency (DCAA) oversight of contractor business systems, DoD is considering a rule to clarify the definition and administration of contractor business systems as follows:

1. DoD is proposing to define contractor business systems as accounting systems, estimating systems, purchasing systems, earned value management systems (EVMS), material management and accounting systems (MMAS), and property management systems.

2. DoD is proposing to implement compliance enforcement mechanisms in the form of a business systems clause which includes payment withholding that allows administrative contracting officers to withhold a percentage of payments, under certain conditions, when a contractor's business system contains deficiencies. Under such circumstances, payments could be withheld on—

- Interim payments under—
  - Cost reimbursement contracts;
  - Incentive type contracts;
  - Time-and-materials contracts;
  - Labor-hour contracts;
- Progress payments; and
- Performance-based payments.

This is not a significant regulatory action and therefore was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

DoD has prepared an initial regulatory flexibility analysis consistent with 5 U.S.C. 603. A copy of the analysis may be obtained from the point of contact specified herein. The analysis is summarized as follows:

The objective of the rule is to establish a definition for contractor business systems and implement compliance mechanisms to improve DoD oversight of those contractor business systems. The requirements of the rule will apply to entities contractually required to maintain one or more of the defined contractor business systems.

At this time DoD is unable to estimate the number of small entities to which this rule will apply. Therefore, DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2009–D038) in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies because the

proposed rule contains information collection requirements. DoD invites comments on the following aspects of the proposed rule: (a) Whether the collection of information is necessary for the proper performance of the functions of DoD, including whether the information will have practical utility; (b) the accuracy of the estimate of the burden of the information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology. The following is a summary of the information collection requirement:

The business systems clause in this proposed rule contains a requirement for contractors to respond to initial and final determinations of deficiencies. The information that contractors will be required to submit to respond to deficiencies in four of the six business systems defined in this rule has been approved by the Office of Management and Budget (OMB) as follows:

(1) Accounting Systems—OMB Clearance 9000–0011;

(2) Estimating Systems—OMB Clearance 0704–0232;

(3) MMAS—OMB Clearance 0704–0250; and

(4) Purchasing Systems—OMB Clearance 0704–0253.

DoD is also proposing a new information collection requirement as follows:

Title: Defense Federal Acquisition Regulation Supplement (DFARS) Business Systems—Definition and Administration.

Type of Request: New request.

The information that contractors will be required to submit to respond to deficiencies in contractors' EVMS is estimated as follows:

Number of Respondents: 186.

Responses per Respondent: 48.

Annual Responses: 8,928.

Burden per Response: 40 hours.

Annual Burden Hours: 357,120 hours.

The information that contractors will be required to submit to respond to deficiencies in contractors' property management systems is estimated as follows:

Number of Respondents: 2,646.

Responses per Respondent: 1.

Annual Responses: 2,646.

Average Burden per Response: 1.2 hours.

Annual Burden Hours: 3,175 hours.

Needs and Uses: DoD needs the information required by the business systems clause in this proposed rule to mitigate the risk of unallowable and unreasonable costs on Government contracts when a contractor has one or more deficiencies in a business system.

Affected Public: Businesses or other for-profit institutions, and not-for-profit institutions.

Frequency: On occasion.

Written comments and recommendations on the proposed information collection should be sent to Ms. Jasmeet Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503, with a copy to the Defense Acquisition Regulations System, Attn: Mr. Mark Gomersall, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Comments can be received from 30 to 60 days after the date of this notice, but comments to OMB will be most useful if received by OMB within 30 days after the date of this notice.

To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Acquisition Regulations System, Attn: Mr. Mark Gomersall, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062.

List of Subjects in 48 CFR Parts 215, 234, 242, 244, and 252

Government procurement.

Amy G. Williams,

Editor, Defense Acquisition Regulations System.

Therefore, DoD proposes to amend 48 CFR parts 215, 234, 242, 244, and 252 as follows:

1. The authority citation for 48 CFR parts 215, 234, 242, 244, and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 215—CONTRACTING BY NEGOTIATION

2. Amend section 215.407–5–70 by:

a. Revising paragraphs (a)(4), (c)(3), and (d);

b. Removing paragraphs (e) and (f);

c. Redesignating paragraph (g) as paragraph (e);

d. Adding new paragraphs (f), (g), and (h) to read as follows:

215.407–5–70 Disclosure, maintenance, and review requirements.

(a) * * *

(4) *Deficiency* means failure to maintain an element of an acceptable estimating system.

* * * * *

(c) * * *

(3) The auditor conducts estimating system reviews.

* * * * *

(d) *Characteristics of an acceptable estimating system*—(1) General. An acceptable system shall provide for the use of appropriate source data, utilize sound estimating techniques and good judgment, maintain a consistent approach, and adhere to established policies and procedures.

(2) *Evaluation.* In evaluating the acceptability of a contractor's estimating system, the ACO shall consider whether the contractor's estimating system complies with the requirements for an acceptable estimating system as contained in 252.215–7002(d).

* * * * *

(f) The ACO, in consultation with the auditor, shall—

(1) Approve the system; and

(2) Pursue correction of any system deficiencies.

(g) *Disposition of audit findings*—(1) *Reporting of audit findings.* The auditor shall document findings and recommendations in a report to the ACO.

(2) *Notification of initial determination.* The ACO shall—

(i) Provide a notification of any system deficiencies to the contractor, evaluate contractor responses, and make determinations to disapprove the system in accordance with the clause at 252.215–7002, Cost Estimating System Requirements;

(ii) Withhold payments in accordance with 252.242–7XXX, Business Systems, if applicable; and

(iii) Follow the procedures at 252.215–7002, Cost Estimating System Requirements and PGI 215.407–5–70(g) for disposition of estimating system deficiencies.

(h) The ACO shall approve the estimating system when the ACO determines that the contractor has substantially corrected the system deficiencies. The ACO shall notify the contractor, auditor, payment office, appropriate action officers responsible for reporting past performance at the requiring activities, and affected contracting and contract administration activities of the system approval and the ACO's decision, as appropriate, to reduce or discontinue the withholding of payments in accordance with 252.242–7XXX, Business Systems.

PART 234—MAJOR SYSTEM ACQUISITION

2. Amend section 234.201 by adding paragraphs (5), (6), and (7) to read as follows:

234.201 Policy.

* * * * *

(5) The cognizant ACO shall—

(i) Determine whether the contractor is compliant with the contractual EVMS requirements; and

(ii) Pursue correction of any noncompliance with the contractual EVMS requirements.

(6) *Disposition of system deficiencies*—(i) *Reporting of system deficiencies.* The cognizant functional specialist or auditor shall document findings and recommendations in a report to the ACO.

(ii) *Notification of initial determination.* The ACO shall—

(A) Provide a notification of system deficiencies to the contractor, evaluate contractor responses, and make determinations of noncompliance in accordance with the clause at 252.234–7002, Earned Value Management System;

(B) Withhold payments in accordance with 252.242–7XXX, Business Systems, if applicable; and

(C) Follow the procedures at 252.234–7002(h), Earned Value Management System, and PGI 234.201 for disposition of EVMS deficiencies.

(7) *Withdrawal of finding of system noncompliance.* The ACO shall withdraw the finding of system noncompliance when the ACO determines that the contractor has substantially corrected the system deficiencies. The ACO shall notify the contractor, auditor, payment office, and affected contracting and contract administration activities of the system approval and the ACO's decision, as appropriate, to reduce or discontinue the withholding of payments in accordance with 252.242–7XXX, Business Systems.

PART 242—CONTRACT ADMINISTRATION AND AUDIT SERVICES

3. Add subpart 242.70 to read as follows:

Subpart 242.70—Business Systems

242.70X1 Business system deficiencies.

(a) *Definitions.* "Acceptable business systems" and "Business systems" are defined in the clause at 252.242–7XXX, Business Systems.

(b) *Reporting of deficiencies.* The auditor or other cognizant functional specialist shall document deficiencies in a report to the ACO. The report shall describe the deficiencies in sufficient detail to allow the contracting officer to understand what the contractor would need to correct to comply with the applicable standard or system requirement, and the potential magnitude of the risk to the Government posed by the deficiency. Follow the procedures at PGI 242.70X1(b) for reporting of deficiencies.

(1) *Initial determination of deficiencies.* If the ACO makes a determination that there is a system deficiency, the ACO shall provide an initial determination of deficiencies and a copy of the report to the contractor and require the contractor to submit a written response in accordance with the clause at 252.242–7XXX, Business Systems.

(2) *Evaluation of contractor's response.* The ACO, in consultation with the auditor or cognizant functional specialist, shall evaluate the contractor's response and make a final determination.

(3) *Notification of ACO final determination.* The ACO shall notify the contractor in writing of the ACO's final determination with copies provided, as applicable, to the auditor; other cognizant functional specialists; and affected contracting activities and contract administration offices. The ACO shall take one of the following actions—

(i) Withdraw the initial determination of deficiencies. The ACO shall withdraw the initial notification if the contractor has corrected all deficiencies or the ACO agrees with the contractor's written response disagreeing with the initial determination of deficiencies; or

(ii) The ACO shall notify the contractor of the ACO's decision to implement payment withholding in accordance with the clause at 252.242–7XXX, Business Systems. The notice shall—

(A) Identify any deficiencies requiring correction;

(B) Inform the contractor that—

(*1*) The contractor must correct the deficiencies;

(*2*) The contractor must submit an acceptable corrective action plan within 45 days if the deficiencies have not been corrected within that 45 day timeframe;

(*3*) Payments shall be withheld in accordance with 252.242–7XXX, Business Systems, until the ACO determines that all deficiencies have been corrected; and

(*4*) The ACO reserves the right to take other actions within the terms and conditions of the contract.

(c) *Monitoring contractor's corrective action.* The Government shall monitor the contractor's progress in correcting the deficiencies and shall notify the contractor of the decision to decrease or increase the amount of payment withholding in accordance with 252.242–7XXX, Business Systems.

(d) *Correction of system deficiencies.*

(1) If the contractor notifies the ACO that the contractor has corrected the system deficiencies, the ACO shall request the auditor or other cognizant functional specialist to review the correction to determine if the deficiencies have been resolved.

(2) The ACO shall determine if the contractor has corrected the deficiencies.

(3) If the ACO determines the contractor has corrected all deficiencies, the ACO shall discontinue withholding payments.

(e) *System review matrix.* Refer to the matrix at PGI 242.70X1(e) to cross-reference DCAA internal control reviews and other business system audits to the list of "business systems" defined at 252.242–7XXX, Business Systems.

242.70X2 Contract clause.

Use the clause at 252.242–XXXX, Business Systems, in solicitations and contracts when the solicitation or contract includes any of the following clauses:

(a) 52.244–2, Subcontracts.

(b) 52.245–1, Government Property.

(c) 252.215–7002, Cost Estimating System Requirements.

(d) 252.234–7002, Earned Value Management System.

(e) 252.242–7004, Material Management and Accounting System.

(f) 252.242–7YYY, Accounting System Administration.

4. Amend section 242.7203 by:

a. Removing paragraph (c);

b. Redesignating paragraph (d) as paragraph (c); and c. Revising the newly designated paragraph (c) to read as follows:

242.7203 Review procedures.

* * * * *

(c) *System deficiencies*—(1) *Report of MMAS review findings.* The auditor shall document the MMAS review findings and recommendations in the MMAS report to the ACO. If there are any MMAS deficiencies, the report shall provide an estimate of the adverse impact on the Government resulting from those deficiencies.

(2) *Notification of initial determination.* The ACO shall—

(i) Provide a notification of system deficiencies to the contractor, evaluate contractor responses, and make determinations to disapprove the system in accordance with the clause at 252.242–7004, Material Management and Accounting System;

(ii) Withhold payments in accordance with 252.242–7XXX, Business Systems, if applicable; and

(iii) Follow the procedures at 252.242–7004(d), Material Management and Accounting System, and PGI 242.7203 for disposition of MMAS deficiencies.

(3) *Withdrawal of MMAS disapproval.* The ACO shall approve the MMAS when the ACO determines that the contractor has substantially corrected the system deficiencies. The ACO shall notify the contractor, auditor, payment office, and affected contracting and contract administration activities of the system approval and the ACO's decision, as appropriate, to reduce or discontinue the withholding of payments in accordance with 252.242–7XXX, Business Systems.

5. Revise the heading of subpart 242.75 to read as follows:

Subpart 242.75—Contractor Accounting Systems

6. Revise section 242.7501 to read as follows:

242.7501 Policy.

(a) Contractors receiving cost-reimbursement, incentive type, time-and-materials, or labor-hour contracts, or contracts which provide for progress payments based on costs or on a percentage or stage of completion, shall maintain an acceptable accounting system as defined in the clause at 252.242–7YYY, Accounting System Administration.

(b) The ACO is responsible for approving a contractor's accounting system.

7. Revise section 242.7502 to read as follows:

242.7502 Procedures.

(a) *Definitions.* "Acceptable accounting system," and "accounting system" are defined in the clause at 252.242–7YYY, Accounting System Administration.

(b) The ACO shall determine whether the accounting system contains deficiencies that need to be corrected in accordance with the clause 252.242–7YYY, Accounting System Administration.

(c) *Disposition of audit findings*—(1) *Reporting of audit findings.* The auditor shall document findings and recommendations in a report to the ACO. The report shall describe the deficiencies in sufficient detail to allow the contracting officer to understand what the contractor would need to correct to comply with the applicable standard or system requirement, and the potential magnitude of the risk to the Government posed by the deficiency. Follow the procedures at PGI 242.70X1(b) for reporting of deficiencies.

(2) *Notification of initial determination.* The ACO shall—

(i) Provide a notification of system deficiencies to the contractor, evaluate contractor responses, and make determinations to disapprove the system in accordance with the clause at 252.242–XXXX, Accounting System Administration;

(ii) Withhold payments in accordance with 252.242–7XXX, Business Systems, if applicable; and

(iii) Follow the procedures at 252.242–7XXX(e), Accounting System Administration, and PGI 242.7502(c)(2) for disposition of accounting system deficiencies.

(d) *Withdrawal of accounting system disapproval.* The ACO shall approve the accounting system when the ACO determines that the contractor has substantially corrected the system deficiencies. The ACO shall notify the contractor, auditor, payment office, and affected contracting and contract administration activities of the system approval and the ACO's decision, as appropriate, to reduce or discontinue the withholding of payments in accordance with 252.242–7XXX, Business Systems.

8. Add section 242.7503 to read as follows:

242.7503 Contract clause.

Use the clause at 252.242–7YYY, Accounting System Administration, in solicitations and contracts when contemplating—

(a) A cost-reimbursement, incentive type, time-and-materials, or labor-hour contract;

(b) A fixed-price contract with progress payments made on the basis of costs incurred by the contractor or on a percentage or stage of completion;

(c) A construction contract that includes the clause 52.232–27, Prompt Payment for Construction Contracts.

PART 244—SUBCONTRACTING POLICIES AND PROCEDURES

9. Revise section 244.305–70 to read as follows:

244.305–70 Granting, withholding, or withdrawing approval.

Use this subsection instead of FAR 44.305–2(c) and 44.305–3(b).

(a) The ACO, in consultation with the purchasing system analyst (PSA) or auditor, shall—

(1) Grant, withhold, or withdraw system approval; and

(2) Pursue correction of any system deficiencies.

(b) *Disposition of system deficiencies*—(1) *Reporting of deficiencies.* The PSA or auditor shall document findings and recommendations in a report to the ACO.

(2) *Notification of initial determination.* The ACO shall—

(i) Provide a notification of system deficiencies to the contractor, evaluate contractor responses, and make determinations to disapprove the system in accordance with the clause at 252.242–XXXX, Purchasing System Administration, and follow the procedures at PGI 244.305–70; and

(ii) Withhold payments in accordance with 252.242–7XXX, Business Systems, if applicable.

(3) The ACO shall approve the purchasing system when the ACO determines that the contractor has substantially corrected the system deficiencies. The ACO shall notify the contractor, auditor, payment office, and affected contracting and contract administration activities of the system approval and the ACO's decision, as appropriate, to reduce or discontinue the withholding of payments in accordance with 252.242–7XXX, Business Systems.

10. Add section 244.305–7X to read as follows:

244.305–7X Contract clause.

Use the clause at 252.244–7XXX, Contractor Purchasing System-Administration, in solicitations and contracts containing the clause at FAR 52.244–2, Subcontracts.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

11. Amend section 252.215–7002 by:

a. Revising the clause date;

b. Revising the definition of "acceptable estimating system" in paragraph (a);

c. Adding new paragraph (d)(4);

d. Revising paragraph (e); and

e. Adding new paragraph (f) to read as follows:

252.215–7002 Cost estimating system requirements.

* * * * *

Cost Estimating System Requirements (Date)

(a) *Definitions.*

Acceptable estimating system means an estimating system that complies with, but is not limited to, the system requirements in paragraph (d) of this clause, and provides for a system that—

(1) Is maintained, reliable, and consistently applied;

(2) Produces verifiable, supportable, and documented cost estimates that are an acceptable basis for negotiation of fair and reasonable prices;

(3) Is consistent with and integrated with the Contractor's related management systems; and

(4) Is subject to applicable financial control systems.

* * * * *

(d) * * *

(4) The Contractor's estimating system shall provide for the use of appropriate source data, utilize sound estimating techniques and good judgment, maintain a consistent approach, and adhere to established policies and procedures. An acceptable estimating system shall accomplish, but not be limited to, the following functions—

(i) Establish clear responsibility for preparation, review, and approval of cost estimates;

(ii) Provide a written description of the organization and duties of the personnel responsible for preparing, reviewing, and approving cost estimates;

(iii) Assure that relevant personnel have sufficient training, experience, and guidance to perform estimating tasks in accordance with the Contractor's established procedures;

(iv) Identify the sources of data and the estimating methods and rationale used in developing cost estimates;

(v) Provide for appropriate supervision throughout the estimating process;

(vi) Provide for consistent application of estimating techniques;

(vii) Provide for detection and timely correction of errors;

(viii) Protect against cost duplication and omissions;

(ix) Provide for the use of historical experience, including historical vendor pricing information, where appropriate;

(x) Require use of appropriate analytical methods;

(xi) Integrate information available from other management systems, where appropriate;

(xii) Require management review including verification that the company's estimating policies, procedures, and practices comply with this regulation;

(xiii) Provide for internal review of and accountability for the acceptability of the estimating system, including the comparison of projected results to actual results and an analysis of any differences;

(xiv) Provide procedures to update cost estimates in a timely manner throughout the negotiation process; and

(xv) Address responsibility for review and analysis of the reasonableness of subcontract prices.

(e) *System deficiencies.*

(1) The ACO will provide an initial notification to the Contractor of system deficiencies. The initial notification will describe the deficiency in sufficient detail to allow the Contractor to understand what actions are necessary to correct the deficiencies.

(2) The Contractor shall respond within 30 days to a written initial notification from the ACO that identifies deficiencies in the Contractor's estimating system. If the Contractor disagrees with the initial notification, the Contractor shall state in writing its rationale for disagreeing.

(3) The ACO will evaluate the Contractor's response and notify the Contractor of the determination concerning remaining deficiencies, the adequacy of any proposed or completed corrective action, and system disapproval, if applicable.

(f) *Withholding payments.* If the ACO determines the Contractor's estimating system contains one or more deficiencies, and the contract includes the clause at 252.242–7XXX, Business Systems, the ACO will withhold payments in accordance with that clause.

(End of clause)

12. Amend section 252.234–7002 by:

a. Revising the clause date;

b. Redesignating existing paragraph (h) as paragraph (j);

c. Adding new paragraphs (h) and (i) to read as follows:

252.234–7002 Earned Value Management System.

* * * * *

Earned Value Management System (Date)

* * * * *

(h) *System deficiencies.* (1) The ACO will provide an initial notification to the Contractor of system deficiencies. The initial notification will describe the deficiency in sufficient detail to allow the Contractor to understand what actions are necessary to correct the deficiencies.

(2) The Contractor shall respond within 30 days to a written initial notification from the ACO that identifies deficiencies in the Contractor's EVMS. If the Contractor disagrees with the initial notification, the Contractor shall state in writing its rationale for disagreeing.

(3) The ACO will evaluate the Contractor's response and notify the Contractor of the determination concerning remaining deficiencies, the adequacy of any proposed or completed corrective action, and any portions of the system that are noncompliant with ANSI\EIA–748.

(i) *Withholding payments.* If the ACO determines the Contractor's EVMS contains one or more deficiencies, and the contract includes the clause at 252.242–7XXX, Business Systems, the ACO will withhold payments in accordance with that clause.

* * * * *

(End of clause)

13. Amend section 252.242–7004 by:

a. Revising the clause date;

b. Revising paragraph (d);

c. Redesignating existing paragraph (e) as paragraph (f); and

d. Adding new paragraph (e) to read as follows:

252.242–7004 Material management and accounting system.

* * * * *

Material Management and Accounting System (Date)

* * * * *

(d) *System deficiencies.* (1) The ACO will provide an initial notification to the Contractor of system deficiencies. The initial notification will describe the deficiency in sufficient detail to allow the Contractor to understand what actions are necessary to correct the deficiencies.

(2) The Contractor shall respond within 30 days to a written initial notification from the ACO that identifies deficiencies in the Contractor's accounting system. If the Contractor disagrees with the initial notification, the Contractor shall state in writing its rationale for disagreeing.

(3) The ACO will evaluate the Contractor's response and notify the Contractor of the determination concerning remaining deficiencies, the adequacy of any proposed or completed corrective action, and system disapproval if applicable.

(e) *Withholding payments.* If the ACO determines the Contractor's MMAS contains one or more deficiencies, and this contract includes the clause at 252.242–7XXX, Business Systems, the ACO will withhold payments in accordance with that clause.

* * * * *

14. Add section 252.242–7XXX to read as follows:

252.242–7XXX Business systems.

As prescribed in 242.70X2, use the following clause:

Business Systems (Date)

(a) *Definitions.* As used in this clause—

Acceptable business systems means business systems that comply with the terms and conditions of this contract.

Business systems means—

(1) Accounting system, if this contract includes the clause at 252.242–7YYY, Accounting System Administration;

(2) Earned value management system, if this contract includes the clause at 252.234–7002, Earned Value Management System;

(3) Estimating system, if this contract includes the clause at 252.215–7002, Cost Estimating System Requirements;

(4) Material management and accounting system, if this contract includes the clause at 252.242–7004, Material Management and Accounting System;

(5) Property management system, if this contract includes the clause at 52.245–1, Government Property; and

(6) Purchasing system, if this contract includes the clause at 52.244–2, Subcontracts.

(b) *General.* The Contractor shall establish and maintain acceptable business systems in accordance with the terms and conditions of this contract.

(c) *System deficiencies.* (1) The Contractor shall respond in writing within 30 days to an initial determination of deficiencies from the ACO that identifies deficiencies in any of the Contractor's business system.

(2) The ACO will evaluate the Contractor's response and notify the Contractor in writing of the final determination as to whether the business system contains deficiencies. If the ACO determines that the Contractor's business system contains deficiencies, the final determination will include a notice of a decision to withhold payments.

(d) *Withholding payments.* (1) If the Contractor receives a final determination with a notice of the ACO's decision to withhold payments for deficiencies in a business system required under this contract, the ACO will immediately withhold ten percent of each of the Contractor's payments under this contract. The Contractor shall, within 45 days of receipt of the notice, either correct the deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies.

(2) If the Contractor submits an acceptable corrective action plan within 45 days of receipt of a notice of the ACO's intent to withhold, but has not completely corrected the identified deficiencies, the ACO will reduce the amount withheld to an amount equal to five percent of each payment until the ACO determines that the Contractor has corrected the deficiencies in the business system. However, if at any time the ACO determines that the Contractor fails to follow the accepted corrective action, the ACO will increase the amount of payment withheld to ten percent of each payment under this contract until the ACO determines that the Contractor has completely corrected the deficiencies in the business system.

(3) If the ACO is withholding payments for deficiencies in more than one business system, the cumulative percentage of payments withheld shall not exceed fifty percent on this contract.

(4) Notwithstanding any other rights or remedies of the Government under this contract, including paragraphs (d)(1) through (d)(3) of this clause, if the ACO determines that there are one or more system deficiencies that are highly likely to lead to improper contract payments being made, or represent an unacceptable risk of loss to the Government, then the ACO will withhold up to one-hundred percent of payments until the ACO determines that the Contractor has corrected the deficiencies.

(5) For the purpose of this clause, payment means any of the following payments authorized under this contract:

(i) Interim payments under—

(A) Cost reimbursement contracts;

(B) Incentive type contracts;

(C) Time-and-materials contracts;

(D) Labor-hour contracts.

(ii) Progress payments.

(iii) Performance-based payments.

(6) The withholding of any amount or subsequent payment to the Contractor shall not be construed as a waiver of any rights or remedies the Government has under this contract.

(7) Notwithstanding the provisions of any clause in this contract providing for interim, partial, or other payment on any basis, the ACO may withhold payment in accordance with the provisions of this clause.

(8) The payment withholding authorized in this clause is not subject to the interest-penalty provisions of the Prompt Payment Act.

(e) *Correction of deficiencies.* (1) The Contractor shall notify the ACO in writing when the Contractor has corrected the business system's deficiencies.

(2) Once the Contractor has notified the ACO that deficiencies have been corrected, the ACO will take one of the following actions:

(i) If the ACO determines the Contractor has corrected all deficiencies in a business system, the ACO will discontinue the payment withholding under this contract associated with that business system and release any monies previously withheld that are not also being withheld due to deficiencies on other business systems under this contract. Any payment withholding in effect on other business systems under this contract will remain in effect until the deficiencies for those business systems are corrected.

(ii) If the ACO determines the Contractor has not corrected all deficiencies, the ACO will continue the withholding payments in accordance with paragraph (d) of this clause and not release any monies previously withheld.

(End of clause)

15. Add section 252.242–7YYY to read as follows:

252.242–7YYY Accounting system administration.

As prescribed in 242.7503, use the following clause:

Accounting System Administration (Date)

(a) *Definitions.* As used in this clause—

(1) *Acceptable accounting system* means a system that complies with the requirements under paragraph (d) of this clause to provide reasonable assurance that—

(i) Applicable laws and regulations are complied with;

(ii) The accounting system and cost data are reliable;

(iii) Risk of misallocations and mischarges are minimized; and

(iv) Contract allocations and charges are consistent with invoice procedures.

(2) *Accounting system* means the Contractor's system or systems for accounting methods, procedures, and controls established to gather, record, classify, analyze, summarize, interpret, and present accurate and timely financial data for reporting data in compliance with applicable laws, regulations, and management decisions.

(3) *Deficiency* means a failure to maintain an element of an acceptable accounting system.

(b) *General.* The Contractor shall establish and maintain an acceptable accounting system. Failure to maintain an acceptable accounting system, as defined in this clause, may result in disapproval of the system by the ACO and/or withholding of payments.

(c) *System requirements.* The Contractor's accounting system shall be in compliance with applicable laws and ensure the proper recording, accumulating, and billing of costs on Government contracts, including but not limited to providing, as applicable—

(1) A basic structure that defines the form and nature of the organization as well as the management functions and reporting relationships;

(2) Proper segregation of direct costs from indirect costs;

(3) Identification and accumulation of direct costs by contract;

(4) A logical and consistent method for the accumulation and allocation of indirect costs to intermediate and final cost objectives;

(5) Accumulation of costs under general ledger control;

(6) Reconciliation of subsidiary cost ledgers and cost objectives to general ledger;

(7) Approval and documentation of adjusting entries;

(8) Periodic monitoring of the system, as appropriate;

(9) A timekeeping system that identifies employees' labor by intermediate or final cost objectives;

(10) A labor distribution system that charges direct and indirect labor to the appropriate cost objectives;

(11) Interim (at least monthly) determination of costs charged to a contract through routine posting of books of account;

(12) Exclusion from costs charged to Government contracts of amounts which are not allowable in terms of FAR Part 31, Contract Cost Principles and Procedures, and other contract provisions;

(13) Identification of costs by contract line item and by units (as if each unit or line item were a separate contract) if required by the contract;

(14) Segregation of preproduction costs from production costs;

(15) Cost accounting information as required:

(i) By contract clauses concerning limitation of cost (FAR 52.232–20) or limitation on payments (FAR 52.216–16); and

(ii) To readily calculate indirect cost rates from the books of accounts;

(16) Billings that can be reconciled to the cost accounts for both current and cumulative amounts claimed and comply with contract terms; and

(17) Adequate, reliable data for use in pricing follow-on acquisitions.

(d) *System deficiencies.* (1) The ACO will provide an initial notification to the Contractor of system deficiencies. The initial notification will describe the deficiency in sufficient detail to allow the Contractor to understand what actions are necessary to correct the deficiencies.

(2) The Contractor shall respond within 30 days to a written initial notification from the ACO that identifies deficiencies in the Contractor's accounting system. If the Contractor disagrees with the initial notification, the Contractor shall state in writing its rationale for disagreeing.

(3) The ACO will evaluate the Contractor's response and notify the Contractor of the determination concerning remaining deficiencies, the adequacy of any proposed or completed corrective action, and system disapproval if applicable.

(e) *Withholding payments.* If the ACO determines the Contractor's accounting system contains one or more deficiencies, and this contract includes the clause at 252.242–7XXX, Business Systems, the ACO will withhold payments in accordance with that clause.

(End of clause)

16. Add section 252.244–7XXX to read as follows:

252.244–7XXX Contractor purchasing system administration.

As prescribed in 244.305–7X, insert the following clause:

Contractor Purchasing System Administration (Date)

(a) *Definitions.* As used in this clause—

Deficiency means a failure to maintain any element of an acceptable purchasing system.

Purchasing system means the Contractor's system or systems for purchasing and subcontracting including make or buy decisions, the selection of vendors, analysis of quoted prices, negotiation of prices with vendors, placing and administering of orders, and expediting delivery of materials. Purchasing system includes, but is not limited to—

(1) Internal audits or management reviews, training, and policies and procedures for the purchasing department to ensure the integrity of the purchasing system;

(2) Policies and procedures to assure purchase orders and subcontracts contain all flow down clauses, including terms and conditions required by the prime contract and any clauses required to carry out the requirements of the prime contract;

(3) An organizational and administrative structure that ensures effective and efficient procurement of required quality materials and parts at the most economical cost from responsible and reliable sources;

(4) Selection processes to ensure the most responsive and responsible sources for furnishing required quality parts and materials and to promote competitive sourcing among dependable suppliers so that purchases are reasonably priced and from sources that meet contractor quality requirements;

(5) Performance of price or cost analysis on purchasing actions; and

(6) Procedures to ensure that proper types of subcontracts are selected and that there are controls over subcontracting, including oversight and surveillance of subcontracted effort.

(b) *General.* The Contractor shall establish and maintain an acceptable purchasing system. Failure to maintain an acceptable purchasing system, as defined in this clause, may result in disapproval of the system by the ACO and/or withholding of payments.

(c) *System requirements.* (1) Have an adequate system description including policies, procedures, and operating instructions that comply with the FAR and DFARS.

(2) Ensure that all applicable purchase orders and subcontracts contain all flow down clauses, including terms and conditions and any other clauses needed to carry out the requirements of the prime contract.

(3) Maintain an organization plan that establishes clear lines of authority and responsibility.

(4) Purchase orders are based on authorized requisitions and include complete history files.

(5) Establish and maintain adequate documentation to provide a complete and accurate history of purchase transactions to support vendors selected and prices paid.

(6) Apply a consistent make or buy policy that is in the best interest of the Government.

(7) Use competitive sourcing to the maximum extent practicable and ensure debarred or suspended contractors are properly excluded from contract award.

(8) Evaluate price, quality, delivery, technical capabilities, and financial capabilities of competing vendors.

(9) Require management level justification and cost/price analysis as applicable for any sole or single source award.

(10) Perform appropriate cost or price analysis and technical evaluation for each subcontractor and supplier proposal or quote.

(11) Document negotiations in accordance with FAR 15.406–3.

(12) Seek, take, and document appropriate purchase discounts, including cash discounts, trade discounts, quantity discounts, rebates, freight allowances, and company-wide volume discounts.

(13) Ensure proper type of contract selection and prohibit issuance of cost-plus-a-percentage-of-cost subcontracts.

(14) Maintain subcontract surveillance to ensure timely delivery of an acceptable product and procedures to notify the Government of potential subcontract problems that may impact delivery, quantity, or price.

(15) Document and justify reasons for subcontract changes that affect cost or price.

(16) Notify the Government of the award of an auditable subcontract and perform adequate audits of those subcontracts.

(17) Enforce adequate policies on conflict of interest, gifts, and gratuities, including the requirements of the Anti-Kickback Act.

(d) *System deficiencies.* (1) The ACO will provide an initial notification to the Contractor of system deficiencies. The initial notification will describe the deficiency in sufficient detail to allow the contractor to understand what actions are necessary to correct the deficiencies.

(2) The Contractor shall respond within 30 days to a written initial notification from the ACO that identifies deficiencies in the Contractor's purchasing system. If the Contractor disagrees with the initial notification, the Contractor shall state in writing its rationale for disagreeing.

(3) The ACO will evaluate the Contractor's response and notify the Contractor of the determination concerning remaining deficiencies, the adequacy of any proposed or completed corrective action, and system disapproval, if applicable.

(e) *Withholding payments.* If the ACO determines the Contractor's purchasing system contains one or more deficiencies, and the contract includes the clause at 252.242–7XXX, Business Systems, the ACO will withhold payments in accordance with that clause.

(End of clause)

[FR Doc. 2010–392 Filed 1–14–10; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

Department of the Army

48 CFR Parts 5132, 5136, and 5152

RIN 0710–AA69

Continuing Contract for Civil Works Project Managed by the United States Army Corps of Engineers Clauses

AGENCY: U.S. Army Corps of Engineers, Department of the Army, DoD.

ACTION: Proposed rule; request for comments.

SUMMARY: The U.S. Army Corps of Engineers (USACE) is proposing an interim Continuing Contracts clause for use on specifically authorized Civil Works projects only. This proposal is in response to a recurring statutory provision that requires a change to the clause USACE had previously used.

DATES: Comments must be received by March 16, 2010.

ADDRESSES: You may submit comments, identified by docket number COE–2009–0065, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

E-mail: contract.policy@usace.army.mil. Include the docket number, COE–2009–0065, in the subject line of the message.

Mail: U.S. Army Corps of Engineers, *Attn:* CECT–P (Robin A. Baldwin), 441 G Street, NW., Washington, DC 20314–1000.

Hand Delivery/Courier: Due to security requirements, we cannot receive comments by hand delivery or courier.

Instructions: Direct your comments to docket number COE–2009–0065. All comments received will be included in the public docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the commenter indicates that the comments includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through regulations.gov or e-mail. The regulations.gov Web site is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail directly to the U.S. Army Corps of Engineers without going though *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, we recommend that you include your name and other contract information in the body of your comment and with any disk or CD–ROM you submit. If we cannot read your comment because of technical difficulties and cannot contact you for clarification, we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* All documents in the docket are listed. Although listed in the index, some information is not publicly available, such as 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.

FOR FURTHER INFORMATION CONTACT: Ms. Robin A. Baldwin, Headquarters U.S. Army Corps of Engineers, Directorate of Contracting, Policy Division, 441 G Street, Washington, DC at 202–761–8645.

SUPPLEMENTARY INFORMATION:

A. Background

The new funding clause for civil works projects includes alternate language and is designed to give USACE officials options for funding contracts spanning more than one fiscal year after the enactment of statutory restrictions to the Corps' continuing contract authority. The new clause allows Congress more oversight over continuing contracts and better control over the rate at which funds are spent on projects. The end result is contracts that obligate funds in close alignment with prerogatives reflected in budget documents and appropriations acts. USACE has submitted a report to Congress on the overall effects, both positive and negative, of the statutory restriction.

Continuing contracts are authorized by Section 10 of the River and Harbor Act of 1922, 33 U.S.C. 621, which provides as follows: "Any public work on canals, rivers, and harbors adopted by Congress may be prosecuted by direct appropriations, by continuing contracts, or by both direct appropriations and continuing contracts." The use of continuing contracts permitted large civil work projects, spanning more than one fiscal year, to be accomplished in a comprehensive manner, rather than through a series of yearly work units. Implementation of continuing contract was covered under Engineers Federal Acquisition Regulation Supplement (EFARS) Subpart 32.7—Contract Funding, and through the inclusion of either clause EFARS 52.232–5001, Continuing Contracts, or EFARS 52.232–5002, Continuing Contracts (Alternate).

The Energy and Water Development Appropriations Act of 2006 (06 E&WDA), Public Law 109–103, included provisions that restricted the Corps' authority to reprogram funds and award continuing contracts in Fiscal Year 2006. Section 108 of the 06 E&WDA prohibited the Corps from awarding or modifying an existing continuing contract when doing so would commit an amount in excess of the amount appropriated for that project pursuant to the 06 E&WDA, plus any amounts available from carryover or reprogramming. In light of Section 108 of the 06 E&WDA, USACE changed its implementation of continuing contracts, as well as the clauses it uses to award new continuing contracts that are not fully funded. The restriction in Section 108 has been carried forward into all E&WDAAs, and USACE anticipates that Congress will continue to include that restriction in future Acts.

The existing continuing contract clause (EFARS 52.232–5001) permits the contractor to work beyond the amount reserved to the contract for a fiscal year. Doing so creates a legal liability to pay the contractor for such costs, even though—under the existing continuing contract clause—the Corps does not have to make the payments until the next fiscal year. Accordingly, because the clause permits contractors to commit the government in excess of the amount appropriated for that project plus available carryover and reprogramming, use of this clause runs a high risk of violating the new statutory restriction on continuing contracts.

In order to implement the USACE Civil Works program under the new continuing contract restrictions, USACE has drafted a new clause for inclusion in the AFARS. The basic clause, "5152.232–9000 Special Continuing Contract for Civil Works Project Managed by the United States Army Corps of Engineers," permits the Corps to award continuing contracts while only obligating the government's estimate of contractor earnings for the first fiscal year. This basic clause does not permit the contractor to work beyond the amount reserved, and it also expressly requires the contractor to stop working when funds are exhausted. The alternate language, if appropriate, would limit the government's liability for termination costs to the amount reserved on the contract. In contrast, under the basic clause, the government is responsible for all costs pursuant to the termination for convenience clause regardless of the amount reserved on the contract.

Alternatives to using the new clause include fully funding contracts at award; structuring the work into segments that could be accomplished through options, using multiple fully-funded contracts over multiple years, or using the clause at DFARS 252.232–7007 to incrementally fund a contract. Each of these alternatives is still a viable alternative and the contracting officer must choose which acquisition strategy best suits the requirement. That determination shall be based on an analysis of the possible contracting options with the intent that the Special Continuing Contract for Civil Works Project Managed by the United States Army Corps of Engineers clause be used as a least preferred method.

In light of the legal restrictions on continuing contracts, USACE had to change its implementation of existing continuing contracts, as well as the terms it uses to award new continuing contracts. USACE shall no longer permit the contractor to work beyond the amount reserved in the contract without first reprogramming sufficient funds to cover the contractor's earnings through the end of the fiscal year. The new clause should be used where the true Continuing Contract clause (EFARS 52.232–5001) might have been used in the past and alternative contract options are not viable.

B. Regulatory Flexibility Act

This proposed rule may have a significant economic impact upon a substantial number of small entities. The clause differs from the true continuing contract clause (EFARS 52.232–5001) in that they no longer permit the contractor to work beyond the amount reserved to the contract. This change may affect a contractor's ability to schedule work and equipment effectively. Pursuant to authority contained in Section 608(a) of the Act (5 U.S.C. 608(a)) a determination has been made that circumstances require delay in preparation of an initial Regulatory Flexibility Act analysis to bring the USACE continuing contract into compliance with existing statutory authority. Within approximately thirty

days an analysis will be prepared and forwarded to the Chief Counsel for Advocacy of the Small Business Administration. Comments from small entities concerning the affected AFARS Subpart 5152 will be considered in accordance with Section 610 of the Act. Such comments shall be submitted separately and cite the AFARS Proposed Rule on Continuing Contract for Civil Works Project in the correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed rule does not impose any new information collection burden that requires the approval of the Office of Management and Budget under 44 U.S.C. 3501, et seq.

List of Subjects in 48 CFR Parts 5132, 5136, and 5152

Government procurement.

Dated: January 7, 2010.

Approved By:

Robin A. Baldwin,

Chief, Contracting Policy Division.

For the reasons stated in the preamble, the Corps is proposing to amend 48 CFR Chapter 51 as set forth below:

1. Add part 5132 to read as follows:

PART 5132—CONTRACT FINANCING

Subpart 5132.7—Contract Funding

Sec.

Authority: 33 U.S.C. 621, *10 U.S.C. 2202,* DOD Directive 5000.35, FAR 1.301 and DOD FAR Supplement 201.3.

Subpart 5132.7—Contract Funding

5132.703–90 Civil Works Project Appropriations Act Restriction.

(a) The U.S. Army Corps of Engineers (USACE) is authorized by 33 U.S.C. 621 to prosecute its specifically authorized civil works projects on canals, rivers and harbors by direct appropriations or by continuing contract, or both. A continuing contract permits USACE to obligate the government to the entire contract amount at award and fund the contract incrementally until completion.

5132.705 Contract Clauses [Reserved].

5132.705–90 Clause for Limitation of the Government's Obligation for Civil Works Projects.

(a) The clause at 5152.232–9000, Special Continuing Contract for Civil Works Project Managed by the United States Army Corps of Engineers, may be used in solicitations and contracts for civil works water resource projects that have been specifically adopted by Congress in authorizing legislation and for which future fiscal year funding is provided in the budget. This clause shall be used for all civil works projects when funds are appropriated for the project from either the operation and maintenance (O&M) account in the Energy and Water Development Appropriations Act (E&WDAA) or the O&M portion of the Mississippi River and Tributaries account in the E&WDAA and sufficient funds are not available to complete the contract. The contracting officer must insert the sum being reserved in the clause and reserve this amount stated in subsection (a) of the clause at contract award and modify the contract each fiscal year to reflect the amount reserved. This clause is required through 30 September 2010 in accordance with Section 103 of the Energy and Water Development Appropriations Act, 2010, Public Law 111–85. If future appropriations acts continue in the same manner, the requirement will be extended as appropriate beyond fiscal year 2010.

(b) The Alternate language for clause 5152.232–9000 may be used in solicitations and contracts for civil works water resource projects that have been specifically adopted by Congress in authorizing legislation but for which future fiscal year funding is not provided in the budget or when use of the 5152.232–9000 clause could be used. The contracting officer must insert the sum being reserved in the clause and reserve this amount stated in subsection (a) of the clause at contract award and modify the contract each fiscal year to reflect the amount reserved. Section 103 of the Energy and Water Development Appropriations Act, 2010, Public Law 111–85. If future appropriations acts continue in the same manner, the requirement will be extended as appropriate beyond fiscal year 2010.

2. Add part 5136 to read as follows:

PART 5136—SPECIAL ASPECTS OF CONTRACTING FOR CONSTRUCTION

Subpart 5136.290—Civil Works Construction Contracts

Sec.

Authority: 33 U.S.C. 621, 10 U.S.C. 2202, DOD Directive 5000.35, FAR 1.301 and DOD FAR Supplement 201.3.

Subpart 5136.290—Civil Works Construction Contracts

5136.290–1 Policy.

The Secretary of the Army, acting through the Chief of Engineers, is authorized by 33 U.S.C. 621 to carry out projects for improvement of rivers and harbors (other than surveys, estimates, and gaugings) by contract or otherwise, in the manner most economical and advantageous to the United States. The U.S. Army Corps of Engineers (USACE) is the only contracting organization authorized to contract for civil works construction projects. *See* AFARS Part 5132.703–90.

5136.290–2 Definition.

As used in this subpart—

"Civil works" means authorized civil functions of the Department of the Army pertaining to rivers and harbors, flood control, shore protection and storm damage reduction, aquatic ecosystem restoration, and related purposes.

PART 5152—TEXTS AND PROVISIONS OF CLAUSES

3. The authority citation for part 5152 is revised to read as follows:

Authority: 10 U.S.C. 2202, 33 U.S.C. 621, DoD Directive 5000.35, FAR 1.301, DoD FAR Supplement 201.301, and DOD FAR Supplement 201.3.

4. Add 51.232–9000 to read as follows:

5152.232–9000 Special Continuing Contract for Civil Works Project Managed by the United States Army Corps of Engineers.

As prescribed in 5132.290–1 and 5132.705–90(a), use the following clause:

(a) Funds are not available at the inception of this contract to cover the entire contract price. The liability of the Government is limited by this clause notwithstanding any contrary provision of the "Payments to Contractor" clause or any other clause of this contract, except the Termination for Convenience clause. The sum of $_____ *[Each fiscal year of contract execution, Contracting Officer shall insert the specific dollar amount that is reserved for this contract and available for payment to the contractor during the current fiscal year. The Contracting Officer shall modify that amount to reflect any funds added to or subtracted from the contract during a current fiscal year.]* has been reserved for this contract and is available for payment to the Contractor during the current fiscal year. It is expected that Congress will make appropriations for future fiscal years from which additional funds,

together with funds provided by one or more non-federal project sponsors, will be reserved for this contract.

(b) Failure to make payments in excess of the amount currently reserved, or that may be reserved from time to time, shall not be considered a breach of contract and shall not entitle the Contractor to a price adjustment under the terms of this contract.

(c) The Government may at any time reserve additional funds for payments under the contract if there are funds available for such purpose. The Contracting Officer will promptly notify the Contractor of any additional funds reserved for the contract by issuing an administrative modification to the contract.

(d) If earnings will be such that funds reserved for the contract will be exhausted before the end of any fiscal year, the Contractor shall give written notice to the Contracting Officer of the estimated date of exhaustion and the amount of additional funds which will be needed to meet payments due or to become due under the contract during that fiscal year. This notice shall be given not less than 120 days prior to the estimated date of exhaustion. Unless informed in writing by the Contracting Officer that additional funds have been reserved for payments under the contract, the Contractor shall stop work upon the exhaustion of funds.

(e) No payments will be made after exhaustion of funds except to the extent that additional funds are reserved for the contract.

(f) Any suspension, delay, or interruption of work arising from exhaustion or anticipated exhaustion of funds shall not constitute a breach of this contract and shall not entitle the Contractor to any price adjustment under the "Suspension of Work" clause or in any other manner under this contract.

(g) An equitable adjustment in performance time shall be made for any increase in the time required for performance of any part of the work arising from exhaustion of funds or the reasonable anticipation of exhaustion of funds.

(h) If, upon the expiration of one-hundred (100) days after the beginning of the fiscal year following an exhaustion of funds, the Government has failed to reserve additional funds for this contract sufficient to cover the Government's estimate of funding required for the first quarter of that fiscal year, the Contractor, by written notice delivered to the Contracting Officer at any time before such additional funds are reserved, may elect to treat his right to proceed with the work as having been terminated. Such a termination shall be considered a termination for the convenience of the Government.

(i) If at any time it becomes apparent that the funds reserved for any fiscal year are in excess of the funds required to meet all payments due or to become due the Contractor because of work performed and to be performed under the contract during the fiscal year, the Government reserves the right, after notice to the Contractor, to reduce said reservation by the amount of such excess.

(j) The term "Reservation" means monies that have been set aside and made available for payments under this contract. Reservations of funds shall be made in writing via an administrative modification issued by the Contracting Officer.

Alternate I

If future funding for the specifically authorized civil works project for which use of the continuing contract is contemplated is not included in the following year's President's Budget, substitute the following paragraphs (a) and (h) for paragraphs (a) and (h) of the basic clause:

(a) Funds are not available at the inception of this contract to cover the entire contract price. The liability of the Government is limited by this clause notwithstanding any contrary provision of the "Payments to Contractor" clause or any other clause of this contract. The sum of $_____ *[Each fiscal year of contract execution, Contracting Officer shall insert the specific dollar amount that is reserved for this contract and available for payment to the contractor during the current fiscal year. The Contracting Officer shall modify that amount to reflect any funds added to or subtracted from the contract during a current fiscal year.]* has been reserved for this contract and is available for payment to the Contractor during the current fiscal year. It is expected that Congress will make appropriations for future fiscal years from which additional funds, together with funds provided by one or more non-federal project sponsors, will be reserved for this contract.

(h) If, upon the expiration of one-hundred (100) days after the beginning of the fiscal year following an exhaustion of funds, the Government has failed to reserve additional funds for this contract sufficient to cover the Government's estimate of funding required for the first quarter of that fiscal year, the Contractor, by written notice delivered to the Contracting Officer at any time before such additional funds are reserved, may elect to treat his right to proceed with the work as having been terminated. The Government will not be obligated in any event to reimburse the Contractor for any costs incurred after the exhaustion of funds regardless of anything to the contrary in the clause entitled "Termination for Convenience of the Government."

[FR Doc. 2010–379 Filed 1–14–10; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 234

[Docket No. FRA–2009–0032, Notice No. 4]

RIN 2130–AC20

State Highway-Rail Grade Crossing Action Plans

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of public hearing and extension of comment period.

SUMMARY: By notice of proposed rulemaking (NPRM) published on November 13, 2009 (74 FR 58589), FRA proposed a rule to require the ten States with the most highway-rail grade crossing collisions, on average, over the past three years, to develop State highway-rail grade crossing action plans. This document announces a public hearing to provide interested parties the opportunity to comment on the NPRM and announces a fourteen (14) day extension of the comment period, which closed December 14, 2009, to commence on the date of the public hearing. The extension provides interested parties the opportunity to comment on the NPRM and to respond to matters that arise at the public hearing related to the NPRM.

DATES: (1) *Public Hearing:* A public hearing will be held on the date and at the location listed below to provide interested parties the opportunity to comment on the proposed rule contained in the NPRM. A fourteen (14) day extension of the comment period will commence on the date of the hearing. The date of the public hearing is as follows: Monday, February 22, 2010, at 9:30 a.m. in Washington, DC.

(2) *Extension of Comment Period:* The comment period will reopen Monday, February 22, 2010 and written comments must be received by Monday, March 8, 2010. Comments received after that date will be considered to the

extent possible without incurring additional expenses or delays.

ADDRESSES: (1) *Public Hearing:* The public hearing will be held at the following location: *Washington, DC:* Washington Plaza Hotel, Ten Thomas Circle, Washington, DC 20005.

(2) *Extension of Comment Period:* Comments related to Docket No. FRA–2009–0032, may be submitted by any of the following methods:

- *Fax:* 1–202–493–2251;
- *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, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays; or
- Electronically through the Federal eRulemaking Portal, *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name, docket name, and docket number or Regulatory Identification Number (RIN) for this rulemaking. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* at any time or to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 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: Ron Ries, Office of Safety, FRA, 1200 New Jersey Ave. SE., RRS–23, Mail Stop 25, Washington, DC 20590 (Telephone 202–493–6299), or Zeb Schorr, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Ave., SE., Mail Stop 10, Washington, DC 20590 (Telephone 202–493–6072).

SUPPLEMENTARY INFORMATION: FRA has received written comments submitted by interested parties related to various parts of the NPRM and written requests for a hearing regarding the NPRM. FRA is holding a public hearing to permit the exchange of information and concerns regarding FRA's proposed rule. The public hearing is meant to allow interested parties to fully develop and articulate the issues and concerns they have with the NPRM so that these concerns can be fully addressed in any final rule that is developed. Interested parties are invited to present oral statements and proffer evidence at the hearing. The hearing will be informal and will be conducted by a representative designated by FRA in accordance with FRA's Rules of Practice (49 CFR 211.25). The hearing will be a non-adversarial proceeding; as such, there will be no cross-examination of persons presenting statements or proffering evidence. An FRA representative will make an opening statement outlining the scope of the hearing. After all initial statements have been completed, those persons wishing to make a brief rebuttal will be given the opportunity to do so in the same order in which the initial statements were made. Additional procedures, as necessary for the conduct of the hearing, will be announced at the hearing.

On February 22, 2010, the comment period for the NPRM will reopen for fourteen (14) days so that FRA can make the public hearing transcript available for review and comment by the general public, interested parties can provide additional comments and documents related to the NPRM, and interested parties can provide responses to matters that arise at the public hearing.

Public Participation Procedures

Any person wishing to participate in the public hearing should notify the FRA's Docket Clerk by mail, Michelle Silva, Office of Chief Counsel, FRA, 1200 New Jersey Ave. SE., Room W31–109, Washington, DC 20590, or e-mail (*Michelle.Silva@dot.gov*), or at the fax number 202–493–6068, at least five (5) working days prior to the date of the hearing. The notification should identify the party the person represents, and the particular subject(s) the person plans to address. The notification should also provide the Docket Clerk with the participant's mailing address and other contact information. FRA reserves the right to limit participation in the hearing by persons who fail to provide such notification.

Privacy Act

FRA wishes to inform all potential commenters that anyone is able to search the electronic form of all comments received into any agency docket 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 (65 FR 19477–78) or you may visit *http://www.regulations.gov/search/footer/privacyanduse.jsp.*

Issued in Washington, DC, on January 11, 2010.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development, Federal Railroad Administration.

[FR Doc. 2010–684 Filed 1–14–10; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 395

[Docket No. FMCSA–2004–19608]

RIN 2126–AB26

Hours of Service

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of public listening session.

SUMMARY: FMCSA announces that it will hold a public listening session (in addition to those identified in a Federal Register notice on January 5, 2010) to solicit comments and information on potential hours-of-service (HOS) regulations. Specifically, the Agency wants to know what factors, issues, and data it should be aware of as it prepares to issue a notice of proposed rulemaking (NPRM) on HOS requirements for property-carrying commercial motor vehicle (CMV) drivers. This session will be held in the Davenport, Iowa area. The listening session will allow interested persons to present comments, views, and relevant research on revisions FMCSA should consider in its forthcoming rulemaking. All comments will be transcribed and placed in the rulemaking docket for the FMCSA's consideration.

DATES: This listening session will be held on Thursday, January 28, 2010, in Davenport, Iowa. It will begin at 1 p.m. local time and end at 9 p.m., or earlier, if all participants wishing to express their views have done so.

ADDRESSES: The January 28 meeting will be held in Davenport, Iowa, at the Comfort Inn Hotel and Suites, 8300 Northwest Boulevard, Davenport, Iowa 52806 (563–324–8300).

You may submit comments bearing the Federal Docket Management System (FDMS) Docket ID FMCSA–2004–19608 using any of the following methods:

Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the

online instructions for submitting comments.

Mail: Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.

Hand Delivery or Courier: West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Fax: 1–202–493–2251.

Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *http://www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or to Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The online Federal document management system is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments online.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf.*

FOR FURTHER INFORMATION CONTACT: For special accommodations for this listening session, such as sign language interpretation, contact Mr. David Miller, Regulatory Development Division, (202) 366–5370 or at *FMCSAregs@dot.gov,* by January 20, 2010, to allow us to arrange for such services. There is no guarantee that interpreter services requested on short notice can be provided. For information concerning the hours-of-service rules, contact Mr. Tom Yager, Chief, Driver and Carrier Operations Division, (202) 366–4325, *mcpsd@dot.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On October 26, 2009, Public Citizen, et al. (Petitioners) and FMCSA entered into a settlement agreement under which the parties agreed to seek to hold Petitioners' petition for judicial review of the November 19, 2008 Final Rule on drivers' hours of service in abeyance pending the publication of an NPRM. The settlement agreement states that FMCSA will submit the draft NPRM to the Office of Management and Budget (OMB) within nine months, and publish a Final Rule within 21 months, of the date of the settlement agreement. The current rule will remain in effect during the rulemaking proceedings.

On January 5, 2010, FMCSA announced its plans to hold three public listening sessions concerning the HOS rulemaking (75 FR 285). FMCSA announces a fourth public listening session to solicit written and/or oral comments and information on potential revisions to the HOS rule. The Agency will provide further opportunity for public comment when the NPRM is published.

This listening session will be held within walking distance of the Flying J Travel Plaza, 8200 Northwest Boulevard near the intersection of Interstate Highway 80 at Exit 292, Davenport, Iowa 52806 (563–386–7710).

II. Meeting Participation

This listening session is open to the public. Speakers' remarks will be limited to 10 minutes each. The public may submit material to the FMCSA staff at each session for inclusion in the public docket, FMCSA–2004–19608.

III. Questions for Discussion During the Listening Sessions

In preparing their comments, meeting participants should consider the following questions about possible alternatives to the current HOS requirements. These scenarios are merely set forth for discussion; FMCSA will not necessarily include them in an NPRM but would request similar information and data in an NPRM. Answers to these questions should be based upon the experience of the participants and any data or information they can share with FMCSA.

A. Rest and On-Duty Time

1. Would mandatory short rest periods during the work day improve driver alertness in the operation of a CMV? How long should these rest periods be? At what point in the duty cycle or drive-time would short rest periods provide the greatest benefit? What are the unintended consequences if these short rest periods are mandatory? Should the on-duty period be extended to allow for mandatory rest periods?

2. If rest or other breaks from driving improve alertness, could a driver who chooses to take specified minimum breaks be given scheduling flexibility—the ability to borrow an hour from another driving day once a week, for example—if that flexibility would not increase safety risks or adversely impact driver health?

3. How many hours per day and per week would be safe and healthy for a truck driver to work?

4. Would an hours-of-service rule that allows drivers to drive an hour less when driving overnight improve driver alertness and improve safety? Are there any adverse consequences that could arise from the implementation of a separate night time hours-of-service regulation?

B. Restart to the 60- and 70-Hour Rule

1. Is a 34-consecutive-hour off-duty period long enough to provide restorative sleep regardless of the number of hours worked prior to the restart? Is the answer different for a driver working a night or irregular schedule?

2. What would be the impact of mandating two overnight off-duty periods, e.g., from midnight to 6 a.m., as a component of a restart period? Would such a rule present additional enforcement challenges?

3. How is the current restart provision being used by drivers? Do drivers restart their calculations after 34 consecutive hours or do drivers take longer periods of time for the restart?

C. Sleeper Berth Use

1. If sleeper-berth time were split into two periods, what is the minimum time in each period necessary to provide restorative sleep?

2. Could the 14-hour on-duty limitation be extended by the amount of some additional sleeper-berth time without detrimental effect on highway safety? What would be the appropriate length of such a limited sleeper-berth rest period?

D. Loading and Unloading Time

1. What effect has the fixed 14-hour driving "window" had on the time drivers spend waiting to load or unload? Have shippers and receivers changed their practices to reduce the amount of time drivers spend waiting to load or unload?

E. General

1. Are there aspects of the current rule that do not increase safety risks or adversely impact driver health and that should be preserved?

Issued on: January 13, 2010.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. 2010–826 Filed 1–13–10; 4:15 pm]

BILLING CODE 4910–EX–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 090225243–91127–01]

RIN 0648–AX67

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Amendment 31

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS issues this proposed rule to implement Amendment 31 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP) prepared by the Gulf of Mexico Fishery Management Council (Council). This proposed rule would implement restrictions applicable to the bottom longline component of the reef fish fishery in the exclusive economic zone (EEZ) of the eastern Gulf of Mexico (Gulf). The proposed restrictions would include a bottom longline endorsement requirement, a seasonal closed area, and a limitation on the number of hooks that could be possessed and fished. The intent of the proposed rule is to balance the continued operation of the bottom longline component of the reef fish fishery in the eastern Gulf while maintaining adequate protective measures for sea turtles.

DATES: Written comments must be received on or before March 1, 2010.

ADDRESSES: You may submit comments on the proposed rule, identified by "0648–AX67" by any of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal e-Rulemaking Portal: *http://www.regulations.gov*.
- Fax: 727–824–5308; Attention: Cynthia Meyer.
- Mail: Cynthia Meyer, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701–5505.

Instructions: No comments will be posted for public viewing until after the comment period has closed. All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

To submit comments through the Federal e-Rulemaking Portal: *http://www.regulations.gov*, enter "NOAA-NMFS–2008–0310" in the keyword search, then select "Send a Comment or Submission." NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Copies of Amendment 31, which include a draft environmental impact statement (DEIS), an initial regulatory flexibility analysis (IRFA), and a regulatory impact review may be obtained from the Gulf of Mexico Fishery Management Council, 2203 North Lois Avenue, Suite 1100, Tampa, FL 33607; telephone 813–348–1630; fax 813–348–1711; e-mail *gulfcouncil@gulfcouncil.org*; or may be downloaded from the Council's website at *http://www.gulfcouncil.org/*.

Written comments regarding the burden-hour estimate or other aspects of the collection-of-information requirement contained in this proposed rule may be submitted to Richard Malinowski, Southeast Regional Office, NMFS, and by e-mail to *David__Rostker@omb.eop.gov*, or by fax to 202–395–7285.

FOR FURTHER INFORMATION CONTACT: Cynthia Meyer, telephone: 727–824–5305.

SUPPLEMENTARY INFORMATION: The reef fish fishery of the Gulf of Mexico is managed under the FMP. The FMP was prepared by the Council and is implemented through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

Background

Sea turtles are incidentally taken, and some are killed, as a result of numerous activities, including fishery-related activities in the Gulf and along the Atlantic seaboard. Under the Endangered Species Act (ESA) and its implementing regulations, the taking of sea turtles is prohibited, with exceptions identified in 50 CFR 223.206(d), or according to the terms and conditions of a biological opinion issued under section 7 of the ESA, or according to an incidental take permit issued under section 10 of the ESA. All sea turtles that occur in U.S. waters are listed as either endangered or threatened under the ESA of 1973. The Kemp's ridley (*Lepidochelys kempii*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*) turtles are listed as endangered. The loggerhead (*Caretta caretta*) and green (*Chelonia mydas*) turtles are listed as threatened, except for breeding populations of green turtles in Florida and on the Pacific coast of Mexico, which are listed as endangered.

In September 2008, NMFS released a report analyzing sea turtle takes in the reef fish fishery as documented through an observer program. Subsequently updated in April 2009, the report indicated that the number of hardshell sea turtle takes by the bottom longline component of the Gulf reef fish fishery had exceeded the incidental take estimates specified in a 2005 Biological Opinion. Therefore, action was needed to provide protection for threatened loggerhead sea turtles in compliance with ESA.

To address this issue in the short-term while the Council developed a long-term management strategy, NMFS published an emergency rule effective May 18, 2009. The emergency rule prohibited longline fishing for reef fish in the eastern Gulf shoreward of a line approximating the 50–fathom depth contour, and prohibited all longline fishing in the eastern Gulf after the deep-water grouper and tilefish commercial quotas were filled.

On October 16, 2009, NMFS published a rule, under the authority of the ESA, to replace the emergency rule. The rule prohibits bottom longline fishing in the eastern Gulf shoreward of a line approximating the 35–fathom (64–m) contour with a restriction of 1,000 hooks per vessel with no more than 750 hooks rigged for fishing or fished at any given time. The intended effect of the rulemaking is to maintain protective measures for loggerhead sea turtles as well as to maintain a viable bottom longline fleet pending the

implementation of Amendment 31 or alternative long-term mitigation measures.

At the August 2009 meeting, the Council approved long-term measures in Amendment 31, and submitted the amendment for review by the Secretary of Commerce following final editing, along with the accompanying regulations deemed necessary and appropriate to implement Amendment 31. Dated October 13, 2009, the updated Biological Opinion determined that the fishing activities conducted under Amendment 31 and its implementing regulations are not likely to jeopardize the continued existence of sea turtles or smalltooth sawfish.

Management Measures

The proposed rule would modify regulations for the bottom longline component of the reef fish fishery by including a seasonal area closure, qualifying endorsement, and gear restrictions. Collectively, the actions contained in the proposed rule are anticipated to achieve a 48–percent to 67–percent reduction in effective bottom longline fishing effort and, therefore, hardshell sea turtle takes in the bottom longline component of the reef fish fishery.

The June through August seasonal area closure would prohibit the use of bottom longline gear to fish for reef fish shoreward of a line approximating the 35–fathom (64–m) boundary in the eastern Gulf. In the case of the 35–fathom (64–m) boundary intersecting a marine reserve, fishermen would also be required to adhere to the regulations for the reserve. During vessel transit through closed zones, no reef fish could be possessed unless bottom longline gear is appropriately stowed, meaning that a longline may be left on the drum if all gangions and hooks are disconnected and stowed below deck; hooks are not baited, and all buoys are disconnected from the gear, but may remain on deck.

The gear restriction would apply to longline vessels with Gulf reef fish permits with longline endorsements. The restriction would limit the number of hooks allowed per vessel. Each vessel would be allowed to possess 1,000 hooks total. However, only 750 hooks may be fished or rigged for fishing at any given time.

The qualifying endorsement to fish in the eastern Gulf would reduce the number of vessels operating in the bottom longline component of the reef fish fishery. The longline endorsement would be provided only to vessel permits with demonstrated average annual landings of 40,000 lb (18,144 kg) of reef fish harvested with fish traps or longline gear during 1999–2007. The transfer of the endorsement would be unrestricted between commercial Gulf reef fish permit holders.

To be eligible to receive a longline endorsement to fish in the eastern Gulf, a person would need to possess an active or renewable (within the one year grace period immediately following expiration) Gulf reef fish commercial vessel permit. The calculation of landings would be based on the average annual reef fish landings using fish traps or longline gear associated with each permit during the applicable landings period, 1999–2007. All landings associated with an active or renewable Gulf reef fish commercial vessel permit for the applicable landings period that were reported to NMFS by December 31, 2008, would be attributed to the current owner, as of the date of publication of the final rule. The associated landings also include landings reported by a person who held the permit prior to the current owner. Only legal landings reported in compliance with applicable state and Federal regulations would be used to identify initial endorsement holders. The NMFS would automatically mail initial endorsements to all eligible permit holders.

The appeals process included in this rule would provide a formalized process for resolving disputes regarding eligibility for a longline endorsement to fish in the eastern Gulf. Items subject to appeal would include the accuracy of the amount of reef fish landings using longline gear or fish traps, the correct assignment of landings to the permit owner, and the initial eligibility for an eastern Gulf reef fish bottom longline endorsement based on ownership of a qualifying reef fish permit.

Appeals would need to contain documentation supporting the basis for the appeal and must be submitted to the Regional Administrator (RA) postmarked no later than 90 days after the effective date of the final rule that would implement Amendment 31. Landings data for appeals would be based on NMFS' logbooks submitted to and received by the Southeast Fisheries Science Center (SEFSC) by December 31, 2008, for the years 1999 through 2007. Appeals based on hardship factors would not be considered. The RA would review, evaluate, and render final decision on appeals based on NMFS' logbooks. Appellants would need to submit NMFS' logbooks to support their appeal. If NMFS' logbooks are not available, the RA could use state landings records. In addition, NMFS' records of Gulf commercial reef fish permits would constitute the sole basis for determining ownership of such permits. A person who believes he/she meets the permit eligibility criteria based on ownership of a vessel under a different name, as may have occurred when ownership has changed from individual to corporate or vice versa, would need to document his/her continuity of ownership.

Positive impacts to the biological environment include reductions in bycatch of both hardshell sea turtles and non-targeted or undersized reef fish. During the months of June through August, the NMFS observer program data indicate a concentration of sea turtles in water depths of 20–35 fathoms (37–64 m). Shifting the fishing effort to deeper waters for this time period may reduce the sea turtle takes in the bottom longline component of the fishery. The bottom longline endorsement requirement would reduce the number of permitted vessels operating in the fishery from approximately 120 to 61, resulting in a bottom longline trip reduction of approximately 54–percent. Limiting the number of hooks would likely change the fishing behavior for a number of vessels as they would reduce the length of their mainline and possibly increase the number of sets to accommodate the reduction in hooks. The range in reduction is based on various analyses of effort shifting scenarios in the bottom longline component of the reef fish fishery.

Availability of Amendment 31

Additional background and rationale for the measures discussed above are contained in Amendment 31. The availability of Amendment 31 was announced in the **Federal Register** on December 31, 2009 (74 FR 69322). Written comments on Amendment 31 must be received by March 1, 2010. All comments received on Amendment 31 or on this proposed rule during their respective comment periods will be addressed in the preamble of the final rule.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the AA has determined that this proposed rule is consistent with Amendment 31, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

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

NMFS prepared a DEIS for this amendment. A notice of availability for

the DEIS was published on November 13, 2009 (74 FR 58625).

An IRFA was prepared, as required by section 603 of the Regulatory Flexibility Act. The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. A copy of this analysis is available from the Council (see **ADDRESSES**). A summary of the analysis follows.

The purpose of this proposed rule is to reduce interactions between sea turtles and bottom longline gear in the reef fish fishery in the eastern Gulf. The Magnuson-Stevens Act provides the statutory basis for this proposed rule.

No duplicative, overlapping, or conflicting Federal rules have been identified.

This proposed rule would prohibit the use of bottom longline gear to fish for reef fish in the eastern Gulf (east of 85° 30′ W. longitude) shoreward of a line approximating the 35–fathom (64–m) depth contour from June through August, require a permit endorsement to fish for reef fish using bottom longline gear in the eastern Gulf, and limit the number of hooks per vessel using bottom longline gear to fish for reef fish in the eastern Gulf to 1,000 hooks, of which no more than 750 hooks could be rigged for fishing or fished at any given time.

This proposed rule would be expected to directly affect commercial fishing vessels that use bottom longline gear to fish for reef fish in the eastern Gulf. Based on logbook records, for the period 2003–2007, an average of 149 vessels per year recorded reef fish landings using bottom longline gear. These vessels are estimated to average $108,635 per year in gross revenues and $72,649 per year in net operating revenues (NOR; revenues net of non-labor trip costs).

Some fleet activity is known to occur in the commercial sector of the Gulf reef fish fishery. Based on permit data, the maximum number of permits reported to be owned by the same entity is six, though additional permits may be linked through other affiliations which cannot be identified with current data. It is unknown whether all of these linked permits are for vessels that use longline gear, which generate higher average annual revenues than vessels that use other gears to harvest reef fish. Nevertheless, assuming each of these six vessels use bottom longline gear, using the average revenue per vessel provided above the average annual combined revenues for this entity would be approximately $652,000.

The Small Business Administration has established size criteria for all major industry sectors in the U.S. including fish harvesters. A business involved in fish harvesting is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $4.0 million (NAICS code 114111, finfish fishing) for all its affiliated operations worldwide. Based on the gross revenue estimates provided above, all commercial reef fish vessels expected to be directly affected by this proposed rule are determined for the purpose of this analysis to be small business entities.

As previously stated, this proposed rule would require a permit endorsement to fish for reef fish using bottom longline gear in the eastern Gulf. This permit endorsement would be a new compliance requirement. Acquisition of the endorsement would not require an application or additional fees. Instead, eligibility for the endorsement would be determined by NMFS, based on an evaluation of the landings history associated with each commercial reef fish permit, and the permit endorsement provided to qualified vessels. As a result, no additional costs or administrative burdens would be imposed on qualifying entities. Permit holders that do not qualify for the endorsement would be prohibited from using bottom longline gear to harvest reef fish in the prescribed area. The expected economic effects of the endorsement requirement on entities that historically have harvested reef fish with bottom longline gear but that would not qualify for the endorsement are discussed below. This proposed rule would not establish any new reporting or record-keeping requirements.

The expected effects of the proposed seasonal bottom longline gear prohibition and endorsement requirement were evaluated in tandem. Vessels affected by the proposed endorsement and gear restrictions would be expected to either shift fishing effort to areas that remain open and continue to fish with bottom longline gear, or convert to vertical line gear. However, because of the absence of adequate data, effort shift was not modeled in the analysis of the expected economic effects of this proposed rule. Instead, only gear conversion was modeled, with gear conversion rates varied from 0 percent to 100 percent of affected vessels and trips. Under this modeling approach, any affected effort that did not convert to vertical line gear was assumed to not occur, resulting in the loss of all normal harvests and revenues for that vessel and trip. As such, this is an extreme assumption. In reality, rather than trip cancellation, effort shift is likely to occur, resulting in some amount of continued historic harvest. The absence of effort shift in the analysis results in over-estimation of the expected economic effects of this proposed rule and, as a result, the following results should be viewed as upper bounds.

This proposed rule would be expected to reduce the net operating revenues (NOR; revenues minus non-labor variable operating costs) of commercial vessels that have historically harvested reef fish using bottom longline gear in the eastern Gulf by $1.28 million per year (100–percent conversion to vertical line gear) to $3.44 million (0–percent conversion to vertical line gear). Averaged across the average number of vessels per year with recorded landings of reef fish using bottom longline gear from 2003–2007 (149 vessels), the estimated reduction in NOR per vessel ranges from approximately $8,600 to $23,100, or approximately 12 percent to 32 percent of the average annual NOR per vessel. It is noted that individual vessels may experience higher or lower losses than these averages. Gear conversion is estimated to cost approximately $13,750 per vessel, though partial financial assistance is available for up to 50 vessels from an environmental advocacy group. Additional economic losses may accrue due to the proposed hook restriction. Although these losses cannot be quantified with available data, the proposed hook restriction may result in reduced harvest efficiency of some vessels. This would be expected to result in either reduced harvests or increased costs to maintain normal harvests if fishermen have to fish longer or make more sets. The proposed hook restrictions could also increase the possibility that a trip may have to be terminated early if a line is lost and insufficient replacement hooks are available to allow continued fishing.

Four alternatives, including the no action alternative (status quo), with multiple sub-alternatives, were considered for the action to establish seasonal and area gear restrictions. One alternative and set of sub-options focused on the geographic scope of the proposed gear restriction, one alternative and set of sub-options focused on the depth specification of the proposed gear restriction, and one alternative and set of sub-options focused on the temporal application of

the proposed gear restriction. The no-action alternative would not establish any new gear restrictions, would not be expected to reduce interactions between sea turtles and bottom longline gear in the reef fish fishery, and would not be expected to achieve the Council's objectives.

The alternative specifications of the geographic scope of the proposed gear restrictions would have imposed the restrictions on smaller areas than the proposed rule and, as a result, would be expected to result in lower adverse economic effects than this proposed rule. However, the reduced geographic scope of these alternative specifications would be expected to result in insufficient reduction in interactions between sea turtles and bottom longline gear, and would not be expected to achieve the Council's objectives.

One alternative to the depth specification of this proposed rule would have prohibited the use of bottom longline gear to harvest reef fish in waters less than 30 fathoms (55 m), which would be less restrictive than the proposed restriction, while two alternatives would have been more restrictive, prohibiting the use of the gear in waters less than 40 fathoms (73 m) and 50 fathoms (91 m), respectively. The less restrictive alternative would be expected to reduce the loss of NOR to commercial vessels relative to the proposed rule. However, the reduced scope of the restriction would be expected to result in insufficient reduction in interactions between sea turtles and bottom longline gear, and would not be expected to achieve the Council's objectives. While the two more restrictive alternatives may be expected to result in greater protection of sea turtles, both would be expected to result in greater adverse economic effects than the depth specification of this proposed rule. As a result, these alternative depth specifications would not be expected to achieve the Council's objectives of sufficiently reducing interactions between sea turtles and bottom longline gear while minimizing the adverse effects on the reef fish fishery.

Both alternatives to the seasonal specification of this proposed rule would have increased the duration of the gear prohibition and would be expected to result in greater adverse economic effects than the seasonal restriction of this proposed rule. Similar to the more restrictive depth alternatives, while increased seasonal application of the proposed gear prohibition would be expected to result in greater sea turtle protection, these alternatives would not be expected to achieve the Council's objectives of sufficiently reducing interactions between sea turtles and bottom longline gear while minimizing the adverse effects on the reef fish fishery.

Seven alternatives, including the no action alternative (status quo), were considered for the action to reduce the number of vessels allowed to use bottom longline gear to harvest reef fish in the eastern Gulf. Except for the no action alternative, the alternatives varied by the minimum average annual reef fish harvest threshold that would be required to qualify for a permit endorsement that allowed the use of bottom longline gear to harvest reef fish in the eastern Gulf, and each alternative included two sub-options for the qualifying time period from which average annual harvests would be evaluated (1999–2004 or 1999–2007) and three sub-options that addressed the transferability of the endorsement. The no action alternative would not establish a longline endorsement to the reef fish permit, would not be expected to reduce the number of vessels (permits) allowed to use bottom longline gear to harvest reef fish in the eastern Gulf, and would not be expected to achieve the Council's objectives.

Two alternatives would have established lower average annual harvest thresholds (20,000 lb (9,072 kg) and 30,000 lb (13,608 kg), gutted weight) for endorsement qualification than this proposed rule (40,000 lb (18,144 kg), gutted weight), while two alternatives would establish higher thresholds (50,000 lb (22,680 kg) and 60,000 lb (27,216 kg), gutted weight). Because lower thresholds would allow more vessels to continue to participate in the reef fish fishery using bottom longline gear, these alternatives would be expected to result in lower adverse economic effects than the proposed qualification threshold. However, these two alternatives would not be expected to result in sufficient reductions in the number of vessels allowed to use bottom longline gear to harvest reef fish in the eastern Gulf or, in turn, sufficient reductions in bottom longline effort necessary to achieve target reductions in interactions between sea turtles and bottom longline gear. As a result, these alternatives would not be expected to achieve the Council's objectives. The two alternatives that would have established higher qualification thresholds would be expected to result in fewer qualifying vessels, greater economic losses, and greater reduction in interactions between sea turtles and bottom longline gear than is necessary to achieve the Council's objectives.

Under the seventh alternative for the action to reduce the number of vessels allowed to use bottom longline gear to harvest reef fish in the eastern Gulf, endorsement qualification would have been based on landings histories in communities where the ex-vessel value of red grouper landings accounted for at least 15 percent of the total ex-vessel value of all species landed in the community. Qualifying permits would be required to have reported landings in these communities for at least 5 years during the period of 1999–2007, with minimum average annual reef fish harvests of 30,000 lb (13,608 kg) per permit. The net economic effects of this alternative are unknown. However, while over 80 vessels would be expected to qualify for an endorsement under a 30,000–lb (13,608–kg) threshold without a community-linkage requirement, fewer than 50 vessels would qualify with the imposition of the community requirement. The intent of this alternative was to reduce bottom longline effort to a level that would adequately reduce sea turtle interactions while protecting communities dependent on this component of the commercial sector of the Gulf reef fish fishery. However, the alternative was determined to be incapable of achieving the Council's objectives because qualifying vessels could not be required to continue landing their harvests in the target communities. Additionally, the exclusion of vessels that met the landings threshold but lacked the required history with a specific dependent community was determined to be inequitable.

This proposed rule would establish endorsement qualification based on harvest history from 1999–2007. The alternative period of evaluation, 1999–2004, would, for all landings thresholds, have resulted in fewer qualifying permits and greater adverse economic effects than the proposed action.

This proposed rule would also allow unrestricted transfer of endorsements between commercial reef fish permit holders. The alternative sub-options would either not have allowed endorsement transfer or only allowed transfer to reef fish permit holders with a vessel of equal or lesser length. Each of these sub-options would have been more restrictive than the transfer allowance of this proposed rule and, as a result, would be expected to result in greater adverse economic effects than this proposed rule.

Four alternatives, including the no action alternative (status quo), were considered for the action to modify fishing gear or practices. The no action alternative would not establish further

restrictions on fishing gear or practices and, as a result, would not be expected to achieve the Council's objectives.

One alternative, with multiple sub-options, to the proposed fishing gear restriction would limit mainline length for bottom longlines, while another would limit gangion length. The economic effects of these alternatives cannot be quantitatively evaluated with available data. In general, these actions would be expected to adversely affect the catch rates, operating efficiency, and NOR of affected vessels. Whether these alternatives would result in lower adverse economic effects than the proposed hook restriction is unknown. However, available data do not indicate that these measures would be more effective in reducing interactions between sea turtles and bottom longline gear than the proposed hook restriction.

Two alternative hook limits, 500 hooks and 1,500 hooks, were considered relative to the proposed hook restriction. The lower hook limit would be expected to result in greater adverse economic effects than the proposed limit and is more restrictive than believed necessary to achieve the target reduction in interactions between sea turtles and bottom longline gear. Conversely, while the higher hook limit would be expected to result in lower adverse economic effects than the proposed limit, it is not believed to be sufficiently restrictive to achieve the target reduction in sea turtle interactions.

The amendment on which this proposed rule is based also considered an action to establish restrictions on the bait used in the bottom longline reef fish fishery. Two alternatives, including the no action alternative (status quo), were considered. However, the no action alternative was selected by the Council as the preferred alternative. As a result, no regulatory action is required, no direct adverse economic effects would be expected to accrue to entities involved in the bottom longline component of the reef fish fishery in the eastern Gulf, and the issue of significant alternatives is not relevant.

This proposed rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA). This requirement has been submitted to the Office of Management and Budget (OMB) for approval. Public reporting burden for marking a checkbox for a Gulf reef fish bottom longline endorsement on the Federal Permit Application Form is estimated to average less than 1 minute per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Public comment is sought regarding: whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments regarding the burden estimate or any other aspect of the collection-of-information requirement, including suggestions for reducing the burden, to NMFS and to the OMB (see **ADDRESSES**).

Notwithstanding any other provision of law, no person is required to respond to, nor shall a person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA unless that collection of information displays a currently valid OMB control number.

List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Reporting and recordkeeping requirements, Virgin Islands.

Dated: January 11, 2010.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 622 is proposed to be amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

1. The authority citation for part 622 continues to read as follows:

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

2. In § 622.2, the definition of "Annual catch target" and "Bottom longline" are added in alphabetical order to read as follows:

§ 622.2 Definitions and acronyms.

* * * * *

Annual catch target (ACT) means an amount of annual catch of a stock or stock complex that is the management target of the fishery, and accounts for management uncertainty in controlling the actual catch at or below the ACL.

* * * * *

Bottom longline means a longline that is deployed, or in combination with gear aboard the vessel, e.g., weights or anchors, is capable of being deployed to maintain contact with the ocean bottom.

* * * * *

3. In § 622.4, the third sentence of paragraph (a)(2)(v) and the first sentence of paragraph (g)(1) are revised, and paragraph (a)(2)(xiv) is added to read as follows:

§ 622.4 Permits and fees.

* * * * *

(a) * * *

(2) * * *

(v) * * * See paragraph (a)(2)(ix) of this section regarding an IFQ vessel account required to fish for, possess, or land Gulf red snapper or Gulf groupers and tilefishes and paragraph (a)(2)(xiv) of this section regarding an additional bottom longline endorsement required to fish for Gulf reef fish with bottom longline gear in a portion of the eastern Gulf. * * *

* * * * *

(xiv) *Eastern Gulf reef fish bottom longline endorsement.* For a person aboard a vessel, for which a valid commercial vessel permit for Gulf reef fish has been issued, to use a bottom longline for Gulf reef fish in the Gulf EEZ east of 85°30′ W. long., a valid eastern Gulf reef fish bottom longline endorsement must have been issued to the vessel and must be on board. A permit or endorsement that has expired is not valid. This endorsement must be renewed annually and may only be renewed if the associated vessel has a valid commercial vessel permit for Gulf reef fish or if the endorsement and associated permit are being concurrently renewed. The RA will not reissue this endorsement if the endorsement is revoked or if the RA does not receive a complete application for renewal of the endorsement within 1 year after the endorsement's expiration date.

(A) *Initial eligibility.* To be eligible for an initial eastern Gulf reef fish bottom longline endorsement a person must have been issued and must possess a valid or renewable commercial vessel permit for Gulf reef fish that has bottom longline landings of Gulf reef fish averaging at least 40,000 lb (18,144 kg), gutted weight, annually during the period 1999 through 2007. In addition, for a commercial reef fish permit with reef fish longline landings after February 7, 2007, and with reef fish trap or longline landings during 1999 through February 7, 2007, such reef fish trap landings may be applied toward satisfaction of the eligibility requirement for an initial eastern Gulf reef fish bottom longline endorsement. All applicable reef fish landings associated with a current reef fish

permit for the applicable landings history, including those reported by a person(s) who held the license prior to the current license owner, will be attributed to the current license owner. However, landings accumulated via permit stacking are not creditable for the purpose of determining eligibility for an initial eastern Gulf reef fish bottom longline endorsement. Only legal landings reported in compliance with applicable state and Federal regulations will be accepted.

(B) *Initial issuance.* On or about [*date 30 days after date of publication of the final rule in the FEDERAL REGISTER*] the RA will mail each eligible permittee an eastern Gulf reef fish bottom longline endorsement via certified mail, return receipt requested, to the permittee's address of record as listed in NMFS' permit files. An eligible permittee who does not receive an endorsement from the RA, must contact the RA no later than [*date 60 days after date of publication of the final rule in the FEDERAL REGISTER*] to clarify his/her endorsement status. A permittee who is denied an endorsement based on the RA's initial determination of eligibility and who disagrees with that determination may appeal to the RA.

(C) *Procedure for appealing longline endorsement eligibility and/or landings information.* The only items subject to appeal are initial eligibility for an eastern Gulf reef fish bottom longline endorsement based on ownership of a qualifying reef fish permit, the accuracy of the amount of landings, and correct assignment of landings to the permittee. Appeals based on hardship factors will not be considered. Appeals must be submitted to the RA postmarked no later than 120 days after [*date of publication of the final rule in the FEDERAL REGISTER*], and must contain documentation supporting the basis for the appeal. The RA will review all appeals, render final decisions on the appeals, and advise the appellant of the final decision.

(*1*) *Eligibility appeals.* NMFS' records of reef fish permits are the sole basis for determining ownership of such permits. A person who believes he/she meets the permit eligibility criteria based on ownership of a vessel under a different name, as may have occurred when ownership has changed from individual to corporate or vice versa, must document his/her continuity of ownership.

(*2*) *Landings appeals.* Appeals regarding landings data for 1999 through 2007 will be based on NMFS' logbook records. If NMFS' logbooks are not available, the RA may use state landings records or data for the period 1999 through 2007 that were submitted in compliance with applicable Federal and state regulations on or before December 31, 2008.

(D) *Transferability.* An owner of a vessel with a valid eastern Gulf reef fish bottom longline endorsement may transfer that endorsement to an owner of a vessel that has a valid commercial vessel permit for Gulf reef fish.

(E) *Fees.* There is no fee for initial issuance of an eastern Gulf reef fish bottom longline endorsement. A fee is charged for each renewal, transfer, or replacement of such endorsement. The amount of each fee is calculated in accordance with the procedures of the NOAA Finance Handbook, available from the RA, for determining the administrative costs of each special product or service. The fee may not exceed such costs and is specified with each application form. The appropriate fee must accompany each application for renewal, transfer, or replacement.

* * * * *

(g) * * *

(1) A vessel permit, license, or endorsement or a dealer permit or endorsement issued under this section is not transferable or assignable, except as provided in paragraph (m) of this section for a commercial vessel permit for Gulf reef fish, in paragraph (o) of this section for a king mackerel gillnet permit, in paragraph (q) of this section for a commercial vessel permit for king mackerel, in paragraph (r) of this section for a charter vessel/headboat permit for Gulf coastal migratory pelagic fish or Gulf reef fish, in paragraph (s) of this section for a commercial vessel moratorium permit for Gulf shrimp, in § 622.17(c) for a commercial vessel permit for golden crab, in § 622.18(b) for a commercial vessel permit for South Atlantic snapper-grouper, in § 622.19(b) for a commercial vessel permit for South Atlantic rock shrimp, or in § 622.4(a)(2)(xiv)(D) for an eastern Gulf reef fish bottom longline endorsement. * * *

* * * * *

4. In § 622.34, paragraph (q) is added to read as follows:

§ 622.34 Gulf EEZ seasonal and/or area closures.

* * * * *

(q) *Prohibitions applicable to bottom longline fishing for Gulf reef fish.* (1) From June through August each year, bottom longlining for Gulf reef fish is prohibited in the portion of the Gulf EEZ east of 85°30′ W. long. that is shoreward of rhumb lines connecting, in order, the following points:

Point	North lat.	West long.
A	28°58.70′	85°30.00′
B	28°59.25′	85°26.70′
C	28°57.00′	85°13.80′
D	28°47.40′	85°3.90′
E	28°19.50′	84°43.00′
F	28°0.80′	84°20.00′
G	26°48.80′	83°40.00′
H	25°17.00′	83°19.00′
I	24°54.00′	83°21.00′
J	24°29.50′	83°12.30′
K	24°26.50′	83°00.00′

(2) Within the prohibited area and time period specified in paragraph (q)(1) of this section, a vessel with bottom longline gear on board may not possess Gulf reef fish unless the bottom longline gear is appropriately stowed, and a vessel that is using bottom longline gear to fish for species other than Gulf reef fish may not possess Gulf reef fish. For the purposes of paragraph (q) of this section, appropriately stowed means that a longline may be left on the drum if all gangions and hooks are disconnected and stowed below deck; hooks cannot be baited; and all buoys must be disconnected from the gear but may remain on deck.

(3) Within the Gulf EEZ east of 85°30′ W. long., a vessel for which a valid eastern Gulf reef fish bottom longline endorsement has been issued that is fishing bottom longline gear or has bottom longline gear on board cannot possess more than a total of 1000 hooks including hooks on board the vessel and hooks being fished and cannot possess more than 750 hooks rigged for fishing at any given time. For the purpose of this paragraph, "hooks rigged for fishing" means hooks attached to a line or other device capable of attaching to the mainline of the longline.

* * * * *

[FR Doc. 2010–687 Filed 1–14–10; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register
Vol. 75, No. 10
Friday, January 15, 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

Submission for OMB Review; Comment Request

January 4, 2010.

Editorial Note: Federal Register notice document 2010–48 should have published at pages 1026 to 1027 in the issue of January 8, 2010. This document is being published in its entirety.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

National Agricultural Statistics Service

Title: Honey Survey.

OMB Control Number: 0535–0153.

Summary of Collection: The National Agricultural Statistics Service (NASS) primary function is to prepare and issue State and national estimates of crop and livestock production. General authority for these data collection activities is granted under U.S. Code Title 7, Section 2204. Domestic honeybees are critical to the pollination of U.S. crops, especially fruits and vegetables. Africanized bees, parasites, diseases, and pesticides threaten the survival of bees. Programs are provided by Federal, State and local governments to assist in the survival of bees and to encourage beekeepers to maintain bee colonies.

Need and Use of the Information: NASS will collect information on the number of colonies, honey production, stocks, and prices. The survey will provide data needed by the Department and other government agencies to administer programs and to set trade quotas and tariffs. Without the information agricultural industry would not be aware of changes at the State and national level.

Description of Respondents: Farms.

Number of Respondents: 10,000.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 2,347.

National Agricultural Statistics Service

Title: Nursery and Christmas Tree Production Survey and Nursery and Floriculture Chemical Use Survey.

OMB Control Number: 0535–0244.

Summary of Collection: The National Agricultural Statistics Service (NASS) is charged with the responsibility of providing reliable, up-to-date information concerning the Nation's crop and livestock production, prices, and disposition, as well as environmental statistics. This includes estimates of production and value of key nursery products and chemical use by nursery and floriculture production operations. Congress appropriated funds for the collection of pesticide use data on nursery and floriculture operations. This data will expand the existing NASS pesticide database that contains comprehensive annual pesticide use reports. NASS will collect the information using surveys. The authority for these data collection activities is granted under U.S. Code Title 7, Section 2204.

Need and Use of the Information: Nursery and Christmas tree production data and nursery and floriculture chemical use data will be used by NASS, the Environmental Protection Agency, the nursery and floriculture industries, and other parties to assess the environmental and economic impact of various programs, policies, and procedures on nursery and floriculture operators and workers. The basic chemical use and farm practices information also will be used to enhance the national chemical use database maintained by NASS. This database is an integral source of data necessary for on-going risk assessments related to dietary exposure to chemicals, worker safety, water quality, and ecological resources.

Description of Respondents: Farms; Business or other for-profit.

Number of Respondents: 5,400.

Frequency of Responses: Reporting: Triennial.

Total Burden Hours: 1,940.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 2010–48 Filed 1–7–10; 8:45 am]

Editorial Note: Federal Register notice document 2010–48 should have published at pages 1026 to 1027 in the issue of January 8, 2010. This document is being published in its entirety.

[FR Doc. C1–2010–48 Filed 1–14–10; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities: Proposed Collection; Comment Request—Information Collection for the Child and Adult Care Food Program

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on a proposed information collection for the Child and Adult Care Food Program (CACFP). This information collection concerns the efforts required of States and service institutions to comply with the Secretary's requests for information. This proposed collection is a revision of the currently approved collection for the CACFP.

DATES: Written comments must be submitted by March 16, 2010.

ADDRESSES: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of 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. Comments may be sent to: Mrs. Lynn Rodgers-Kuperman, Chief, Program Analysis and Monitoring Branch, Child Nutrition Division, Food and Nutrition Service (FNS), U.S. Department of Agriculture, 3101 Park Center Drive, Room 638, Alexandria, Virginia 22302. Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations.gov* and follow the online instructions for submitting comments electronically.

All written comment(s) will be open for public inspection at the office of the Food and Nutrition Service during regular business hours (8:30 a.m. to 5 p.m., Monday through Friday) at 3101 Park Center Drive, Room 640, Alexandria, Virginia 22302.

All responses to this notice will be summarized and included in the request for Office of Management and Budget (OMB) approval, and will become a matter of public record.

FOR FURTHER INFORMATION CONTACT: Mrs. Lynn Rodgers-Kuperman at (703) 305–2590.

SUPPLEMENTARY INFORMATION:

Title: Child and Adult Care Food Program.

OMB Number: 0584–0055.

Expiration Date: June 30, 2010.

Type of Request: Revision of a currently approved collection.

Abstract: Section 17 of the NSLA, as amended, 42 U.S.C. 1766, authorizes the CACFP to provide cash reimbursement and commodity assistance, on a per meal basis, for food service to children in nonresidential child care centers and family day care homes, and to eligible adults in nonresidential adult day care centers. Pursuant to Section 17 of the Richard B. Russell National School Lunch Act (NSLA), the CACFP provides cash reimbursement and commodity assistance, on a per meal basis, for food service to children in nonresidential child care centers and family day care homes, and to eligible adults in nonresidential adult day care centers. The U.S. Department of Agriculture, through the Food and Nutrition Service has established application, monitoring and reporting requirements to manage the CACFP effectively. The purpose of this submission to OMB is to obtain approval to continue the discussed information collection. States and service institutions participating in the CACFP will submit to FNS account and record information reflecting their efforts to comply with statutory and regulatory Program requirements. In accordance with 7 CFR 226.7(d), State agencies must submit a monthly Report of the Child and Adult Care Food Program (FNS–44) in order to receive federal imbursement for meals served to eligible participants. Each State agency must also submit a quarterly Financial Status Report (SF–425) on the use of Program funds. Information to support these reports must be collected and reported to the State agency at various intervals by the Program participants—institutions, day care center facilities, family day care homes, and individuals and households. Examples of data collected and reported include, but are not limited to: Applications and supporting documents; records of enrollment; records supporting the free and reduced price eligibility determinations; daily records indicating numbers of program participants in attendance and the number of meals served by type and category; receipts, invoices and other records of CACFP costs; claims for reimbursement, and documentation of non-profit operation of food service.

Respondents: The respondents are State agencies, (Business: not-for-profit and for-profit) institutions, day care center facilities, family day care homes, and individuals and households.

Estimated Number of Respondents: 55 State agencies, (*Business:* non-for-profit and for-profit) 19,582 institutions, 163,483 facilities (includes 138,887 family day care homes and 24,596 sponsored center facilities) and 2,016,946 individuals and households.

SUMMARY OF REPORTING BURDEN ESTIMATES

Affected public	Estimated number of respondents	Responses per respondent	Total annual responses	Estimated avg. number of hours per response	Estimated total hours
State Agency	55	646.29091	35,546.000	7.348298	261,202.600
Sponsor/Institution	19,582	31.18226	610,611.000	5.293912	3,232,521.148
Facility	163,483	12.00000	1,961,796.000	1.212388	2,378,457.000
Individual/Household	2,016,946	1.93389	3,900,552.000	0.156314	609,711.439
Total Reporting Burden Estimates	2,200,066	2.958323	6,508,505.000	0.995911	6,481,892.187

SUMMARY OF RECORDKEEPING BURDEN ESTIMATES

Affected public	Estimated number of respondents	Responses per respondent	Total annual responses	Estimated avg. number of hours per response	Estimated total hours
State Agency	55	6.00	330.000	2.17	716.000
Sponsor/Institution	19,582	8.4747	165,952.000	1.47	243,244.178

SUMMARY OF RECORDKEEPING BURDEN ESTIMATES—Continued

Affected public	Estimated number of respondents	Responses per respondent	Total annual responses	Estimated avg. number of hours per response	Estimated total hours
Facility	163,483	3.00	490,449.000	1.00	490,449.000
Total Recordkeeping Burden Estimates	183,120	3.586	656,731.000	4.01053	734,408.178

Total Reporting & Recordkeeping Estimates: 7,216,300.365

Dated: January 7, 2010.

Julia Paradis,

Administrator, Food and Nutrition Service.

[FR Doc. 2010–628 Filed 1–14–10; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Forest Service

Plan Development for Kiowa, Rita Blanca, Black Kettle and McClellan Creek National Grasslands, Colfax, Harding, Mora and Union Counties, NM; Dallam, Gray and Hemphill Counties, TX; Cimarron and Roger Mills Counties, OK

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement in conjunction with development of a new land and resource management plan.

SUMMARY: As directed by the National Forest Management Act (NFMA), the USDA Forest Service (FS) is preparing the Kiowa, Rita Blanca, Black Kettle and McClellan Creek National Grasslands land and resource management plan (plan) and will also prepare an environmental impact statement (EIS) for this new plan. Currently, the National Grasslands named above receive management direction from the 1985 Cibola National Forest plan. However, the new plan will provide direction specific to the National Grasslands only, while the 1985 plan will continue to provide direction for the forested, mountain districts of the Cibola National Forest until it is revised in the future. This notice briefly describes the nature of the decision to be made; the proposed action (the new plan) and need for change from the 1985 plan specific to the National Grasslands, and information concerning public participation in the new plan development. It also provides estimated dates for filing the EIS and the names and addresses of the responsible agency official and the individuals who can provide additional information. Finally, this notice briefly describes the applicable planning rule and how work done on the plan revision under the 2008 planning rule will be used or modified for completing this plan revision.

Thus, the new plan will supersede, for the National Grassland units only, the plan previously approved by the Regional Forester on July 15, 1985 and as amended. The 1985 plan amendments relative to the National Grasslands designated new electronic sites; identified eligible Wild and Scenic Rivers; addressed travel management issues and oil and gas leasing stipulations, and the need for additional Management Indicator Species (MIS). The 1985 amended plan will remain in effect for the National Grasslands until the new plan takes effect. When the Record of Decision for the new Kiowa, Rita Blanca, Black Kettle and McClellan Creek National Grasslands plan and Environmental Impact Statement (EIS) and Final Plan is signed by the Responsible Official, the 1985 plan will be amended after 30 days have passed to remove only those portions that apply to the National Grasslands. Again, the 1985 plan as currently amended will still apply to the rest of the Cibola National Forest until it is revised.

DATES: Comments concerning the need for change provided in this notice will be most useful in the development of the new plan and draft EIS if received by February 15, 2010. The agency expects to release a draft Grasslands plan and draft EIS for formal comment by fall 2010 and a final National Grasslands plan and final EIS by summer 2011. *See* the **SUPPLEMENTARY INFORMATION**—Public Involvement section for information on future public meeting dates.

ADDRESSES: Send written comments to: Cibola National Forest, 2113 Osuna Rd. NE., Albuquerque, NM 87113. Comments may also be sent via e-mail to *comments-grasslandsplan@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Champe Green (Forest Planner), Cibola National Forest and Grasslands, 2113 Osuna Rd., NE., Albuquerque, NM 87113; *champegreen@fs.fed.us;* (505) 346–3900. Information on this new plan is also available at Cibola National Grasslands Web site: *http://www.fs.fed.us/r3/cibola/plan-revision/national_grasslands/index.shtml.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Time Monday through Friday.

SUPPLEMENTARY INFORMATION:

Name and Address of the Responsible Official

Corbin Newman, Regional Forester, Southwestern Region, 333 Broadway SE., Albuquerque, NM 87102.

Nature of the Decision To Be Made

The Kiowa, Rita Blanca, Black Kettle and McClellan Creek National Grasslands, managed by the Cibola National Forest, are preparing an EIS to develop a new plan pertaining to the National Grasslands portion of the Forest only. The EIS process is meant to inform the Regional Forester so that he can decide which National Grasslands plan alternative best meets the need to achieve quality land management under the sustainable multiple-use management concept, meet the diverse needs of people, and conserve the National Grasslands' resources, as required by the NFMA and the Multiple Use Sustained Yield Act (MUSYA).

The new plan will describe the strategic intent of managing the National Grasslands into the next 10 to 15 years and will address the need for change described below. The new plan will provide management direction in the form of goals (desired conditions), objectives, suitability determinations, standards, guidelines, and a monitoring plan, including identification of MIS. It may also make new special area recommendations for wilderness, research natural areas, and other special areas.

As important as the decisions to be made is the identification of the types of decisions that will not be made within the new plan. The authorization of project-level activities on the National Grasslands is not a decision made in the National Grasslands plan but occurs through subsequent project specific decision-making. The designation of routes, trails, and areas

for motorized vehicle travel is not considered during plan development, but is addressed in the concurrent, but separate, Environmental Assessment (EA) for public motorized travel planning on the Kiowa and Rita Blanca National Grasslands and the Motor Vehicle Use Map for the Black Kettle and McClellan Creek National Grasslands. Some issues (*e.g.,* hunting regulations), although important, are beyond the authority or control of the National Grasslands and will not be considered. In addition, some issues, such as wild and scenic river suitability determinations, may not be undertaken at this time but addressed later as a future National Grasslands plan amendment. The National Grasslands will also not change the August 2008 plan amendment for oil and gas stipulations, and these standards will be carried forward in the new plan as they are currently stated in the amended 1985 plan.

Need for Change and Proposed Action

According to the NFMA, plans are to be revised on a 10 to 15 year cycle. The purpose and need for developing a new National Grasslands plan is: (1) The 1985 plan does not address many of the unique local features of the National Grasslands because it was developed primarily for the forested, mountain districts of the Cibola National Forest; (2) the 1985 plan is over 20 years old, and (3) since 1985, there have been changes in economic, social, and ecological conditions, new policies and priorities, and new information generated by monitoring and scientific research.

Extensive public, agency, and interagency collaborations, along with science-based evaluations, have identified the need for change in the 1985 plan by developing a National Grasslands-specific plan. This need for change has been organized into three topics that focus on the sustainability of ecological, social, and economic systems: (1) Ecosystem Diversity, (2) Managed Recreation, and (3) Human Influences on the National Grasslands. The need for change is described fully through an Analysis of Management Situation (AMS), which is comprised of the Comprehensive Evaluation Report (CER) and its supplement, both of which are available on the Forest's Web site: *http://www.fs.fed.us/r3/cibola/plan-revision/national_grasslands/index.shtml.*

The proposed action is to develop a new National Grasslands-specific plan that addresses the above three topics.

Topic 1—Ecosystem Diversity

Since the 1985 plan was implemented, ecological monitoring and new scientific information have advanced the agency's knowledge and understanding of vegetation and its range of historical variation, ecological processes, and habitat requirements of native fauna of the National Grasslands. Similarly, since 1985, new issues have emerged, such as the unwelcome introduction of non-native plants and animals and changes in climate.

- The vegetation types found on the National Grasslands are altered remnants of what were once found across the southern Great Plains. In the new plan, there is a need to provide management direction that will maintain or accelerate movement of vegetation types toward conditions within the historical range of variation (HRV), recognizing that past events may limit the ability to achieve full restoration.
- There are invasive plants present on the National Grasslands that have the potential to affect ecosystem structure, composition, and processes. Currently, there are no known invasive animals. The new plan needs to provide management direction addressing the unwelcome introduction, spread, and control of invasive plants and animals.
- The new plan needs to provide direction on anticipating and responding to changes in the climate, relative to National Grasslands management.
- During the new plan development, there may be a need to reevaluate and update the MIS list. MIS are species whose population trends could possibly indicate the effects of FS management activities.

Topic 2—Managed Recreation

The 1985 plan does not clearly and specifically address issues related to recreation and scenic resources that play a vital role in supporting social and economic sustainability on the National Grasslands. The new plan needs to provide direction that is more specific to the Grasslands relative to management of motorized, dispersed and developed recreation opportunities, areas of high scenic quality and assessment and possible designation of special areas. Relevant law, policy, regulation and other FS direction developed since 1985 also needs to be incorporated by reference into the new plan, and redundancies removed.

- The demand for day-hiking, particularly on scenic and interpretive trails, continues to increase on the National Grasslands. The new plan needs to provide more direction on management of dispersed recreation.
- There are components of the 1985 plan which are redundant with existing FS Handbook and Manual direction. Redundancies will be absent from the new plan, and current Handbook and Manual direction will be incorporated by specific reference.
- There is a need for the revised plan to reflect and support direction from the implementation of the Travel Management Rule. The new National Grasslands plan is being developed concurrently with the Travel Management Study EA for the Kiowa and Rita Blanca National Grasslands, but the new plan will not be pre-decisional to the findings of the EA or the resultant motor vehicle use map.
- There is a need for the new plan to provide direction to manage for recreation opportunities in a variety of different settings and levels of development, from large, developed recreation settings with many facilities, to primitive settings.
- There is a need for the new plan to provide direction that management of scenic resources be based on objectives for specific areas, particularly those areas identified as having high scenic quality.
- Plan direction addressing opportunities for visiting, touring, and enjoying guided and interpretive activities related to unique scenery, historic/cultural sites, wildlife, and formally-designated sites (such as eligible Wild and Scenic Rivers, Historic Trails and Scenic Byways) needs to be included in the new plan.
- The development of the new plan will assess the need for additional special area designations such as potential wilderness, an eligible Wild and Scenic River, or potential research natural areas (RNA) and provide direction.

Topic 3—Human Influences on the National Grasslands

The 1985 plan does not provide adequate direction to the National Grasslands regarding the management and monitoring of livestock grazing; the placement, maintenance or rehabilitation of energy development sites; the use of planned or unplanned fire; nor the allowance of special uses (*i.e.,* mineral extraction, utility corridors, fuelwood harvesting, research activities). There are also many components of the 1985 plan which duplicate existing FS Handbook and Manuel direction. The new plan should provide direction for management of these land uses and economic opportunities:

• The new plan needs to provide management direction to the livestock grazing program that incorporates adaptive management toward ecosystem-based desired conditions.

• Because of increasing interest in alternative energy enterprises such as wind farms in the proximity of the National Grasslands, the new plan needs to provide direction for guiding energy development on the National Grasslands, while protecting natural resources, heritage sites and scenery.

• There is a need to provide direction in the new plan for the rehabilitation of disturbed sites, such as oil and gas pads and roads, after operations have ceased, in order to protect soil productivity and re-establish vegetative cover.

• The new plan needs to provide direction to the process of obtaining legal road access to National Grassland units, access that meets public, private landowner and management needs.

• Because of the projected increase and changes in the type of energy developments in the region and the land ownership pattern of the National Grasslands, the new plan needs to provide direction on the permitting of utility easements and related special uses.

• There are many special uses of the National Grasslands that provide economic support to local communities. The new plan needs to provide direction for accommodating the removal of miscellaneous products for commercial, non-commercial and Tribal use, such as wood products, plants, grass seed, or other materials.

• The new plan needs to provide direction on the non-commercial use of common mineral materials, so that resources can be adequately protected.

• The new plan should provide direction on the management of firewood and fuelwood harvesting and gathering on the National Grasslands.

• There is a need for the new plan to provide direction on opportunities to conduct research on the National Grasslands, regardless of whether a research natural area is established.

• The checkerboard pattern of the National Grassland units and private land, along with the types of fuels found on the National Grasslands, create a fire environment which is very different from forests of the intermountain west. The new plan needs to provide direction for applying management strategies for responding to wildland fires and using prescribed fire on National Grassland units to avoid loss of life or significant property damage.

• The new plan needs to provide updated direction on the stabilization and preservation of historic structures and Traditional Cultural Properties. The new plan should also provide direction on the role of heritage sites in economic development.

Public Involvement

Extensive public involvement and collaboration related to revising the National Grasslands plan has already occurred and is ongoing. Informal discussions with the public regarding needed changes to the 1985 plan began with a series of public meetings in 2006. This input, along with science-based evaluations, was used to determine the needs for change identified above. Additional meetings, correspondence, news releases, comment periods, and other tools have been utilized to gather feedback from the public, forest employees, Tribal governments, Federal and State agencies, and local governments. The most recent public involvement was a series of public meetings held in March 2009 to solicit input and comment on potential desired conditions, which had been developed based upon previous public collaboration. The Forest desires to continue collaborative efforts with members of the public who are interested in the National Grasslands management, as well as Native American Tribes, Federal and State agencies, local governments, and private organizations.

Future public meetings to gather input on the working draft plan and potential alternatives are tentatively scheduled for late winter or spring 2010. The dates, times, and locations of these meetings will be posted on the Forest's Web site: *http://www.fs.fed.us/r3/cibola/plan-revision/national_grasslands/index.shtml.*

The information gathered at these meetings will help guide the development of the draft plan and draft EIS. Once the draft plan and draft EIS are compiled and released (tentatively scheduled for September 2010), members of the public will have 45 days to submit comments. After consideration of comments, a final proposed plan and final EIS will be released in early 2011. We anticipate using the 2000 planning rule pre-decisional objection process (36 CFR 219.32) for administrative review.

At this time, the Cibola National Forest is seeking input on the need for change and the proposed action to develop a new National Grasslands-specific plan: Did we miss any substantive issues or concerns? It is important that reviewers provide their comments at such times and in such a way that they are useful to the Agency's preparation of the revised plan and the EIS. Therefore, comments on the proposed action (need for a new plan) and needs for change will be most valuable if received by February 15, 2010, and should clearly articulate the reviewer's concerns. The submission of timely and specific comments can affect a reviewer's ability to participate in subsequent administrative or judicial review.

Comments received in response to this solicitation, including the names and addresses of those who comment will be part of the public record. Comments submitted anonymously will be accepted and considered.

Applicable Planning Rule

Preparation of the new plan was underway when the 2008 National Forest System land management planning rule was enjoined on June 30, 2009, by the United States District Court for the Northern District of California (*Citizens for Better Forestry* v. *United States Department of Agriculture,* 632 F. Supp. 2d 968 (N.D. Cal. June 30, 2009)). On December 18, 2009, the Department reinstated the previous planning rule, commonly known as the 2000 planning rule in the **Federal Register** (**Federal Register**, Volume 74, No. 242, Friday, December 18, 2009, pages 67059 through 67075). The transition provisions of the reinstated rule (36 CFR 219.35 and appendices A and B) allow use of the provisions of the National Forest System land and resource management planning rule in effect prior to the effective date of the 2000 Rule (November 9, 2000), commonly called the 1982 planning rule, to amend or revise plans. The Cibola National Forest has elected to use the provisions of the 1982 planning rule, including the requirement to prepare an EIS, to complete its plan revision. Prior to the enjoinment of the 2008 planning rule, the National Grasslands had been working to revise the 1985 plan. Informal revision efforts began in the summer of 2006, with collaborative discussions regarding the need to change the plan.

A formal Notice of Initiation to revise the forest plan was published on September 19, 2008, in the **Federal Register**, Vol. 73, No. 183, p. 54363. That notice also requested review on the CER, the Ecological Sustainability Report, and the Socio-economic Assessment (documents that provide evaluations of social, economic, and ecological conditions and trends in and around the forest).

The Forest had begun collaborative development of forest plan components during the fall of 2008. The latest set of plan components, the Working Draft

Land Management Plan, will be made available for review and comment in the spring of 2010. The CER was further supplemented in December 2009 to conform to the Need for Change AMS requirements of the 1982 rule provisions. The needs for change previously identified in the CER have been verified by this supplementary information; no new needs for change were identified.

Although the 2008 planning rule is no longer in effect, information gathered prior to the court's injunction is useful for completing the plan revision using the provisions of the 1982 planning rule. The Cibola National Forest has concluded that the following material developed during the plan revision process to date is appropriate for continued use in the revision process:

- The CER was completed in September 2008. It forms the basis for need to change the existing Forest Plan and the proposed action for the plan revision to develop a National Grasslands-specific plan.
- The Kiowa, Rita Blanca, Black Kettle and McClellan Creek National Grasslands CER Supplementary Document to meet AMS Requirements, December 2009 (as described above).
- The Ecological Sustainability Report (ESR) that was completed in August, 2008 will continue to be used as a reference in the planning process as appropriate to those items in conformance with the 2000 planning rule transition language and 1982 planning rule provisions. This is scientific information and is not affected by the change of planning rule. This information will be updated with any new available information.
- The Socio-economic Sustainability Report that was completed in August 2008 is not affected by the change in planning rule and will continue to be used as a reference in the planning process. This information will be updated with any new available information.
- The Kiowa National Grassland Potential Wilderness Evaluation Report for the Canadian River Potential Wilderness Area, completed in October 2008.
- USDA FS, Southwestern Region, Mid-Scale Vegetation Analysis, June 2009 (BKMC NG); November 2009 (KRB NG); an inventory of current vegetation conditions.
- USDA FS, Southwestern Region, Potential Natural Vegetation Types, 2008. A simulation of vegetation inventory pre-European settlement, which functions as the reference condition for current analysis.
- USDA Cibola National Forest, Kiowa and Rita Blanca National Grasslands, Geographic Area Assessments, v. 1, 1999.
- USDA Cibola National Forest, Black Kettle and McClellan Creek National Grasslands, Geographic Area Assessments, v. 1, 2000.

All of the above described documents are either available on the Forest's Web site: *http://www.fs.fed.us/r3/cibola/plan-revision/national_grasslands/index.shtml* or by contacting the Cibola National Forest at the address provided in the Address section of this notice.

As necessary or appropriate, the above listed material will be further adjusted as part of the planning process using the provisions of the 1982 planning rule.

Authority: 16 U.S.C. 1600–1614; 36 CFR 219.35 (74 FR 67073–67074).

Dated: January 11, 2010.

Nancy Rose,

Forest Supervisor.

[FR Doc. 2010–689 Filed 1–14–10; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS-2009-0087]

Wildlife Services; Availability of an Environmental Assessment and Finding of No Significant Impact

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that we have prepared an environmental assessment and finding of no significant impact relative to oral rabies vaccination programs in several States. The environmental assessment made available by this notice analyzes the further expansion of the oral rabies vaccination program to include the States of New Mexico and Arizona, which is necessary to effectively combat the gray fox variant of the rabies virus. The environmental assessment provides a basis for our conclusion that the expansion of the oral rabies vaccination program will not have a significant impact on the quality of the human environment. Based on its finding of no significant impact, the Animal and Plant Health Inspection Service has determined that an environmental impact statement need not be prepared.

ADDRESSES: To obtain copies of the environmental assessment and finding of no significant impact, contact Mr. Kevin Williams, Operational Support Staff, WS, APHIS, 4700 River Road Unit 87, Riverdale, MD 20737-1234; phone (301) 734-4937, fax (301) 734-5157, or email: (*Kevin.E.Williams@aphis.usda.gov*). The environmental assessment and finding or no significant impact are also posted on the APHIS Web site at (*http://www.aphis.usda.gov/regulations/ws/ws_nepa_environmental_documents.shtml*).

FOR FURTHER INFORMATION CONTACT: Dr. Dennis Slate, Rabies Program Coordinator, Wildlife Services, APHIS, 59 Chenell Drive, Suite 7, Concord, NH 03301; (603) 223-9623.

SUPPLEMENTARY INFORMATION: The Wildlife Services (WS) program in the Animal and Plant Health Inspection Service (APHIS) cooperates with Federal agencies, State and local governments, and private individuals to research and implement the best methods of managing conflicts between wildlife and human health and safety, agriculture, property, and natural resources. Wildlife-borne diseases that can affect domestic animals and humans are among the types of conflicts that APHIS-WS addresses. Wildlife is the dominant reservoir of rabies in the United States.

On November 24, 2009, we published a notice[1] in the **Federal Register** (74 FR 61319-61321, Docket No. APHIS-2009-0087) in which we made available, for review and comment, a proposed environmental assessment that analyzed the further expansion of the oral rabies vaccination program to include the States of New Mexico and Arizona, which is necessary to effectively combat the gray fox variant of the rabies virus. In that notice, we stated that the new environmental assessment is intended to facilitate planning and interagency coordination in the event of rabies outbreaks, help streamline program management, and clearly communicate to the public the actions involved in the oral rabies vaccination program.

We solicited comments on the proposed environmental assessment for 30 days ending on December 24, 2009. We received 102 comments by that date. The comments, which were almost entirely supportive of the vaccination program, are addressed in an attachment to the finding of no significant impact.

In this document, we are advising the public of our finding of no significant impact regarding the further expansion

[1] To view the notice, environmental assessment, finding of no significant impact, and comments, go to (*http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2009-0087*).

of the oral rabies vaccination program to include the States of New Mexico and Arizona. The finding, which is based on the environmental assessment, reflects our determination that this expansion of the oral rabies vaccination program will not have a significant impact on the quality of the human environment.

The environmental assessment and finding of no significant impact may be viewed on the Regulations.gov Web site (see footnote 1). Copies are also available from the individual listed under **ADDRESSES** and may be viewed in our reading room at USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect copies are requested to call ahead on (202) 690-2817 to facilitate entry into the reading room. In addition, copies may be obtained by calling or writing to the individual listed under **ADDRESSES**.

The environmental assessment and finding of no significant impact have been prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500-1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

Done in Washington, DC, this 12th day of January 2010.

Kevin Shea

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2010–806 Filed 1–14–10; 8:45 am]

BILLING CODE 3410–34–S

THE BROADCASTING BOARD OF GOVERNORS

Submission for OMB; Comment Request

AGENCY: The Broadcasting Board of Governors.

ACTION: Submission for OMB review; comment request.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 [Pub. L. 104–13; 44 U.S.C. Chapter 3506(c)(2)(A)], this notice announces that the information collection activity titled, "Surveys and Other Audience Research for Radio and TV Marti" has been forwarded to the Office of Management and Budget (OMB) for review and comment. The Broadcasting Board of Governors (BBG) is requesting reinstatement of this collection for a three-year period and approval of a revision to the burden hours. The information collection activity involved with this program is conducted pursuant to the mandate given to the BBG (formerly the United States Information Agency) in accordance with Public Law 98–111, the Radio Broadcasting to Cuba Act, dated, October 4, 1983, to provide for the broadcasting of accurate information to the people of Cuba and for other purposes. This act was amended by Public Law 101–246, dated, February 16, 1990, which established the authority for TV Marti.

DATES: Comments must be submitted on or before February 16, 2010.

FOR FURTHER INFORMATION CONTACT: Ms. Cathy Brown, the BBG Clearance Officer, BBG, IBB/A, Room 1274, 330 Independence Avenue, SW., Washington, DC 20237, telephone (202) 203–4664, e-mail address *cabrown@IBB.GOV;* or Mr. Nicholas Fraser, the OMB Desk Officer for BBG, via fax at 202–395–7285 or by e-mail at: *Nicholas_A._Fraser@omb.eop.gov.*

Copies: Copies of the proposed collection submitted to OMB for approval may be obtained from the BBG Clearance Officer or the OMB Desk Officer for BBG.

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on October 19, 2009, Volume 74, Number 200, Pages 53464–53465.

Public reporting burden for this proposed collection of information is estimated to average 30 minutes (.50 of an hour) per response for field survey respondents (600), and 240 minutes (4 hours) for Focus Group Study respondents (48), and 153 minutes (2.33 hours) for 120 Panel Group Study respondents based on one panel study, 10 respondents per month for 12 months, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Responses are voluntary and respondents will be required to respond only one time. Comments are requested on the proposed information collection concerning:

(a) Whether the proposed collection of information is necessary for the proper performance of the agency, including whether the information has practical utility;

(b) The accuracy of the Agency'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. Send comments regarding this burden estimate or any other aspect of this collection of information to Ms. Cathy Brown, the BBG Clearance Officer, BBG, IBB/A, Room 1274, 330 Independence Avenue, SW., Washington, DC 20237, telephone (202) 203–4664, e-mail address *cabrown@ibb.gov;* or to Mr. Nicholas Fraser, the OMB Desk Officer for BBG, via fax at 202–395–7285 or by e-mail at: *Nicholas_A._Fraser@omb.eop.gov.*

Current Actions: BBG is requesting reinstatement of this collection for a three-year period and approval for a revision to the burden hours.

Title: Interviews and Other Audience Research for Radio and TV Marti.

Abstract: Data from this information collection are used by BBG's Office of Cuba Broadcasting (OCB) in fulfillment of its mandate to evaluate effectiveness of Radio and TV Marti operations by estimating the audience size and composition for broadcasts; and assess signal reception, credibility and relevance of programming through this research.

Proposed Frequency of Responses

Number of Respondents—600 Field Study + 48 Group Study + 120 Panel Study = 768

Recordkeeping Hours—.50 Field Study + 4 Group Study + 2.38 Panel Study Group = (300) + (192) + (280) =

Total Annual Burden—772

Dated: January 8, 2010.

Marie Lennon,

Chief of Staff, IBB.

[FR Doc. 2010–706 Filed 1–14–10; 8:45 am]

BILLING CODE 8610–01–P

CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD

Sunshine Act; Notice of Meeting

In connection with its investigation into a natural gas explosion that occurred at the ConAgra production facility in Garner, North Carolina the

United States Chemical Safety and Hazard Investigation Board (CSB) announces that it will hold a public meeting on February 4, 2010, in Garner, North Carolina to consider urgent recommendations to the National Fire Protection Association (NFPA), the American Gas Association (AGA) and the Chair of the NFPA 54/ANSI Z223.1 Committee that result from its investigation of this incident.

The meeting will begin at 6 p.m. in the Oak Forrest Ballroom at the Sheraton Raleigh Hotel, 421 Salisbury St., Raleigh, North Carolina. The meeting is free and open to the public. Pre-registration is not required, but to assure adequate seating, attendees are encouraged to pre-register by emailing their names and affiliations to *ConAgra@CSB.gov.* by January 29, 2010.

On June 9, 2009, the ConAgra Slim Jim production facility in Garner, North Carolina, experienced a catastrophic natural gas explosion that caused four deaths, three critical life-threatening burn injuries, an amputation, and other injuries that sent a total of 71 people to the hospital. The explosion caused serious structural damage to 100,000 square feet of the packaging area of the plant, including wall and roof collapse, which had the potential to cause additional deaths and serious injuries.

The accident occurred during the installation and commissioning of a new gas-fired industrial water heater, manufactured by Energy Systems Analysts, Inc. (ESA). On the day of the accident, an ESA worker was attempting to purge the new gas piping of air by opening the supply of gas, prior to the start-up of the water heater. The purged gas was piped directly into the room rather than being vented to the outside. Some ConAgra employees smelled gas in the packaging area, others did not. Personnel who were in and out of the utility room noticed the gas odor but most were not seriously concerned and considered the purging activity to be a normal part of the start-up process. The ESA and ConAgra employees were not aware that as a result of the purging, a dangerous release of natural gas had occurred into the building, exceeding the lower explosive limit (LEL).

The vicinity of the utility room contained numerous potential ignition sources, including multiple unclassified electrical devices. Nonessential personnel were neither aware of the water heater start-up nor instructed to leave the plant during the gas line purging activity. Over 200 people who had no role in the installation were in the building at the time of the explosion.

At the meeting, the CSB investigative team will present its preliminary findings supporting the need for urgent recommendations arising from this incident to the CSB Board and the public. The Board will then ask questions of the team. At the end of the panel discussion, the Board will consider the urgent recommendations proposed by the staff. At the end of the Board's deliberations, the Board may decide to proceed to vote to formally approve the draft urgent recommendations.

The meeting will be videotaped and an official transcript will be included in the investigative file. All staff presentations are preliminary and are intended solely to allow the Board to consider the issues and factors involved in this case in a public forum. No factual analyses, conclusions, findings or recommendations of the staff should be considered final. Only after the Board has considered and approved the urgent recommendations will there be an approved final record.

Christopher W. Warner,

General Counsel.

[FR Doc. 2010–840 Filed 1–13–10; 4:15 pm]

BILLING CODE 6350–01–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Bureau of Industry and Security (BIS).

Title: Chemical Weapons Convention Declaration and Report Handbook and Forms.

OMB Control Number: 0694–0091.

Form Number(s): Form 1–1, Form 1–2, Form 1–2A, Form 1–2B, etc.

Type of Request: Extension without change of a currently approved collection.

Burden Hours: 16,047.

Number of Respondents: 816.

Average Hours per Response: 30 minutes to 577 hours (depending on the required documentation).

Needs and Uses: This information is required for the United States to comply with the Chemical Weapons Convention (CWC), an international arms control treaty. The Chemical Weapons Convention Implementation Act of 1998 and Commerce Chemical Weapons Convention Regulations (CWCR) specify the rights, responsibilities and obligations for submission of declarations, reports and inspections.

Affected Public: Business or other for-profit organizations.

Frequency: Annually or on occasion.

Respondent's Obligation: Mandatory.

OMB Desk Officer: Jasmeet Seehra, (202) 395–3123.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Jasmeet Seehra, OMB Desk Officer, via the Internet at *Jasmeet_K._Seehra@omb.eop.gov* or Fax to (202) 395–5167.

Dated: January 12, 2010.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–654 Filed 1–14–10; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Fisheries Certificate of Origin

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before March 16, 2010.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection

instrument and instructions should be directed to William G. Jacobson, (562) 980–4035 or *bill.jacobson@noaa.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

The information required by the International Dolphin Conservation Program Act, amendment to the Marine Mammal Protection Act, is needed to: (1) Document the Dolphin-safe status of tuna import shipments; (2) verify that import shipments of fish not harvested by large scale, high seas driftnets; and (3) verify that imported tuna not harvested by an embargoed nation or one that is otherwise prohibited from exporting tuna to the United States. Forms are submitted by importers and processors.

II. Method of Collection

Respondents have a choice of either electronic or paper forms. Methods of submittal include e-mail of electronic forms, and mail and facsimile transmission of paper forms.

III. Data

OMB Control Number: 0648–0370.

Form Number: NOAA Form 370.

Type of Review: Regular submission.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 440.

Estimated Time per Response: 20 minutes.

Estimated Total Annual Burden Hours: 4,167.

Estimated Total Annual Cost to Public: $4,050.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: January 12, 2010.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–726 Filed 1–14–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–909]

Certain Steel Nails from the People's Republic of China: Notice of Preliminary Results of the New Shipper Review

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

SUMMARY: The Department of Commerce ("Department") is conducting a new shipper review ("NSR") of the antidumping duty order on certain steel nails from the People's Republic of China ("PRC"). *See Notice of Antidumping Duty Order: Certain Steel Nails From the People's Republic of China*, 73 FR 44961 (August 1, 2008) ("*Order*"). We preliminarily find that Qingdao Denarius Manufacture Co., Ltd ("Qingdao Denarius") sold subject merchandise at less than normal value ("NV") during the period of review ("POR"), January 23, 2008, through January 31, 2009. If these preliminary results are adopted in our final results of review, we will instruct U.S. Customs and Border Protection ("CBP") to assess antidumping duties on entries of subject merchandise during the POR for which the importer–specific assessment rates are above de minimis.

EFFECTIVE DATE: January 15, 2010.

FOR FURTHER INFORMATION CONTACT: Tim Lord or Matthew Renkey, Office 9, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–7425 and (202) 482–2312, respectively.

SUPPLEMENTARY INFORMATION:

General Background

On February 25, 2009, pursuant to section 751(a)(2)(B)(i) of the Tariff Act of 1930, as amended ("Act"), and 19 CFR 351.214(c), the Department received a NSR request from Qingdao Denarius. Qingdao Denarius certified that it is a producer and exporter of the subject merchandise upon which the request was based. On March 20, 2009, the Department initiated the requested antidumping duty NSR. *See Certain Steel Nails from the People's Republic of China: Initiation of Antidumping Duty New Shipper Review*, 74 FR 11909 (March 20, 2009). On June 11, 2009, the Department extended the deadline for the preliminary results of this review by 120 days, to January 11, 2010. *See Certain Steel Nails from the People's Republic of China: Extension of Time Limit for the Preliminary Results of the New Shipper Review ("Extension")*[1], 74 FR 27777 (June 11, 2009).

Between April 3, 2009, and August 4, 2009, Qingdao Denarius submitted responses to the original sections A, C, and D questionnaires and supplemental sections A, C, and D questionnaires.

Surrogate Values

On October 29, 2009, the Department sent interested parties a letter requesting comments on surrogate country selection and information pertaining to valuing factors of production ("FOP"). On November 24, 2009, Petitioner[2] submitted surrogate value data. No other party submitted surrogate country or surrogate value data.

Verification

Pursuant to 19 CFR 351.307(b)(iv), we conducted verification of the sales and factors of production ("FOP") for Qingdao Denarius between November 9–12, 2009. *See* Memorandum to the File from Tim Lord, Case Analyst through Alex Villanueva, Program Manager, Verification of the Sales and Factors Response of Qingdao Denarius Manufacture Co., Ltd in the Antidumping New Shipper Review of Certain Steel Nails from the People's Republic of China, dated, January 8, 2010 ("Qingdao Denarius Verification Report").

Scope of the Order

The merchandise covered by this order includes certain steel nails having a shaft length up to 12 inches. Certain steel nails include, but are not limited to, nails made of round wire and nails that are cut. Certain steel nails may be of one piece construction or constructed of two or more pieces. Certain steel nails may be produced from any type of steel, and have a variety of finishes, heads, shanks, point types, shaft lengths and shaft diameters. Finishes include, but are not limited to, coating in vinyl, zinc (galvanized, whether by electroplating

[1] Where a statutory deadline falls on a weekend, federal holiday, or any other day when the Department is closed, the Department will reach its determination on the next business day, pursuant to 19 CFR 351.303(b). In this instance, the preliminary results will be due no later than January 11, 2010.

[2] Mid-Continent Nail Corporation.

or hot–dipping one or more times), phosphate cement, and paint. Head styles include, but are not limited to, flat, projection, cupped, oval, brad, headless, double, countersunk, and sinker. Shank styles include, but are not limited to, smooth, barbed, screw threaded, ring shank and fluted shank styles. Screw–threaded nails subject to this proceeding are driven using direct force and not by turning the fastener using a tool that engages with the head. Point styles include, but are not limited to, diamond, blunt, needle, chisel and no point. Finished nails may be sold in bulk, or they may be collated into strips or coils using materials such as plastic, paper, or wire. Certain steel nails subject to this proceeding are currently classified under the Harmonized Tariff Schedule of the United States ("HTSUS") subheadings 7317.00.55, 7317.00.65 and 7317.00.75.

Excluded from the scope of this proceeding are roofing nails of all lengths and diameter, whether collated or in bulk, and whether or not galvanized. Steel roofing nails are specifically enumerated and identified in ASTM Standard F 1667 (2005 revision) as Type I, Style 20 nails. Also excluded from the scope of this proceeding are corrugated nails. A corrugated nail is made of a small strip of corrugated steel with sharp points on one side. Also excluded from the scope of this proceeding are fasteners suitable for use in powder–actuated hand tools, not threaded and threaded, which are currently classified under HTSUS 7317.00.20 and 7317.00.30. Also excluded from the scope of this proceeding are thumb tacks, which are currently classified under HTSUS 7317.00.10.00. Also excluded from the scope of this proceeding are certain brads and finish nails that are equal to or less than 0.0720 inches in shank diameter, round or rectangular in cross section, between 0.375 inches and 2.5 inches in length, and that are collated with adhesive or polyester film tape backed with a heat seal adhesive. Also excluded from the scope of this proceeding are fasteners having a case hardness greater than or equal to 50 HRC, a carbon content greater than or equal to 0.5 percent, a round head, a secondary reduced–diameter raised head section, a centered shank, and a smooth symmetrical point, suitable for use in gas–actuated hand tools.

While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

Non–Market Economy Country Status

In every case conducted by the Department involving the PRC, the PRC has been treated as a non–market economy ("NME") country. *See Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Coated Free Sheet Paper from the People's Republic of China*, 72 FR 30758 (June 4, 2007). *See also Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the People's Republic of China*, 72 FR 60632, (October 25, 2007). In accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority. None of the parties to this proceeding have contested such treatment. Accordingly, we calculated NV in accordance with section 773(c) of the Act, which applies to NME countries.

Separate Rate Determinations

A designation as a NME remains in effect until it is revoked by the Department. *See* section 771(18)(C) of the Act. Accordingly, there is a rebuttable presumption that all companies within the PRC are subject to government control and, thus, should be assessed a single antidumping duty rate. It is the Department's standard policy to assign all exporters of the merchandise subject to review in NME countries a single rate unless an exporter can affirmatively demonstrate an absence of government control, both in law (*de jure*) and in fact (*de facto*), with respect to exports. To establish whether a company is sufficiently independent to be entitled to a separate, company–specific rate, the Department analyzes each exporting entity in an NME country under the test established in the *Final Determination of Sales at Less than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588 (May 6, 1991) ("*Sparklers*"), as amplified by the *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585 (May 2, 1994) ("*Silicon Carbide*").

A. Absence of *De Jure* Control

The Department considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) other formal measures by the government decentralizing control of companies. *See Sparklers*, 56 FR at 20589.

In this review, Qingdao Denarius submitted a complete response to the separate rates section of the Department's NME questionnaire. The evidence submitted by Qingdao Denarius includes government laws and regulations on corporate ownership, business licenses, and narrative information regarding the company's operations and selection of management. The evidence provided by Qingdao Denarius supports a finding of a *de jure* absence of government control over its export activities. Thus, we believe that the evidence on the record supports a preliminary finding of an absence of *de jure* government control based on: (1) an absence of restrictive stipulations associated with the exporter's business license; (2) the legal authority on the record decentralizing control over the respondent; and (3) other formal measures by the government decentralizing control of companies.

B. Absence of *De Facto* Control

The absence of *de facto* government control over exports is based on whether the respondent: (1) sets its own export prices independent of the government and other exporters; (2) retains the proceeds from its export sales and makes independent decisions regarding the disposition of profits or financing of losses; (3) has the authority to negotiate and sign contracts and other agreements; and (4) has autonomy from the government regarding the selection of management. *See Silicon Carbide*, 59 FR at 22587; *Sparklers*, 56 FR at 20589; *see also Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol from the People's Republic of China*, 60 FR 22544, 22545 (May 8, 1995).

In this review, Qingdao Denarius submitted evidence indicating an absence of de facto government control over their export activities. Specifically, this evidence indicates that: (1) the company sets its own export prices independent of the government and without the approval of a government authority; (2) the company retains the proceeds from its sales and makes independent decisions regarding the disposition of profits or financing of losses; (3) the company has a general manager, branch manager or division manager with the authority to negotiate and bind the company in an agreement; (4) the general manager is selected by the board of directors or company employees, and the general manager appoints the deputy managers and the manager of each department; and (5)

there is no restriction on any of the company's use of export revenues. Therefore, the Department preliminarily finds that Qingdao Denarius has established that it qualifies for a separate rate under the criteria established by Silicon Carbide and Sparklers.

New Shipper Review Bona Fide Analysis

Consistent with the Department's practice, we investigated the *bona fide* nature of the sale made by Qingdao Denarius for this NSR. In evaluating whether a single sale in a NSR is commercially reasonable, and therefore *bona fide*, the Department considers, *inter alia*, such factors as: (1) timing of the sale; (2) price and quantity; (3) the expenses arising from the transaction; (4) whether the goods were sold at a profit; and (5) whether the transaction was made on an arms–length basis. *See Tianjin Tiancheng Pharmaceutical Co. v. the United States*, 366 F. Supp. 2d R46, 1250 (CIT 2005). Accordingly, the Department considers a number of factors in its *bona fide* analysis, "all of which may be specific to the commercial realities surrounding an alleged sale of subject merchandise." *See Hebei New Donghua Amino Acid Co. v. the United States*, 374 F. Supp. 2d 1333, 1342 (CIT 2005). In examining Qingdao Denarius' sale in relation to these factors, the Department observed no evidence that would indicate that this sale was not bona fide. Therefore, we preliminarily find that the new shipper sale by Qingdao Denarius was made on a *bona fide* basis.

Based on our investigation into the *bona fide* nature of the sale, the questionnaire responses submitted by Qingdao Denarius, and our verification of Qingdao Denarius, as well the company's eligibility for separate rates (*see* Separate Rates Determination section above), we preliminarily determine that Qingdao Denarius has met the requirements to qualify as a new shipper during this POR. Therefore, for the purposes of these preliminary results of review, we are treating Qingdao Denarius' sale of subject merchandise to the United States as an appropriate transaction for this NSR.

Surrogate Country

When the Department is investigating imports from an NME country, section 773(c)(1) of the Act directs it to base normal value ("NV"), in most circumstances, on the NME producer's FOPs, valued in a surrogate market economy country or countries considered to be appropriate by the Department. In accordance with section 773(c)(4) of the Act, in valuing the FOPs, the Department shall utilize, to the extent possible, the prices or costs of FOPs in one or more market economy countries that are: (1) at a level of economic development comparable to that of the NME country; and (2) significant producers of comparable merchandise.

The Department determined that India, Philippines, Indonesia, Colombia, Thailand, and Peru are countries comparable to the PRC in terms of economic development.[3] Once it has identified economically comparable countries, the Department's practice is to select an appropriate surrogate country from the list based on the availability and reliability of data from the countries. *See* Department Policy Bulletin No. 04.1: Non–Market Economy Surrogate Country Selection Process (March 1, 2004). In this case, we have found that India is a significant producer of comparable merchandise. In the less–than-fair value investigation, we determined that India is comparable to the PRC in terms of economic development and has surrogate value data that is available and reliable. *See Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 FR 33977 (June 16, 2008). In this proceeding, we received comments regarding surrogate country selection only from the Petitioner, which supports the selection of India. Since no information has been provided in this review that would warrant a change in the Department's selection of India from the less–than-fair value investigation, we continue to find that India is the most appropriate surrogate country because it is at a similar level of economic development pursuant to section 773(c)(4) of the Act, is a significant producer of comparable merchandise, and has reliable, publicly available data representing a broad–market average.

In accordance with 19 CFR 351.301(c)(3)(ii), for the final results in an antidumping administrative review, interested parties may submit publicly available information to value FOPs within 20 days after the date of publication of these preliminary results.

[3] *See* Memorandum from Kelly Parkhill, Acting Director of Office of Policy, to Alex Villanueva, Program Manager, China/NME Group, Office 9: Request for a List of Surrogate Countries for the New Shipper Review of the Antidumping Duty Order on Certain Steel Nails ("Steel Nails") from the People's Republic of China ("PRC") (October 28, 2009).

U.S. Price

For Qingdao Denarius' sale to the United States, we used the export price ("EP") methodology, pursuant to section 772(a) of the Act, because the first sale to an unaffiliated purchaser was made prior to importation, and CEP was not otherwise warranted by the facts on the record. We calculated EP based on the price to unaffiliated purchasers in the United States.

In accordance with section 772(c) of the Act, as appropriate, we deducted from the starting price to unaffiliated purchasers foreign inland freight and brokerage and handling. We have reviewed each of these services and expenses reported by Qingdao Denarius and find that they were provided by an NME vendor or paid for using PRC currency. Thus, we based the deduction of these movement charges on surrogate values. *See* Memorandum to the File through Alex Villanueva, Program Manager, Office 9 from Tim Lord, Case Analyst, Office 9: Antidumping Duty New Shipper Review of Certain Steel Nails from the People's Republic of China: Surrogate Values for the Preliminary Results, dated January 8, 2010 ("Surrogate Values Memo") for details regarding the surrogate values for movement expenses.

Normal Value

1. Methodology

Section 773(c)(1)(B) of the Act provides that the Department shall determine the NVusing a FOP methodology if the merchandise is exported from an NME country and the information does not permit the calculation of NV using home–market prices, third–country prices, or constructed value under section 773(a) of the Act. The Department bases NV on the FOPs because the presence of government controls on various aspects of NMEs renders price comparisons and the calculation of production costs invalid under the Department's normal methodologies.

2. Factor Valuations

In accordance with section 773(c) of the Act, we calculated NV based on FOPs reported by Qingdao Denarius during the POR. To calculate NV, we multiplied the reported per–unit factor–consumption rates by publicly available Indian surrogate values. In selecting the surrogate values, we considered the quality, specificity, and contemporaneity of the data. As appropriate, we adjusted input prices by including freight costs to make them delivered prices. Specifically, we added to Indian import surrogate values a

surrogate freight cost using the shorter of the reported distance from the domestic supplier to the factory of production or the distance from the nearest seaport to the factory of production where appropriate. This adjustment is in accordance with the Court of Appeals for the Federal Circuit's decision in *Sigma Corp. v. United States*, 117 F. 3d 1401, 1407–1408 (Fed. Cir. 1997). Where we did not use Indian Import Statistics, we calculated freight based on the reported distance from the supplier to the factory.

Indian surrogate values denominated in foreign currencies were converted to USD using the applicable average exchange rate based on exchange rate data from the Department's website. For further details regarding the surrogate values used for these preliminary results, *see* the Surrogate Values Memo.

Preliminary Results of the Review

As a result of our review, we preliminarily find that the following margins exist for the period January 23, 2008, through January 31, 2009:

CERTAIN STEEL NAILS FROM PRC

Manufacturer/Exporter	Weighted–Average Margin (Percent)
Qingdao Denarius	38.13

Disclosure

The Department will disclose to parties of this proceeding the calculations performed in reaching the preliminary results within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Comments

In accordance with 19 CFR 351.301(c)(3)(ii), for the final results of this administrative review, interested parties may submit publicly available information to value FOPs within 20 days after the date of publication of these preliminary results. Interested parties must provide the Department with supporting documentation for the publicly available information to value each FOP. Additionally, in accordance with 19 CFR 351.301(c)(1), for the final results of this NSR, interested parties may submit factual information to rebut, clarify, or correct factual information submitted by an interested party less than ten days before, on, or after, the applicable deadline for submission of such factual information. However, the Department notes that 19 CFR 351.301(c)(1) permits new information only insofar as it rebuts, clarifies, or corrects information recently placed on the record.[4]

Interested parties may submit case briefs and/or written comments no later than 30 days after the date of publication of these preliminary results of this NSR. *See* 19 CFR 351.309(c)(ii). Rebuttal briefs and rebuttals to written comments, limited to issues raised in such briefs or comments, may be filed no later than 5 days after the deadline for submitting the case briefs. See 19 CFR 351.309(d). The Department requests that interested parties provide an executive summary of each argument contained within the case briefs and rebuttal briefs.

Any interested party may request a hearing within 30 days of publication of these preliminary results. See 19 CFR 351.310(c). Requests should contain the following information: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. Oral presentations will be limited to issues raised in the briefs. If we receive a request for a hearing, we plan to hold the hearing seven days after the deadline for submission of the rebuttal briefs at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230.

The Department intends to issue the final results of this NSR, which will include the results of its analysis raised in any such comments, within 90 days of publication of these preliminary results, pursuant to section 751(a)(2)(B)(iv) of the Act.

Assessment Rates

Upon completion of the final results, pursuant to 19 CFR 351.212(b), the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries on a weighted–average basis. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of the final results of review. If these preliminary results are adopted in our final results of review, the Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries. Pursuant to 19 CFR 351.212(b)(1), we will calculate importer–specific (or customer) per–unit duty assessment rates. We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review if any importer–specific assessment rate calculated in the final results of this NSR is above *de minimis*.

[4] *See Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Rescission, in Part* 72 FR 58809 (October 17, 2007), and accompanying Issues and Decision Memorandum at Comment 2.

Cash–Deposit Requirements

The following cash deposit requirements, when imposed, will be effective upon publication of the final results of this NSR for all shipments of subject merchandise from Qingdao Denarius entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) for subject merchandise produced and exported by Qingdao Denarius, the cash deposit rate will be the rate that is established in the final results of this NSR; (2) for subject merchandise exported by Qingdao Denarius but not manufactured by Qingdao Denarius, the cash deposit rate will continue to be the PRC–wide rate (*i.e.*, 118.04 percent); and (3) for subject merchandise manufactured by Qingdao Denarius, but exported by any other party, the cash deposit rate will be the rate applicable to the exporter. If the cash deposit rate calculated in the final results is zero or *de minimis*, no cash deposit will be required for those entries of subject merchandise both produced and exported by Qingdao Denarius. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

We are issuing and publishing this determination in accordance with sections 751(a)(2)(B) and 777(i) of the Act, and 19 CFR 351.214(h) and 351.221(b)(4).

Dated: January 8, 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–723 Filed 1–14–10; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–549–502]

Circular Welded Carbon Steel Pipes and Tubes from Thailand: Court Decision Not in Harmony with Final Results of Administrative Review

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

SUMMARY: On January 4, 2010, the U.S. Court for International Trade (CIT) sustained the Department of Commerce's (the Department) results of redetermination pursuant to the CIT's remand and entered final judgment in *Saha Thai v. United States*, Ct. 08–380, Slip Op. 09–116. Consistent with the decision of the United States Court of Appeals for the Federal Circuit (CAFC) in *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990) (*Timken*), the Department is notifying the public that the final judgment in this case is not in harmony with the Department's final results of the administrative review of the antidumping order on circular welded carbon steel pipes and tubes from Thailand covering the period March 1, 2006 through February 28, 2007. *Circular Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review*, 73 FR 61019 (October 15, 2008) (Final Results).

FOR FURTHER INFORMATION CONTACT: Jacqueline Arrowsmith or Dana Mermelstein, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230.; telephone: (202) 482–5255 OR (202) 482–1391, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 15, 2008, the Department published the final results of its administrative review of circular welded carbon steel pipes and tubes from Thailand. *See Final Results*. In the *Final Results*, after considering additional information and the arguments of both Saha Thai and Allied Tube and Conduit Corporation and Wheatland Tube Company (collectively, the petitioners), the Department granted an upward adjustment to export price in accordance with 772(c)(1) of the Tariff Act of 1930, as amended (the Act), which directs the Department to increase export price by "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States." *See* Section 772(c)(1) of the Act. Consistent with the Department's practice in the two most recently completed administrative reviews of this order, we calculated this upward adjustment to export price for exempted import duties using Saha Thai's actual yield loss factor rather than the Government of Thailand's (GOT) average yield loss factor. See Final Results and accompanying Issues and Decision Memorandum at Comment 4.

In *Saha Thai v. United States*, Ct. 08–380, Slip Op. 09–116, on October 15, 2009, the CIT remanded the *Final Results*, directing the Department to recalculate Saha Thai's antidumping duty margin using the GOT average yield loss factor to calculate an adjustment to export price for exempted import duties. The Department issued its final results of redetermination pursuant to the CIT's October 15, 2009 ruling. *See* Results of the Redetermination Pursuant to Remand, dated December 11, 2009 (found at http://ia.ita.doc.gov/remands/index.html). The Department explained that it had followed the CIT's directive and had recalculated Saha Thai's antidumping duty margin using the GOT mandated yield loss factor to calculate the upward adjustment to export price for the exempted import duties. The Department's redetermination resulted in changes to the *Final Results* weighted–average margin from 4.26 percent to 4.21 percent. On January 4, 2010, the CIT sustained the Department's redetermination.

Timken Notice

In its decision in *Timken*, 893 F. 2d at 341, the CAFC held that, pursuant to section 516A(e) of the Act, the Department must publish a notice of a court decision that is not "in harmony" with a Department determination and must suspend liquidation of entries pending a "conclusive" court decision. The CIT's January 4, 2010 decision in *Saha Thai v. United States* constitutes a final decision of that court that is not in harmony with the Department's *Final Results*. This notice is published in fulfillment of the publication requirements of *Timken*. Accordingly, the Department will continue the suspension of liquidation of the subject merchandise pending the expiration of the period of appeal or, if appealed, pending a final and conclusive court decision. In the event the CIT's ruling is not appealed, or if appealed, is upheld by the CAFC, the Department will instruct U.S. Customs and Border Protection to assess antidumping duties on entries of the subject merchandise during the POR from Saha Thai based on revised assessment rates calculated by the Department. The effective date of this notice is January 14, 2010, ten days from the date of the issuance of the court decision.

This notice is issued and published in accordance with section 516A(c)(1) of the Act.

Dated: January 11, 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–719 Filed 1–14–10; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 1–2010]

Foreign-Trade Zone 176—Rockford, IL; Application for Reorganization/Expansion Under Alternative Site Framework

An application has been submitted to the Foreign-Trade Zones (FTZ) Board (the Board) by the Greater Rockford Airport Authority, grantee of Foreign-Trade Zone 176, requesting authority to reorganize the zone under the alternative site framework (ASF) adopted by the Board (74 FR 1170, 1/12/09; correction 74 FR 3987, 1/22/09). The ASF is an option for grantees for the establishment or reorganization of general-purpose zones and can permit significantly greater flexibility in the designation of new "usage-driven" FTZ sites for operators/users located within a grantee's "service area" in the context of the Board's standard 2,000-acre activation limit for a general-purpose zone project. The application was submitted pursuant to the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u) and the regulations of the Board (15 CFR part 400). It was formally filed January 6, 2010.

FTZ 176 was approved by the Board on March 1, 1991 (Board Order 511, 56 FR 10409, 3/12/91) and expanded on February 9, 2005 (Board Order 1368, 70 FR 9613, 2/28/05), August 3, 2006 (Board Order 1473, 71 FR 47483, 8/17/06 and on January 30, 2009 (Board Order 1603, 74 FR 6570, 2/10/09). The general-purpose zone currently consists of the following sites: *Site 1:* (1,308 acres)—seven parcels located in and around the Chicago Rockford International Airport (including the

airport property, existing and planned warehouse and distribution facilities, and the City Logistics Park) and a parcel located at 1635 New Milford School Road/1129 18th Avenue, Rockford; *Site 3:* (566 acres) CenterPoint Industrial Park (366 acres), located at the intersection of Route 38 and Brush Grove Road, and Interstate Transportation Center Industrial Park (200 acres), located on the west side of State Highway 38, Rockford; *Site 4:* (304 acres) ProLogis Center, located at the southwest corner of Interstate 39 and Interstate 88, Rochelle; *Site 6:* (74 acres) Rolling Hills Industrial Park, located at 2200 Lakeshore Drive, Woodstock; *Site 7:* (133 acres) Crossroads Commerce Center, located at Interstate 88 and Main Street, Rochelle; *Site 8:* (8 acres, 2 parcels) Abilities Center, located at 1907 Kishwaukee Street, and Counselor Scale Building, located at 2000/2100 South Kishwaukee Street, Rockford; *Site 9:* (16 acres) former Essex Wire Plant, located 2816 North Main Street, Rockford; *Site 10:* (867 acres, 2 parcels) Park 88 Industrial Park, located at Peace Road and Fairview Drive and at the southwest corner of Peace Road and Gurler Road, DeKalb; *Site 11:* (46 acres) Loves Park Corporate Center, located at Bell School Road and Riverside Drive, Loves Park; and, *Site 12:* (296 acres) Rock 39 Industrial Park, located on Baxter Road, east of Route 39 and west of Mulford Road, Cherry Valley, Illinois. Site 7 is subject to a sunset provision that would terminate authority on September 1, 2011 and Sites 8–12 are subject to a sunset provision that would terminate authority on January 31, 2014 where no activity has occurred under FTZ procedures before those dates.

The grantee's proposed service area under the ASF would be Winnebago, Stephenson, Ogle, Lee, DeKalb, and Boone Counties, and portions of Bureau, McHenry and Kane Counties, Illinois. If approved, the grantee would be able to serve sites throughout the service area based on companies' needs for FTZ designation. The proposed service area is within and adjacent to the Rockford Customs and Border Protection port of entry.

The applicant is requesting authority to reorganize its existing zone project to include all of the sites as "magnet sites" and 40 acres of Site 4 would be deleted due to changed circumstances.

In accordance with the Board's regulations, Claudia Hausler of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is March 16, 2010. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to March 31, 2010.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230–0002, and in the "Reading Room" section of the Board's Web site, which is accessible via *http://www.trade.gov/ftz*. For further information, contact Claudia Hausler at *Claudia.Hausler@trade.gov* or (202) 482–1379.

Dated: January 7, 2010.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2010–746 Filed 1–14–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XT78

Mid-Atlantic Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's (MAFMC) Scientific and Statistical Committee (SSC) will hold a public meeting.

DATES: The meeting will be held on Tuesday, February 16, 2010, from 9 a.m. to 4 p.m.

ADDRESSES: The meeting will be held at the Sheraton Four Points, 7032 Elm Road, Baltimore, MD 21240; telephone: (410) 859–3300.

Council address: Mid-Atlantic Fishery Management Council, 300 S. New Street, Room 2115, Dover, DE 19904; telephone: (302) 674–2331.

FOR FURTHER INFORMATION CONTACT: Daniel T. Furlong, Executive Director, Mid-Atlantic Fishery Management Council, 300 S. New Street, Room 2115, Dover, DE 19904; telephone: (302) 674–2331, extension 19.

SUPPLEMENTARY INFORMATION: Topics to be discussed include new member orientation (overview of Council process and role of the SSC), review and adoption of SSC Standard Operating Practices and Procedures, ABC Control Rule Framework and Council Risk Policy, review 2010 SSC meeting schedule, and an update on the Management Strategy Evaluation Study funded by Council.

Although non-emergency issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during this meeting. Actions will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the MAFMC's intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to M. Jan Bryan at the Mid-Atlantic Council Office, (302) 674–2331 extension 18, at least 5 days prior to the meeting date.

Dated: January 12, 2010.

Tracey L. Thompson,

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

[FR Doc. 2010–646 Filed 1–14–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XT79

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Joint Canada-U.S. Review Panel (Panel) for Pacific hake/whiting will hold a work session that is open to the public.

DATES: The Joint Canada-U.S. Review Panel will be held beginning at 9 a.m., Monday, February 8, 2010 and will continue through Wednesday, February 10, 2010. The meetings will begin at 9 a.m. and end at 5:30 p.m. each day or until business for each day is completed.

ADDRESSES: The Joint Canada-U.S. Review Panel for Pacific hake/whiting will be held at the Hotel Deca, 4507 Brooklyn Avenue N.E., Seattle WA 98105; telephone: 1–800–899–0251.

Council address: Pacific Fishery Management Council (Pacific Council), 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Ms. Stacey Miller, NMFS Northwest Fisheries Science Center; telephone: (206) 437–5670; or Mr. John DeVore, Pacific Fishery Management Council; telephone: (503) 820–2280.

SUPPLEMENTARY INFORMATION: The purpose of the Joint Canada-U.S. Review Panel for Pacific hake/whiting is to review draft 2010 stock assessment documents and any other pertinent information for Pacific hake/whiting, work with the Stock Assessment Team to make necessary revisions, and produce a Joint Canada-U.S. Review Panel report for use by the Pacific Council family and other interested persons for developing management recommendations for 2010 fisheries. No management actions will be decided by the Panel. The Panel's role will be development of recommendations and reports for consideration by the Pacific Council at its March meeting in Sacramento, CA.

Although non-emergency issues not contained in the meeting agenda may come before the Panel participants for discussion, those issues may not be the subject of formal Joint Canada-U.S. Review Panel action during this meeting. Panel action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Panel participants' intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Ms. Carolyn Porter at (503) 820–2280 at least 5 days prior to the meeting date.

Dated: January 12, 2010.

Tracey L. Thompson,

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

[FR Doc. 2010–647 Filed 1–14–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XT81

North Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting by teleconference.

SUMMARY: The North Pacific Fishery Management Council's (Council) Individual Fishing Quota (IFQ) Implementation Team will have a teleconference on February 4, 2010. The conference number to call is (907) 271–2896.

DATES: The teleconference will be held on February 4, 2010 at 9 a.m. (Alaska Standard Time).

ADDRESSES: The teleconference will be held at the North Pacific Fishery Management Council, 605 W. 4th Avenue, Suite 306, Anchorage, AK.

FOR FURTHER INFORMATION CONTACT: Jane DiCosimo, Council staff; telephone: (907) 271–2809.

SUPPLEMENTARY INFORMATION: The Team will review four new proposals, which can be reviewed on the Council website at *http://www.alaskafisheries.noaa.gov/npfmc/* and rank the priority of all recommended proposals.

Although non-emergency issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during this meeting. Actions will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Gail Bendixen at (907) 271–2809 at least 7 working days prior to the meeting date.

Dated: January 12, 2010.

Tracey L. Thompson,

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

[FR Doc. 2010–653 Filed 1–14–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XT80

Fisheries of the South Atlantic, Gulf of Mexico, and Caribbean; Southeast Data, Assessment, and Review (SEDAR) Steering Committee; Public Meeting

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

ACTION: Notice of SEDAR Steering Committee Meeting.

SUMMARY: The SEDAR Steering Committee will meet via conference call to discuss timing of assessment projects for 2010, progress on procedural modifications, and the need for conflict of interest policies. See **SUPPLEMENTARY INFORMATION**.

DATES: The SEDAR Steering Committee will meet on Monday, February 8, 2010, from 9:30 a.m. to 11:30 a.m., EST.

ADDRESSES: The meeting will be held via conference call. Listening stations are available at the following locations: South Atlantic Fishery Management Council, 4055 Faber Place Drive #201, North Charleston, SC 29405; Gulf of Mexico Fishery Management Council, 2203 North Lois Avenue, Suite 1100, Tampa, FL 33607; and Caribbean Fishery Management Council, 268 Munoz Rivera Ave., Suite 1108, San Juan, Puerto Rico 00918.

FOR FURTHER INFORMATION CONTACT: John Carmichael, Science and Statistics Program Manager, SAFMC, 4055 Faber Place, Suite 201, North Charleston, SC 29405; telephone: (843) 571–4366 or toll free: (866) SAFMC–10; fax: (843) 769–4520.

SUPPLEMENTARY INFORMATION: The South Atlantic, Gulf of Mexico, and Caribbean Fishery Management Councils; in conjunction with NOAA Fisheries, the Atlantic States Marine Fisheries Commission, and the Gulf States Marine Fisheries Commission; implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks. The SEDAR Steering Committee provides oversight of the SEDAR

process, establishes assessment priorities, and provides coordination of assessment and management activities.

During this conference call the Steering Committee will discuss assessment scheduling for 2010, including changes in the completion dates for updates, the addition of a Goliath Grouper benchmark assessment, and additional Gulf of Mexico tilefish stocks to be assessed during SEDAR 22. The Committee will receive updates on procedural workshops addressing uncertainty and historic catch estimates. The Committee will discuss stocks to update for the Gulf of Mexico in 2011, timing of a future South Atlantic tilefish assessment, and the type of assessment to be conducted next for Gulf red snapper. The Committee will discuss progress on procedural changes implemented in 2010 and receive feedback from the Councils on the proposed changes. The Committee will discuss revised guidelines addressing conflict of interest policies for scientific reviewers and consider whether SEDAR policy changes are required.

Although non-emergency issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during this meeting. Actions will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the South Atlantic Fishery Management Council office at the address listed above at least 5 business days prior to the meeting.

Dated: January 12, 2010.

Tracey L. Thompson,

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

[FR Doc. 2010–648 Filed 1–14–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XT29

Taking and Importing Marine Mammals; Naval Explosive Ordnance Disposal School Training Operations Activities at Eglin Air Force Base, FL

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

ACTION: Notice; receipt of application for a Letter of Authorization; request for comments and information.

SUMMARY: NMFS has received an application from the U.S. Department of the Air Force, Headquarters 96th Air Base Wing (U.S. Air Force), Eglin Air Force Base (Eglin AFB) for authorization to take marine mammals, by harassment, incidental to Naval Explosive Ordnance Disposal School (NEODS) training operations, military readiness activities, at Eglin AFB, FL from approximately October, 2010, to October, 2015. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is announcing receipt of the U.S. Air Force's request for the development and implementation of regulations governing the incidental taking of marine mammals and inviting information, suggestions, and comments on the U.S. Air Force's application and request. NMFS issued annual Incidental Harassment Authorizations pursuant to the MMPA, for similar specified activities in 2005, 2006, 2007, and 2008. No activities have occurred to date.

DATES: Comments and information must be received no later than February 16, 2010.

ADDRESSES: Comments on the application should be addressed to P. Michael Payne, Chief, Permits, Conservation, and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225. The mailbox address for providing email comments is *PR1.0648–XT29 @noaa.gov*. NMFS is not responsible for e-mail comments sent to addresses other than the one provided here. Comments sent via e-mail, including all attachments, must not exceed a 10–megabyte file size.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.nmfs.noaa.gov/pr/permits/incidental.htm* 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.

A copy of the application containing a list of the references used in this document may be obtained by writing to the address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm*. Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Howard Goldstein or Jolie Harrison, Office of Protected Resources, NMFS, 301–713–2289, ext. 172.

SUPPLEMENTARY INFORMATION:

Availability

A copy of the application containing a list of the references used in this document may be obtained by writing to the address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the internet at:*http://www.nmfs.noaa.gov/pr/permits/incidental.htm*.

Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

Background

In the case of military readiness activities (as defined by Subsection 315(f) of Public Law 107–314; 16 U.S.C. 703 note), subparagraphs 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional, taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and regulations are issued, or if the taking is limited to harassment an Incidental Harassment Authorization (IHA) is issued. Upon making a finding that an application for incidental take is adequate and complete, NMFS commences the incidental take authorization process by publishing in the **Federal Register** a notice of a receipt of an application for the implementation of regulations or a proposed IHA.

An authorization for the incidental takings may be granted if NMFS finds that the taking during the period of the authorization will have a negligible

impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth to achieve the least practicable adverse impact.

NMFS has defined "negligible impact" in 50 CFR 216.103 as:

"...an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

With respect to military readiness activities, the MMPA defines "harassment" as:

"(i) any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or behavioral patterns are abandoned or significantly altered (Level B harassment)."

Summary of Request

On November 6, 2009, NMFS received an application from the U.S. Air Force requesting an authorization for the take of marine mammals incidental to NEODS training operations. The requested regulations would establish a framework for authorizing incidental take future Letters of Authorization (LOA). These LOAs, if approved, would authorize the take, by Level B (behavioral) harassment, of Atlantic bottlenose dolphins (*Tursiops truncatus*) incidental to NEODS training operations and testing at Eglin Gulf Test and Training Range at property off Santa Rosa Island, FL, in the northern Gulf of Mexico (GOM). Based on the application, pre-mitigation take would average approximately 10 animals per year; approximately 50 animals over the five year period. NMFS issued an Incidental Harassment Authorization (IHA) for the same activity in 2005 (70 FR 51341; August 30, 2005), 2006 (70 FR 60693; October 16, 2006), 2007 (72 FR 58290; October 15, 2007), and 2008 (73 FR 56800, September 30, 2008). The past missions have been delayed due to safety issues concerning bringing demolition charges under a bridge and no missions have occurred to date under any of the IHAs. NEODS missions would involve underwater detonations of small, live explosive charges adjacent to inert mines. The NEODS training activities are classified as military readiness activities. The U.S. Air Force states that noise associated with underwater detonation of the specified explosive charges may expose bottlenose dolphins in the area to noise and pressure resulting in non-injurious temporary threshold shift (TTS) (temporary hearing loss).

Specified Activities

The NEODS may conduct up to eight two-day demolition training events annually; these missions may occur at any time of the year, although the U.S. Air Force anticipates that 60 percent of the specified activities will occur during summer months while 40 percent will occur during winter months. Each demolition training event involves a maximum of five detonations. Up to 20 five-pound (lb) charges (five lbs net explosive weight [NEW] per charge) and 20 ten-lb charges (ten lbs NEW per charge) would be detonated annually in the GOM, approximately three nautical miles (5.6 kilometers) offshore of Eglin AFB. Detonations would be conducted on the sea floor, adjacent to an inert mine, at a depth of approximately 60 feet (18.3 meters). Additional information on the NEODS training operations is contained in the application, which is available upon request (see **ADDRESSES**).

Information Solicited

Interested persons may submit information, suggestions, and comments related to the U.S. Air Force's request (see **ADDRESSES**). All information, suggestions, and comments related to the U.S. Air Force's NEODS training operations request and NMFS' potential development and implementation of regulations governing the incidental taking of marine mammals by Eglin AFB's NEODS training operations will be considered by NMFS in developing, if appropriate, the most effective regulations governing the issuance of Letters of Authorization.

Dated: January 11, 2010.

James H. Lecky,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2010–722 Filed 1–14–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

Economic Development Administration

Trade Adjustment Assistance for Firms Program Fiscal Year 2009 Annual Report

AGENCY: Economic Development Administration, Commerce.

ACTION: Notice.

SUMMARY: The Secretary of Commerce is directed by Section 1866 of the Trade and Globalization Adjustment Assistance Act of 2009 (TGAAA), which became effective May 17, 2009, to submit to Congress a report on the Trade Adjustment Assistance for Firms (TAAF) program by the 15th of December each year. The TAAF Program is one of four Trade Adjustment Assistance (TAA) programs authorized by the Trade Act of 1974 (Trade Act). The mission of the TAAF Program is to provide technical and financial assistance to U.S. firms affected by import competition. The program provides assistance in the development of business recovery plans, which are known as Adjustment Proposals under Section 252 of the Trade Act, and matching funds to implement projects outlined in the Adjustment Proposals. The TAAF Program supports a national network of 11 Trade Adjustment Assistance Centers (TAACs) to help U.S. firms apply for assistance and prepare and implement strategies to guide their economic recovery.

Overall, there has been an increase in the demand for the TAAF Program in fiscal year 2009, as demonstrated by the increase in the number of petitions for certification and Adjustment Proposals submitted to EDA for approval.

Fiscal year	Petitions received	Petitions accepted for filing	Petitions certified	Petitions denied	Avg. days between submission and acceptance	Avg. days between acceptance and certification
2009	281	247	212	1	28	45
2008	188	[1] 190	183	0	11	45

Fiscal year	Petitions received	Petitions accepted for filing	Petitions certified	Petitions denied	Avg. days between submission and acceptance	Avg. days between acceptance and certification
Change	49%	30%	16%	NA	155%	NA

[1] Two of the petitions accepted for filing in FY 2008 were received by EDA in FY 2007.

Because of the spike in petitions and Adjustment Proposals, the Economic Development Administration (EDA) experienced challenges in meeting the 40-day processing deadline for petitions accepted for filing immediately after the new legislation was enacted. Beginning in the fourth quarter of FY 2009, the average processing time for petitions has started to decline below the 40-day requirement. Additional TAAF staff resources are expected to help improve the processing time even further for FY 2010.

TAACs effectively reached small and medium-sized firms in FY 2009. The average employment, net sales, and productivity of firms certified in FY 2009 declined in comparison to the previous fiscal year. Sixty-five percent of all firms proposed to implement a marketing/sales project or production/engineering project in their Adjustment Proposals, and 35 percent of all firms proposed support systems or management/financial projects.

FY	Avg. employment at certification	Avg. annual net sales at certification	Avg. productivity at certification (net sales per employee)
2009	77	$10,715,785	$128,729
2008	82	$13,081,993	$149,565
% Change	(6%)	(18%)	(14%)

The following table illustrates that in FY 2009 EDA approved an additional 33 Adjustment Proposals as compared to FY 2008 and proposed to spend an additional total of $2.4 million in government funds.

APPROVED TAAF ADJUSTMENT PROPOSALS

	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Number of Plans Approved	162	177	132	137	126	139	172
Total Government Share (millions)	$8.1	$8.5	$5.9	$6.7	$7.1	$7.9	$10.3
Total Firm Share (millions)	$7.4	$8.1	$5.4	$6.0	$5.9	$7.5	$9.8
Total Projected Costs (millions)	$15.5	$16.6	$11.3	$12.7	$13.0	$15.4	$20.2
Avg. Government Assistance Per Firm	$50,000	$48,023	$44,697	$48,905	$56,449	$56,827	$60,123

The TGAAA identifies 14 measures that should be covered by this report. EDA currently is unable to provide any information on four measures: (1) The number of firms that inquired about the program, (2) the number of petitions certified by congressional district, (3) the number of firms leaving the program and why, and (4) sales, employment, and productivity at each firm upon completion of the program and every year for the two years thereafter. EDA is taking steps to collect and report on all of the missing measures for the FY 2010 Annual Report.

ADDRESSES: Trade Adjustment Assistance for Firms Division, Room 7106, Economic Development Administration, U.S. Department of Commerce, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Bryan Borlik, Director of the TAAF Program, 202–482–3901.

SUPPLEMENTARY INFORMATION:

Table of Contents

Introduction

This report is provided in compliance with Section 1866 of the Trade and Globalization Adjustment Assistance Act of 2009 (Sec. 1866, Pub. L. 111–5, 123 Stat. 115, at 367) (TGAAA). This section directs the Secretary of Commerce to provide an annual report

on the Trade Adjustment Assistance for Firms (TAAF) program by the 15th of December each year. Section 1866 of the TGAAA states:

IN GENERAL.—Not later than December 15, 2009, and each year thereafter, the Secretary of Commerce shall prepare a report containing data regarding the trade adjustment assistance for firms program provided for in chapter 3 of title II of the Trade Act of 1974 (19 U.S.C. 2341 *et seq.*) for the preceding fiscal year.

This report will provide findings and results to the extent that the data is available on the following 14 measures:

1. The number of firms that inquired about the program.

2. The number of petitions filed under section 251.

3. The number of petitions certified and denied.

4. The average time for processing petitions.

5. The number of petitions filed and firms certified for each congressional district of the United States.

6. The number of firms that received assistance in preparing their petitions.

7. The number of firms that received assistance developing business recovery plans (Adjustment Proposals).

8. The number of Adjustment Proposals approved and denied by the Secretary of Commerce.

9. Sales, employment, and productivity at each firm participating in the program at the time of certification.

10. Sales, employment, and productivity at each firm upon completion of the program and each year for the two-year period following completion.

11. The financial assistance received by each firm participating in the program.

12. The financial contribution made by each firm participating in the program.

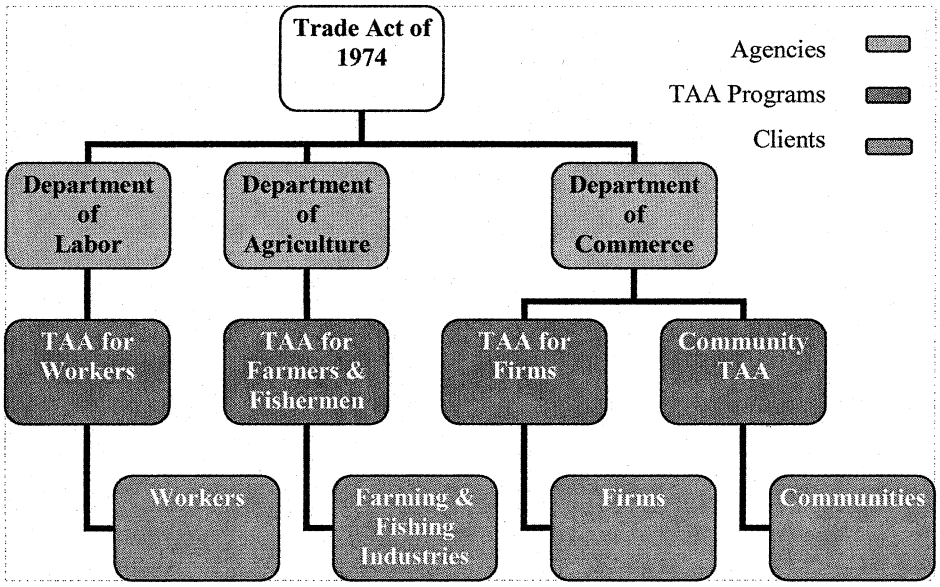
13. The types of technical assistance included in the Adjustment Proposals of firms participating in the program.

14. The number of firms leaving the program before completing the project or projects in their Adjustment Proposals and the reason the project was not completed.

The TAAF program is one of four Trade Adjustment Assistance (TAA) programs authorized under the Trade Act of 1974 (19 U.S.C. 2341 *et seq) (Trade Act).* The responsibility for administering the TAA for Firms program is delegated by the Secretary of Commerce to the Economic Development Administration (EDA). EDA, through a national network of 11 Trade Adjustment Assistance Centers (TAAC), provides technical assistance on a cost-shared basis to U.S. manufacturing, production, and service firms in all fifty states, the District of Columbia, and the Commonwealth of Puerto Rico.

The other TAA programs are TAA for Workers, Farmers, and Communities, which are administered by the Departments of Labor, Agriculture, and Commerce through EDA, respectively.

Exhibit 1: TAA Programs



The TAAF Program is relatively small. Between FY 2000 and FY 2009, its appropriations have ranged from $10.5 million to $15.8 million.

Program Initiative

The mission of the program is to provide technical and financial assistance to U.S. firms affected by import competition. The program provides assistance in the development of business recovery plans, which are known as Adjustment Proposals under Section 252 of the Trade Act, and matching funds to implement projects outlined in Adjustment Proposals.

The program's premise is that some U.S. firms, in particular small businesses, lack the internal capabilities or resources necessary to effectively respond to new import competition. The Trade Adjustment Assistance Centers' goal is to help U.S. firms increase profitability and retain employees while competing successfully in the global economy.

Program Description

The TAAF Program supports a national network of 11 Trade Adjustment Assistance Centers (TAAC) to help U.S. firms apply for assistance and prepare and implement strategies to guide their economic recovery. Information about the TAACs may be found at www.taacenters.org. The current TAACs and the states they serve are listed in the table below. Please note that currently Puerto Rico has not been assigned to any particular TAAC. Firms

in Puerto Rico receive assistance from the TAAC that received the inquiry.

EXHIBIT 2—TAACS AND THEIR RESPECTIVE SERVICE AREAS

TAAC	States served
Great Lakes	Indiana, Michigan, and Ohio.
Mid-America	Arkansas, Kansas, and Missouri.
Mid-Atlantic	Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Virginia, and West Virginia.
Midwest	Illinois, Iowa, Minnesota, and Wisconsin.
New England	Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.
New York State	New York.
Northwestern	Alaska, Idaho, Montana, Oregon, and Washington.
Rocky Mountain	Colorado, Nebraska, New Mexico, North Dakota, South Dakota, Utah, and Wyoming.
Southeastern	Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee.
Southwest	Louisiana, Oklahoma, and Texas.
Western	Arizona, California, Hawaii, and Nevada.

The TAACs' main responsibilities are:

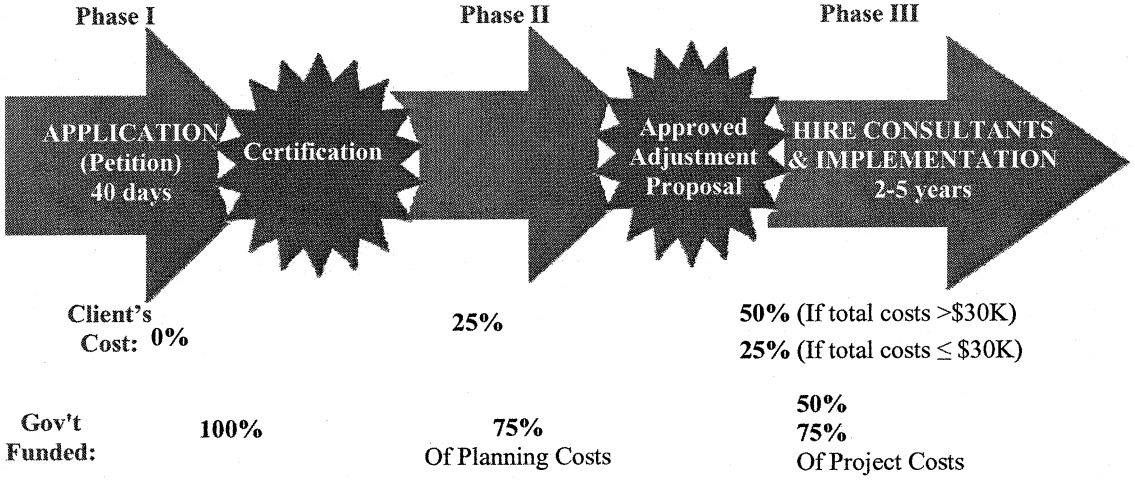
• Assisting firms in preparing their petitions for TAAF. Firms are not charged for any assistance related to preparing a petition.

• Once a petition has been approved, TAACs work closely with company management to identify the firm's strengths and weaknesses and develop a customized Adjustment Proposal designed to stimulate recovery and growth. The program pays up to 75% of the cost of developing an Adjustment Proposal and the firm must pay the rest. EDA must approve all Adjustment Proposals to ensure they conform to statutory and regulatory requirements.

• After an Adjustment Proposal has been approved, company management and TAAC staff jointly identify consultants with the specific expertise required to assist the firm. The program pays up to $75,000 in matching funds for the cost of these consultants when implementing the Adjustment Proposal. After a competitive procurement process, the TAAC and the firm generally contract with private consultants to implement the adjustment plan.

There are three main phases to receiving technical assistance under the program. The phases are (1) Petitioning for certification, (2) recovery planning, and (3) project implementation.

Exhibit 3: TAA for Firms Program Phases



Eligibility to Apply for Trade Adjustment Assistance" and any supporting documentation. Although a firm may complete a petition and submit it to EDA on its own, certification specialists within the TAACs generally work with the firm at no cost to complete and submit a petition to EDA. Once a petition has been accepted, EDA is required to make a final determination on a petition within 40 days.[2]

Certified firms may then submit an Adjustment Proposal for EDA's approval. It generally takes EDA between two weeks to one month to make a final determination on an Adjustment Proposal, depending on the workflow.

The firm works with consultants to implement projects in an approved Adjustment Proposal. As projects are implemented and if the firm is satisfied

[2] As of May 17, 2009, the deadline for making a final determination is 40 days. Before May 17, 2009 EDA had 60 days to make a determination.

with the work, the firm will first pay their match to the consultant and then send a notice to the TAAC stating that they are satisfied with the work and that they have paid their matching share. The TAAC will then pay the federal matching share. Firms have up to five years from the date of an Adjustment Proposal's approval to implement it, unless they receive approval for an extension. Generally, firms complete the implementation of their Adjustment Proposals over a two-year period.

Data for This Report

Most of the data used in this report were collected from the petitions for certification and the Adjustment Proposals submitted by the TAACs on behalf of firms. Data from these sources were recorded into a central database by Eligibility Reviewers at EDA. Results for average processing times and the number of approved and denied petitions and Adjustment Proposal were derived by EDA.

All of the data available for Fiscal Years (FY) 2009 and 2008 were used for this report. One weakness to the data sets used is that a few records were incomplete. EDA has identified data collection deficiencies and plans to train EDA and TAAC staff in order to eliminate, to the extent possible, problems that result in incomplete records.

The performance measures in this report were evaluated by looking at quarterly trends and comparing results for FY 2009 and FY 2008. In addition, characteristics of the petitioning and certified firms were aggregated and reported as averages to provide a general profile for these firms.

Results/Findings

(1) The number of firms that inquired about the program.

Because of the decentralized nature of the TAAF Program, EDA currently does not collect reliable information on the number of firms that inquire about the TAA program. EDA is working with the TAACs to collect this data and will include this measure in the revised quarterly report submitted by the TAACs to EDA. EDA is expecting to start collecting this data by the end of December 2009.

(2) The number of petitions filed under section 251.

(3) The number of petitions certified and denied.

(4) The average time for processing petitions.

In FY 2009, there was a 49 percent increase in the number of petitions received by EDA, a 16 percent increase in the number of certified firms, and on average the total petition processing time increased by 17 calendar days, which period is defined as the period between actual submission of a petition by the TAAC and final determination, that is certification or rejection, by EDA.

After accepting a petition for filing, EDA has 40 calendar days to make a final determination. In order to avoid having to reject many of the petitions, EDA does not consider a petition accepted until all the necessary information is collected. When considering the duration between the time of submission and when a final determination is made, the processing time for petitions increased by 17 days in FY 2009 as compared to FY 2008. For the average petition, in both FY 2008 and FY 2009 it took 45 days to make a final determination after it had been accepted for filing under section 251 of the Trade Act.

EXHIBIT 4—PETITIONS FOR CERTIFICATION FYs 2009 AND 2008 SUMMARY COMPARISON

FY	Number of petitions received	Number of petitions accepted for filing	Number of petitions certified	Number of petitions denied	Average days between submission and acceptance for filing	Average days between acceptance and certification
2009	281	247	212	1	28	45
2008	188	[3] 190	183	0	11	45
% Change	49	30	16	N/A	155	N/A

[3] Two of the petitions accepted for filing in FY 2008 were received by EDA in FY 2007.

EXHIBIT 5—PETITIONS FOR CERTIFICATION BY STATE AND TAAC

FY 2009 Petitions for Certification

TAAC	State	Number of petitions received	Number of petitions accepted for filing	Number of petitions certified	Number of petitions denied	Average days between submission and acceptance	Average days between acceptance and certification
	IN	7	7	7	0		
	MI	13	11	10	0	.....	.....
	OH	8	7	5	0	.....	.....
Great Lakes	Total	28	25	22	0	25	43
	AR	2	2	2	0	.....	.....
	KS	3	2	2	0	.....	.....
	MO	13	10	8	0	.....	.....
Mid-America	Total	18	14	12	0	37	49
	DC	0	0	0	0	.....	41
	DE	0	0	0	0	.....	.....
	MD	0	0	0	0	.....	.....
	NJ	1	1	[4] 2	0	.....	.....
	PA	22	18	16	0	.....	.....

EXHIBIT 5—PETITIONS FOR CERTIFICATION BY STATE AND TAAC—Continued

FY 2009 Petitions for Certification							
TAAC	State	Number of petitions received	Number of petitions accepted for filing	Number of petitions certified	Number of petitions denied	Average days between submission and acceptance	Average days between acceptance and certification
	VA	1	1	0	0		
	WV	0	0	0	0		
Mid-Atlantic.							
	Total	24	20	18	0	32	
	IA	2	2	1	0		
	IL	28	27	23	0		
	MN	8	7	6	0		
	WI	10	9	6	0		
Midwest	Total	48	45	36	0	26	47
	CT	10	9	9	0		
	MA	28	25	24	0		
	ME	2	1	1	0		
	NH	8	8	6	0		
	RI	8	8	7	0		
	VT	0	0	0	0		
New England	Total	56	51	47	0	24	35
New York State	NY Total	16	13	11	0	28	46
	AK	1	0	0	0		
	ID	0	0	0	0		
	MT	2	1	0	0		
	OR	5	6	5	0		
	WA	6	5	5	0		
Northwest	Total	14	12	10	0	33	31
	CO	12	11	11	0		
	ND	1	1	0	0		
	NE	0	0	0	0		
	NM	2	2	2	0		
	SD	0	0	0	0		
	UT	4	3	2	0		
	WY	0	0	0	0		
Rocky Mountain	Total	19	17	15	0	26	49
	AL	0	0	0	0	31	44
	FL	2	2	2	0		
	GA	4	4	3	0		
	KY	0	0	0	0		
	MS	0	1	0	0		
	NC	13	11	10	0		
	SC	0	0	0	0		
	TN	0	0	0	0		
Southeastern	Total	19	18	15	0	31	44
	LA	2	1	1	0		
	OK	12	11	9	1		
	TX	9	8	7	0		
Southwest	Total	23	20	17	1		
	AZ	1	1	0	0		
	CA	15	11	9	0		
	HI	0	0	0	0		
	NV	0	0	0	0		
Western	Total	16	12	9	0	44	37

[4] One of the petitions certified from FY 2009 was received by EDA in FY 2008.

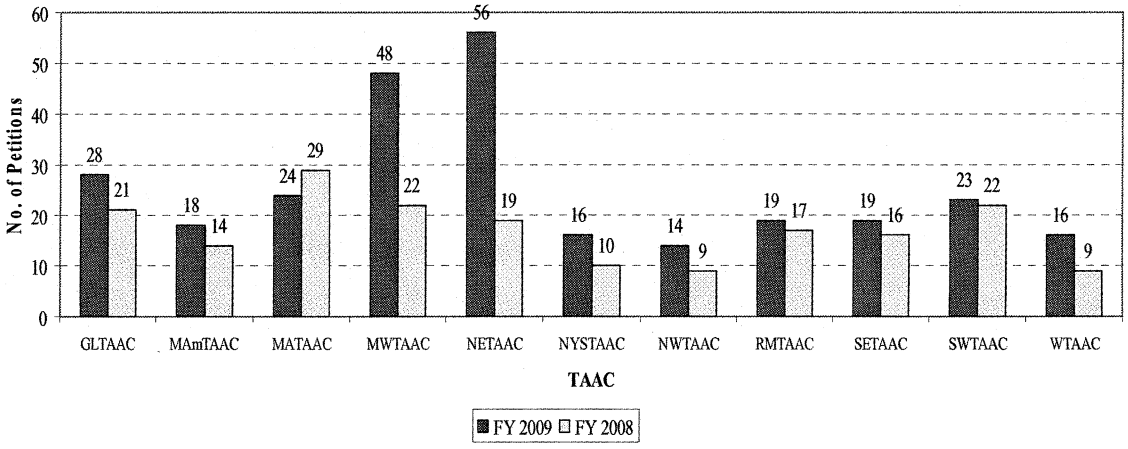
(5) The number of petitions filed and firms certified for each congressional district of the United States.

EDA did not collect the number of petitions filed and certified by congressional district in FY 2009. EDA has revised Form ED–840P and is currently undergoing the required Paperwork Reduction Act (PRA) analysis. EDA has incorporated this measure into the revised Form ED–840P, which is currently being submitted to the Office of Management and Budget (OMB) for PRA clearance. In the interim, TAACs have been instructed to identify applicants' congressional districts in supporting documentation submitted with the petition.

(6) The number of firms that received assistance in preparing their petitions.

Although EDA has not previously recorded whether a petitioning firm received assistance in preparing their petition, EDA understood that all firms who submitted petitions through TAACs received assistance from the respective TAAC. EDA has revised Form ED–840P to more accurately record whether firms receive assistance and from whom. Exhibit 6 shows the number of petitions submitted by each TAAC.

Exhibit 6: Number of Petitions Submitted in FYs 2009 and 2008 by Each TAAC



(7) Sales, employment, and productivity at each firm participating in the program at the time of certification.

For those firms certified in FY 2009, average employment was by six percent below that for firms certified in FY 2008. Average net sales were 18 percent below, and average productivity was 14 percent below. For the purposes of this report, productivity is defined as net sales per employee. Since the certified firms are in various industries, which have a variety of ways to measure productivity, sales per employee was chosen as the productivity measure. This measure is used because it is simple and can be generally applied to all certified firms.

EXHIBIT 7—SUMMARY COMPARISON OF AVERAGE EMPLOYMENT, NET SALES, AND PRODUCTIVITY FOR FIRMS CERTIFIED IN FYS 2009 AND 2008

FY	Average employment at certification	Average annual net sales at certification	Average productivity at certification (net sales per employee)
2009	77	$10,715,785	$128,729
2008	82	$13,081,993	$149,565
% Change	(6%)	(18%)	(14%)

EXHIBIT 8—AVERAGE EMPLOYMENT, NET SALES, AND PRODUCTIVITY FOR FIRMS CERTIFIED IN FY 2009 CLASSIFIED BY STATE AND TAAC

TAAC	State	Monthly average employment	Averag annual net sales	Average productivity (net sales per employee)
	IN	60	$6,563,817	$90,814
	MI	88	13,511,133	169,359
	OH	121	21,163,407	163,563
Great Lakes	Average	86	13,039,777	143,050
	AR	23	2,462,000	106,279

EXHIBIT 8—AVERAGE EMPLOYMENT, NET SALES, AND PRODUCTIVITY FOR FIRMS CERTIFIED IN FY 2009 CLASSIFIED BY STATE AND TAAC—Continued

TAAC	State	Monthly average employment	Averag annual net sales	Average productivity (net sales per employee)
	KS	114	7,847,500	69,224
	MO	159	5,786,387	94,504
Mid-America	Average	129	5,575,841	92,253
	DC	0	0	0
	DE	0	0	0
	MD	0	0	0
	NJ	53	6,195,713	115,674
	PA	77	9,535,754	125,789
	VA	0	0	0
	WV	0	0	0
Mid-Atlantic	Average	74	9,164,638	124,665
	IA	29	1,365,689	47,093
	IL	66	11,027,769	153,625
	MN	85	9,328,702	121,189
	WI	249	33,110,952	158,130
Midwest	Average	99	14,156,731	146,011
	CT	54	8,008,737	116,324
	MA	39	6,070,712	146,199
	ME	8	405,912	49,501
	NH	47	5,468,664	121,973
	RI	79	6,903,936	164,784
	VT	0	0	0
New England	Average	48	6,368,535	138,096
New York State	Average	73	9,339,480	108,707
	AK	0	0	0
	ID	0	0	0
	MT	0	0	0
	OR	189	3,229,683	61,458
	WA	11	1,500,700	103,599
Northwestern	Average	100	2,365,191	82,529
	CO	97	34,035,214	140,439
	ND	0	0	0
	NE	0	0	0
	NM	74	4,408,313	64,871
	SD	0	0	0
	UT	80	11,181,050	150,881
	WY	0	0	0
Rocky Mountain	Average	92	27,037,738	131,755
	AL	0	0	0
	FL	78	7,084,047	138,109
	GA	34	3,183,356	107,743
	KY	0	0	0
	MS	0	0	0
	NC	111	24,225,837	155,842
	SC	0	0	0
	TN	0	0	0
Southeastern	Average	91	17,731,769	143,858
	LA	45	3,121,252	69,361
	OK	51	3,689,045	67,355
	TX	46	5,504,869	110,700
	Average	48	4,403,338	85,321
Southwest	AZ	0	0	0

EXHIBIT 8—AVERAGE EMPLOYMENT, NET SALES, AND PRODUCTIVITY FOR FIRMS CERTIFIED IN FY 2009 CLASSIFIED BY STATE AND TAAC—Continued

TAAC	State	Monthly average employment	Averag annual net sales	Average productivity (net sales per employee)
	CA	51	7,904,808	143,021
	HI	0	0	0
	NV	0	0	0
Western	Average	51	7,921,301	143,139

EXHIBIT 9 [5]—AVERAGE MONTHLY EMPLOYMENT, ANNUAL NET SALES, AND PRODUCTIVITY AT EACH FIRM CERTIFIED FOR THE TAAF PROGRAM IN FY 2009

Project No.	Average monthly employment	Annual net sales	Productivity
−2141167170	11	$1,196,902	$108,809
−2121444292	67	4,006,469	59,798
−2042247253	122	15,791,636	129,355
−2013118865	115	3,298,000	28,741
−1988436588	42	4,101,937	97,665
−1950117994	19	1,983,347	104,387
−1928548648	29	3,379,076	116,520
−1902999773	84	10,028,851	119,391
−1735872532	86	8,007,271	93,108
−1706525908	24	3,247,216	138,179
−1643182588	335	53,848,974	160,743
−1634468345	5	442,494	88,499
−1546967690	93	14,127,000	151,773
−1506878533	203	38,116,000	187,764
−1414666091	48	8,416,445	175,343
−1399657793	21	3,327,060	158,431
−1370436615	52	6,348,965	122,095
−1204293136	113	1,312,194	11,633
−1178629643	51	3,523,858	68,691
−1144864381	113	21,591,273	191,073
−1119666282	27	2,393,550	89,312
−1097381894	4	366,266	91,567
−1028400370	4	712,071	178,018
−976697335	45	3,575,314	79,451
−976135562	15	1,693,508	109,968
−889718167	53	10,400,385	195,606
−887612628	2	23,036	14,133
−879675653	158	16,095,224	101,656
−854603118	23	665,537	29,579
−764521341	27	4,282,608	161,608
−739225309	78	6,027,470	77,774
−721946507	8	405,912	49,501
−707088102	23	5,357,515	233,748
−701972844	95	12,076,738	127,567
−641759960	24	3,274,000	136,417
−632530935	10	112,451	11,245
−631287923	35	1,924,226	54,978
−627002970	21	2,442,947	119,168
−616871455	15	3,975,576	265,038
−594868995	85	8,341,277	98,133
−592625918	58	6,641,978	114,517
−554756768	93	32,349,000	347,540
−534793263	17	2,346,672	136,434
−510304974	218	23,152,444	106,409
−502336347	75	14,316,003	190,880
−477438887	31	4,527,483	146,048
−476833060	178	15,320,292	86,069
−441231945	174	16,688,000	95,770
−428234294	69	9,989,294	145,405
−404256669	80	7,044,108	87,777
−363836427	37	2,853,566	77,543
−360147020	61	807,976	13,246
−283996920	78	9,189,018	118,308
−48958339	122	43,293,680	354,866
23230469	284	59,905,827	210,625

EXHIBIT 9 [5]—AVERAGE MONTHLY EMPLOYMENT, ANNUAL NET SALES, AND PRODUCTIVITY AT EACH FIRM CERTIFIED FOR THE TAAF PROGRAM IN FY 2009—Continued

Project No.	Average monthly employment	Annual net sales	Productivity
65254696	20	2,463,879	124,753
114629866	20	2,074,822	104,789
137101191	15	318,347	21,223
176434616	101	12,903,834	128,141
246147845	26	1,935,948	74,460
280418639	9	3,207,749	341,250
526891792	39	3,514,280	90,110
540241037	87	9,939,297	114,905
587994808	98	17,905,792	182,712
631689182	35	2,995,661	85,590
639991136	17	2,949,494	173,500
674278170	13	836,017	65,570
675284787	11	2,494,392	220,743
675586291	223	19,226,471	86,217
712619105	6	405,088	67,515
717100183	7	717,780	106,338
726417873	38	6,404,000	167,425
744959677	344	42,310,370	122,995
775553880	17	1,020,236	60,014
819813906	33	8,930,078	274,772
838593384	58	950,292	16,384
915263089	4	346,908	86,727
945015730	739	111,833	151
962067466	24	3,227,083	135,024
989234254	6	358,000	61,407
1082975273	22	1,650,000	76,142
1211737402	99	10,494,800	106,115
1218148370	50	4,085,428	81,709
1220532373	174	25,421,539	146,101
1221594278	26	2,622,892	102,457
1221842461	28	3,202,408	113,039
1221849510	19	1,514,723	81,524
1222114933	91	408,844	4,493
1222703402	36	2,153,350	59,272
1222797758	20	1,985,109	99,255
1222976955	33	5,407,901	163,876
1224271418	49	7,677,627	156,686
1224872688	103	13,265,206	128,788
1225120776	28	4,903,000	175,107
1225133741	137	13,773,487	100,720
1225201275	326	50,549,619	155,060
1225287691	292	48,371,484	165,656
1225810350	12	749,609	62,467
1227042607	3	195,253	65,084
1227289294	113	12,397,000	109,708
1227543460	888	103,961	117
1227630320	53	6,328,130	119,399
1227877017	8	2,468,000	300,976
1228925679	1	172,826	216,033
1229617894	58	4,103,785	70,270
1229708794	47	6,561,310	139,602
1230052412	19	2,156,922	115,343
1230750559	28	3,825,907	136,640
1231186429	26	2,951,829	113,532
1231426311	19	2,475,523	130,291
1232040671	51	2,773,358	54,486
1232739420	71	26,183,448	367,745
1232999637	4	261,470	65,368
1233087150	167	8,650,171	51,797
1233153258	89	25,373,011	285,090
1233239620	11	660,126	57,906
1233327674	60	8,141,100	135,685
1233338572	46	5,741,356	124,812
1233673084	78	13,219,682	169,483
1233691704	147	7,407,619	50,392
1233760561	88	22,565,731	257,306
1233842492	20	2,408,353	120,418
1234275977	69	10,463,729	151,648
1234966745	16	3,997,722	249,858
1234980125	6	558,835	101,606

EXHIBIT 9 [5]—AVERAGE MONTHLY EMPLOYMENT, ANNUAL NET SALES, AND PRODUCTIVITY AT EACH FIRM CERTIFIED FOR THE TAAF PROGRAM IN FY 2009—Continued

Project No.	Average monthly employment	Annual net sales	Productivity
1235057791	20	4,409,285	220,464
1235755384	133	49,248,961	370,293
1235770548	97	23,087,874	238,019
1236954447	67	4,297,798	63,984
1237222818	162	34,093,287	210,452
1237298215	61	5,678,660	93,862
1237306159	22	1,874,369	85,199
1237408034	86	8,978,684	104,805
1237488333	79	16,573,810	211,131
1237904074	18	4,579,750	253,305
1237916053	119	9,797,071	82,676
1238084904	14	629,641	45,527
1238173195	115	8,662,992	75,330
1238177474	87	13,279,415	152,637
1238431176	16	1,520,278	93,844
1238505614	29	1,365,689	47,093
1238510711	16	1,147,318	71,707
1238520242	38	3,749,000	98,658
1238765788	21	1,493,937	69,810
1238772555	76	11,606,000	152,110
1239379144	45	3,121,252	69,361
1239897775	10	745,536	74,554
1239916845	17	12,408,106	717,232
1240316759	106	16,656,248	157,134
1240405972	96	12,408,106	129,251
1240492021	153	13,382,187	87,752
1240519189	149	20,677,489	138,682
1242740530	4	196,390	45,672
1242766013	392	24,305,183	61,956
1242847325	69	14,182,980	205,550
1242997549	89	6,572,979	73,688
1243013350	52	16,549,376	318,257
1243436999	644	328,918,000	511,139
1243524425	8	1,389,381	173,673
1243613130	2	232,398	116,199
1243957086	32	3,546,513	112,588
1243968951	23	1,664,125	71,422
1243971069	57	4,043,125	70,808
1244043572	60	4,750,412	79,174
1244055343	99	4,731,197	48,032
1244058559	4	785,907	188,467
1244127442	71	15,427,668	216,529
1244130026	69	9,072,053	131,670
1244133405	79	8,686,480	110,095
1244141043	17	982,499	57,794
1245437191	18	1,736,066	96,448
1246279087	126	18,495,699	146,443
1246304644	474	147,130,573	310,402
1246459021	11	747,668	67,970
1246886248	21	3,131,095	151,261
1246977066	43	5,447,176	126,679
1246981790	38	5,652,842	148,759
1246994607	241	11,004,128	45,660
1247145245	8	442,710	55,339
1247147517	4	1,041,903	260,476
1247150638	10	1,684,610	163,079
1247161869	9	204,767	21,947
1247238696	13	1,965,636	151,203
1247754433	97	18,745,787	194,257
1247831618	50	8,934,942	178,699
1247835180	29	2,441,616	83,332
1247836448	72	10,851,151	150,710
1248180971	5	412,418	82,484
1248977837	137	21,887,413	159,762
1249499924	24	3,648,378	152,016
1249569202	12	936,104	78,009
1249916490	22	3,079,082	138,697
1250184197	138	30,238,000	219,116
1250265178	933	99,626,339	106,781
1327553155	10	1,402,910	140,291

EXHIBIT 9 [5]—AVERAGE MONTHLY EMPLOYMENT, ANNUAL NET SALES, AND PRODUCTIVITY AT EACH FIRM CERTIFIED FOR THE TAAF PROGRAM IN FY 2009—Continued

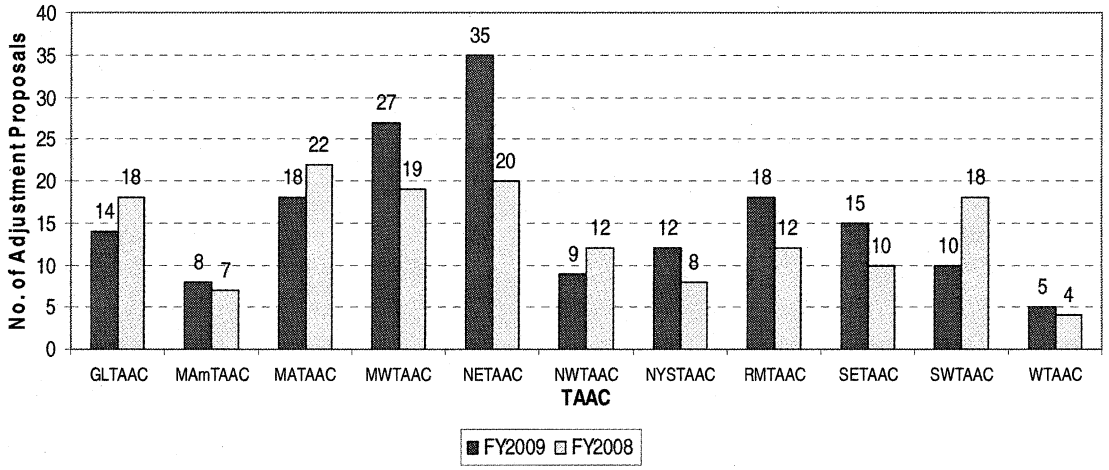
Project No.	Average monthly employment	Annual net sales	Productivity
1447786180	11	190,335	17,303
1531863717	114	14,611,240	128,169
1583584994	8	364,976	45,622
1715521604	9	966,076	108,304
1741163169	66	9,039,000	137,832
1745023300	52	8,970,960	172,518
1874078704	7	454,718	67,767
1884248409	8	391,392	48,924
1892823557	107	13,779,974	128,785
1962799420	9	235,598	27,080
1968260507	32	4,751,162	150,021
1978491171	36	9,163,974	254,555
2019516425	10	1,669,942	169,882
2035965487	10	341,614	34,161
2053807288	66	3,595,710	54,480
2060034620	2	151,618	69,967
2092576996	35	4,072,919	118,056

[5] As reported by the petitioning firm for the most recent year of the firm's petition period (can be between 6 and 12 months).

(8) The number of firms that received assistance developing Adjustment Proposals.

Although EDA has not previously recorded whether a certified firm received assistance in preparing their Adjustment Proposals, EDA understood that all firms who submitted Adjustment Proposals through TAACs received assistance from the respective TAAC. EDA requested that TAACs include such information in the Adjustment Proposals. Exhibit 10 shows the number of plans submitted by each TAAC.

Exhibit 10: No. of Adjustment Proposals submitted in FYs 2009 and 2008 by TAAC



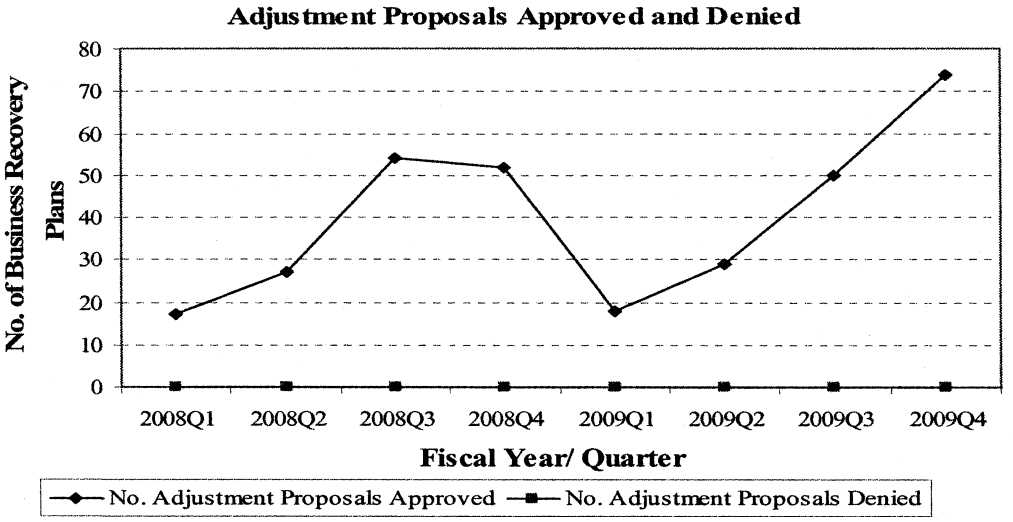
(9) The number of Adjustment Proposals approved and denied by the Secretary of Commerce.

In FY 2009, EDA did not deny any Adjustment Proposals and approved 172 plans.

EXHIBIT 11—CHARACTERISTICS OF THE ADJUSTMENT PROPOSALS APPROVED IN FYS 2003–2009

	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Number of Business Recovery Plans Approved	162	177	132	137	126	139	172
Avg. Firm Sales (millions)	$7.2	$11.6	$8.4	$10.6	$11.2	$15.0	$16.4
Avg. Firm Employees	68	88	64	91	68	81	80

Exhibit 12: Quarterly Trend of Adjustment Proposals Approved and Denied in FYs 2008 and 2009.



(10) The financial assistance received by each firm participating in the program.

(11) The financial contribution made by each firm participating in the program. Although the TAACs maintain records on actual government and firm expenditures for implementation of Adjustment Proposals, EDA currently does not collect or record this information in a central database. In FY 2010, EDA will include this measure in the revised quarterly reports submitted by the TAACs to EDA. Exhibit 13 shows the average government and firm cost share proposed by each firm at the time their Adjustment Proposals were approved.

EXHIBIT 13—PROJECTED COSTS TO IMPLEMENT APPROVED ADJUSTMENT PROPOSALS

	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Total Government Share (millions)	$8.1	$8.5	$5.9	$6.7	$7.1	$7.9	$10.3
Total Firm Share (millions)	7.4	8.1	5.4	6.0	5.9	7.5	9.8
Total Projected Costs (millions)	15.5	16.6	11.3	12.7	13.0	15.4	20.2
Avg. Government Assistance Per Firm[6]	50,000	48,023	44,697	48,905	56,449	56,827	60,123

[6] Government share of project implementation costs as proposed in the Adjustment Proposals divided by the number of approved plans.

(12) The types of technical assistance included in the Adjustment Proposals of firms participating in the program.

Firms proposed various types of projects in Adjustment Proposals. More than half of all firms proposed to implement marketing/sales or production/engineering projects. Marketing and sales projects are geared toward increasing revenue, whereas production and engineering projects tend to be geared toward cutting costs. Support system projects can provide a competitive advantage by either cutting costs or creating new sales channels. Management and financial projects are designed to improve management's decision making ability and business control. Sample projects are listed below in Exhibit 15.

EXHIBIT 14—THE FREQUENCY OF SPECIFIC PROJECTS PROPOSED IN ADJUSTMENT PROPOSALS

[Presented by TAAC]

TAAC	Number of firms that included the following projects in their business recovery plans			
	Marketing/ sales	Support systems	Management/ financial	Production/ engineering
Great Lakes	15	15	11	15
MidAmerica	7	6	4	5
Mid-Atlantic	15	5	5	9
Midwest	26	16	0	23
New England	33	20	27	31
Northwest	7	1	1	5
New York State	10	6	2	9
Rocky Mountain	16	6	4	14
Southeastern	13	7	6	7
Southwest	13	10	1	11

EXHIBIT 14—THE FREQUENCY OF SPECIFIC PROJECTS PROPOSED IN ADJUSTMENT PROPOSALS—Continued

[Presented by TAAC]

TAAC	Number of firms that included the following projects in their business recovery plans			
	Marketing/ sales	Support systems	Management/ financial	Production/ engineering
Western	5	3	0	4
Total	160	95	61	133

EXHIBIT 15—SAMPLE ADJUSTMENT PROPOSALS PROJECTS PROPOSED IN FY 2009

Marketing/sales	Support systems	Management/financial	Production/engineering
• sales planning/development • strategic market planning/marketing strategy • sales and marketing staff training/coaching/mentoring • market, technology, merchandising, consumer research and analysis/export feasibility study • business development/market expansion/customer diversification • brand recognition/rebranding • new product design and development, production line evaluation • web site update/unitronix/Design Online Web site improvements • kiosk ordering system/e-commerce • trade show design/model kit package/travel exhibit design • visual imaging for marketing/advertising tools • Industry certification promotion campaign • sales pricing and sales channel • lead generation • after-market service plan • install new computer network • automate kin controllers	• MRP/ERP selection and installation • IT systems upgrades • Software training • strategic information technology plan • MIS/IT evaluation and recommendation • Design software • MIS reporting systems and server • CRM and PM software • product identification software • CAD software upgrade • Vantage shop floor management system • Tele-conferencing capabilities • implement QuickBooks MIS modules and financial reports • customer communication software upgrade • CRM system • production and inventory control modules/software • MIS system integration quality controls	• succession planning, strategic business plan, financial planning, investment planning, supply chain management strategy, pricing strategy • JV and management project • cost accounting/pricing system/cost studies/quoting/cost estimating • cost tracking/control improvement • financial restructuring • human resources training, employee training • management-leadership development, managerial capacity building, management training and coaching • interim leadership • company fair market valuation • government procurement assistance	• Quality assurance/efficiency systems • production evaluation, integration, analysis, and efficiency • 5S, lean manufacturing, Siemens, MRP, phase-gate system • Industry certifications • Employee training • supply chain management program/improvements • bar coding • PLCM improvement • Green manufacturing and certification • site evaluation • Job Boss Shop scheduling system implementation • Value stream map for the manufacturing process • patent requirements • materials test program • enhance testing and analytical capabilities • program • facility expansion and design • prototype research, design, and testing • develop capabilities for new production line/business • production tooling design • vendor stocking program • FSC chain of custody plan • calibrate equipment, equipment installation and start-up, facility/equipment design • warehouse automation

(13) The number of firms leaving the program before completing the project or projects in their Adjustment Proposals and the reason the project was not completed.

EDA currently does not collect or record this information. In FY 2010, EDA will include this measure in the revised quarterly TAAC report.

(14) Sales, employment, and productivity at each firm upon completion of the program and each year for the two-year period following completion.

Most, if not all, TAACs record the sales, employment and productivity of firms after completing the TAAF Program. However, EDA currently does not collect or record this information for the 2-year period following completion. In FY 2010, EDA will include this measure in the revised quarterly TAAC report.

Discussion and Analysis

FY 2009 Performance

In FY 2009 as compared to FY 2008, the number of petitions submitted to EDA increased by 49 percent. Due to current economic conditions and the expansion of eligibility to service sector firms, increases in the number of petitions are expected to continue in FY 2010. As the TAACs continue to strengthen their marketing channels to more effectively reach service firms, it is expected that the number of petitions will increase. If petitions continue to increase at the same rate, EDA can expect approximately 400 petitions in FY 2010.

Exhibit 16: Quarterly Trend of Petitions Submitted and Accepted for Filing in FYs 2008-2009

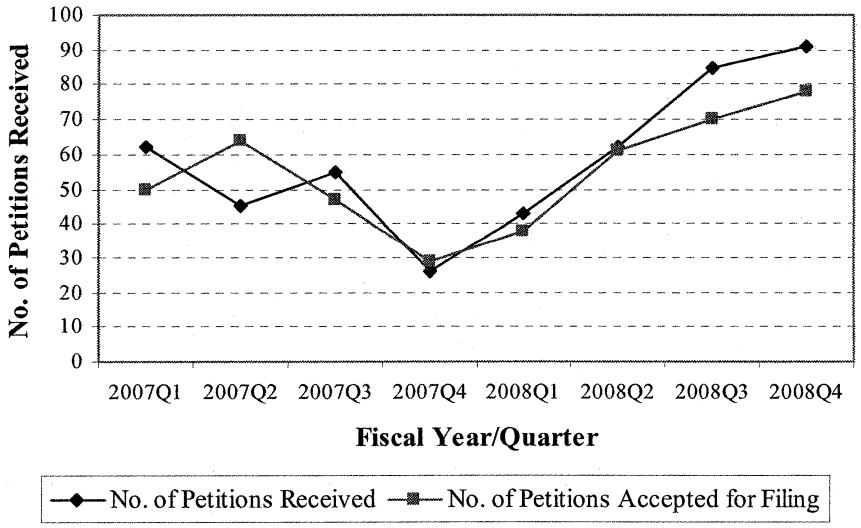
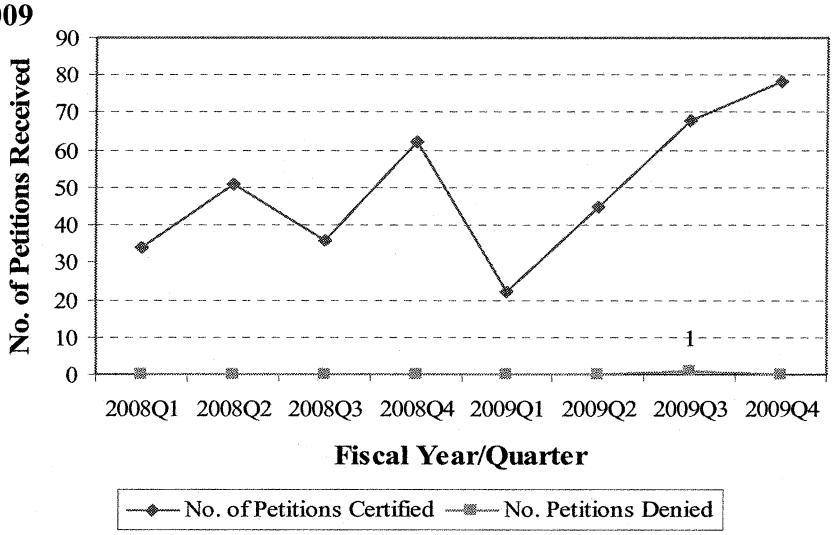
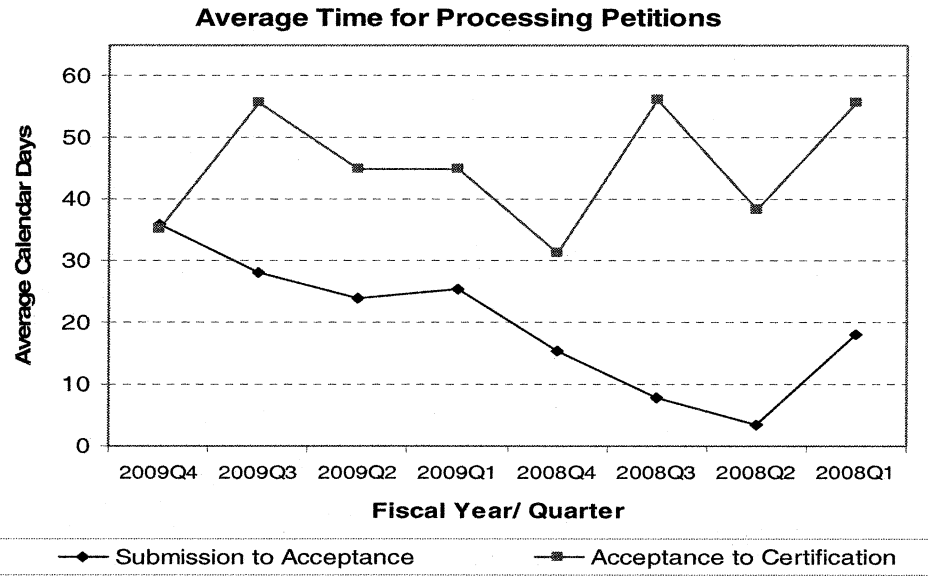


Exhibit 17: Quarterly Trend of Petitions Certified and Denied for FYs 2008 and 2009



The average total processing time of petitions increased by approximately 17 days, a 30 percent overall increase. A spike in the number of petitions submitted and a recent decline in the number of eligibility reviewers have made it challenging for EDA to meet the 40-day review deadline to provide a final determination on petitions. As of May 17, 2009, EDA is required to make a final determination within 40 calendar days of a petition being accepted for filing under Section 251 of the Trade Act. Before May 17, 2009 EDA had to make a determination within 60 calendar days. The average processing time has improved as of the fourth quarter of FY 2009. The addition of two new EDA Program Analysts (expected start dates between December 2009 and February 2010) and a new TAAF Program Director (start date August 30, 2009) is expected to improve EDA's processing time for petitions for the remainder of FY 2010. For the average petition, Exhibit 18 shows that, EDA missed the 40 day deadline in the third quarter of FY 2009, but was able to meet the deadline in the fourth quarter of FY 2009.

Exhibit 18: Average Duration (in Calendar Days) for Processing Petitions for Certification



EDA must approve all petitions for certification and Adjustment Proposals for firms to receive financial assistance. Although EDA has not previously recorded whether a petitioning or certified firm received assistance in preparing their petition or Adjustment Proposals, EDA understood that all firms who submitted petitions and Adjustment Proposals through TAACs received assistance from the respective TAAC. EDA has revised Form ED–840P to more accurately record whether and from whom firms receive assistance. Also, EDA requested that TAACs include such information in the Adjustment Proposals.

EDA has assumed that eligible firms either do not have the capacity to submit petitions and Adjustment Proposals without assistance, or that doing so would cause unnecessary burden to small and medium-sized firms. EDA therefore understands that all firms receive assistance.

As compared to FY 2008, average net sales of certified firms declined by 20 percent and average employment declined by six percent. The National Bureau of Economic Research (NBER) determined that a recession began in December 2007. It is likely that the recession has contributed to the decline in sales and employment of certified firms in FY 2009. Firm productivity, defined as net sales per employee, in certified firms has declined as well.

The TAAF program strongly targets small and medium-sized businesses in the provision of assistance. In order to classify small and medium-sized firms EDA used the Small Business Administration's (SBA's) size standards. Medium-sized firms are classified as those with less than 500 employees for most manufacturing and mining industries, or less than $7 million in average annual receipts for most nonmanufacturing industries. Ninety eight percent of the firms certified in FY 2009 had fewer than 500 employees, and 58 percent had less than $7 million in annual net sales. This indicates that the TAAF program is mostly reaching small and medium-sized businesses.

Exhibit 19: Employment Size of Firms Certified in FY 2009.

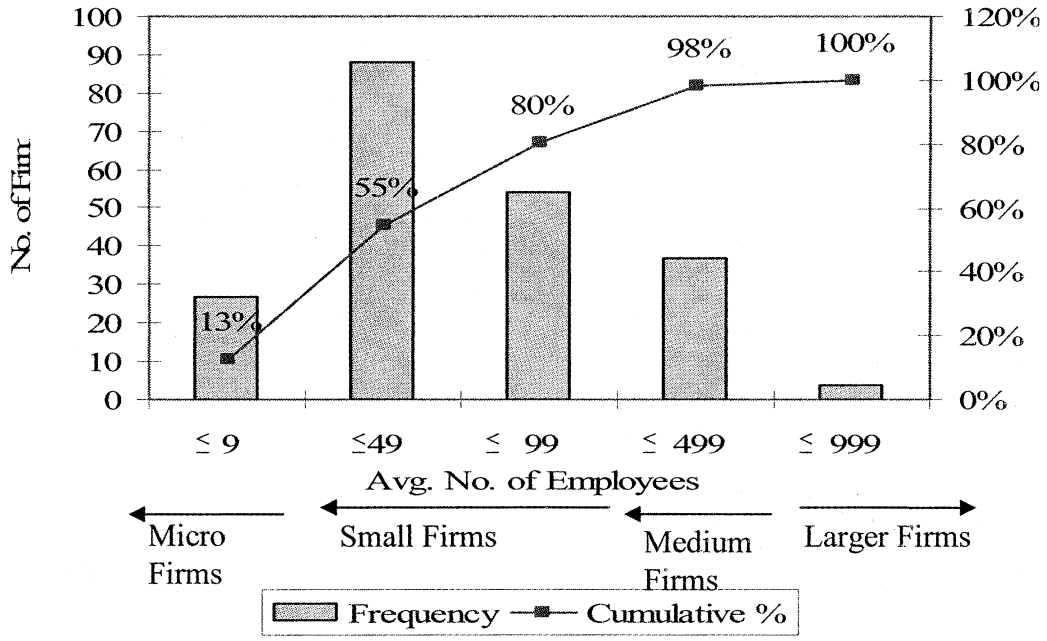
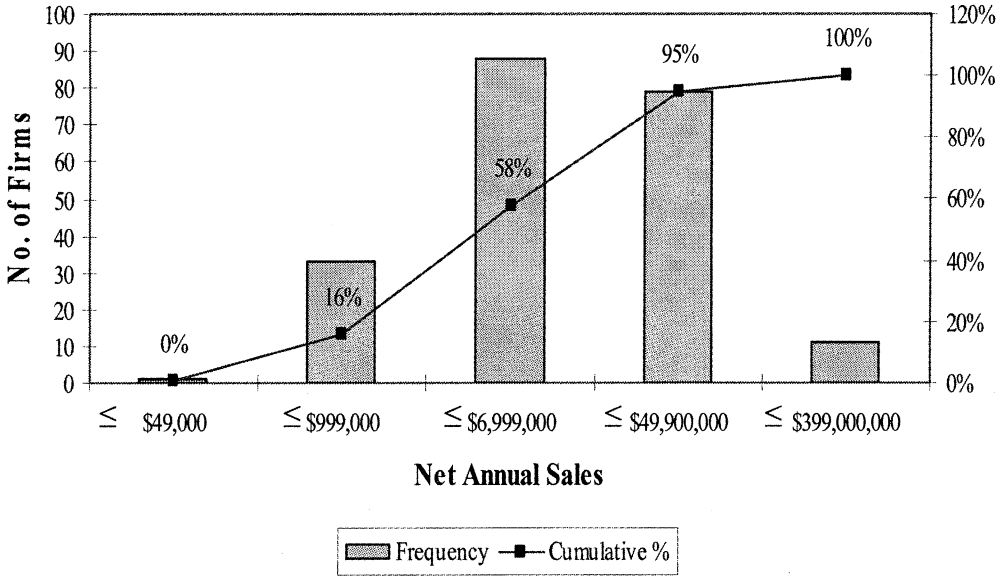
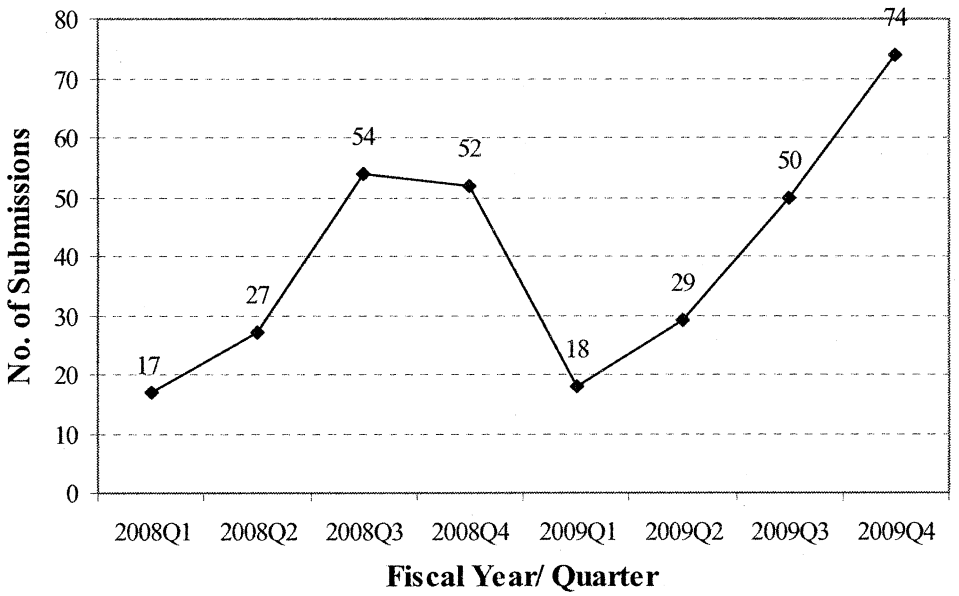


Exhibit 20: Net Sales of Firms Certified in FY 2009



EDA experienced a 15 percent increase in the number of Adjustment Proposals it received for approval in FY 2009. In comparison, there was a 49 percent increase in the number of petitions in the same year. It is expected that the number of Adjustment Proposals submitted will be fewer than the number of petitions, since Adjustment Proposals often take more time to create and require firms to contribute funds for their development and implementation. Firms with limited working capital and limited access to credit will tend to develop and implement the Adjustment Proposals more gradually.

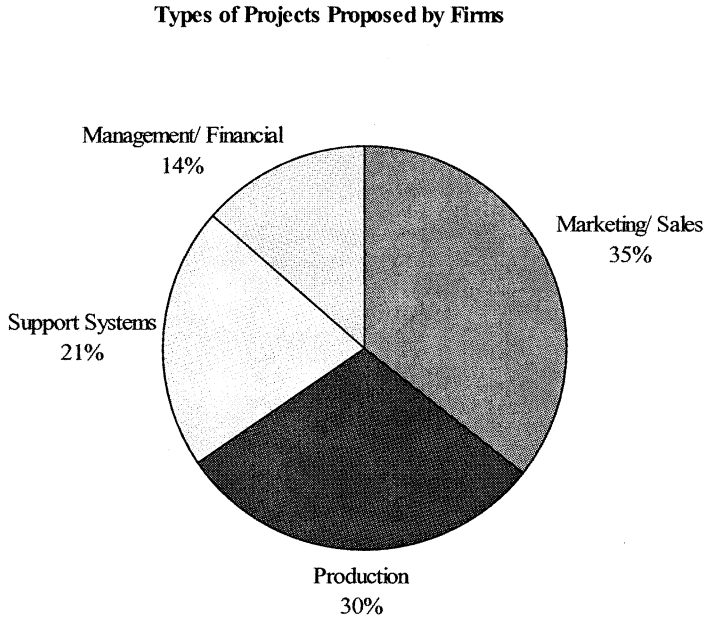
Exhibit 21: Quarterly Trend of Adjustment Proposals Submitted in FYs 2008 and 2009.



The number of approved Adjustment Proposals and the proposed financial assistance to be received from EDA and contributed by each firm increased in FY 2009. EDA approved an additional 28 Adjustment Proposals as compared to FY 2008 and proposed to spend an additional total of $2.4 million in government funds. The TAAF Program received an increase of approximately $1.7 million in Omnibus appropriations for FY 2009.

Approximately 65 percent of firms included marketing/sales projects or production/engineering projects in their Adjustment Proposals. Approximately 35 percent of firms included support system projects or management/ financial projects in their Adjustment Proposals. This mix of project types proposed in the Adjustment Proposals indicates that firms are focusing on both revenue growth and cost reduction in order to improve their profit margin.

Exhibit 22: Types and Frequency of Adjustment Proposal Projects Proposed by Certified Firms



Looking Forward: Data Collection

The TGAAA identifies 14 measures to be included in each year's TAAF Annual Report. Of the 14 measures, EDA currently does not collect data on four. These measures are: (1) The number of firms that inquired about the program, (2) the number of petitions certified by congressional district, (3) the number of firms leaving the program and why, and (4) sales, employment, and productivity at each firm upon completion of the program and every year for the two years thereafter. There are another four measures that EDA does not collect data on directly, but has access to relevant information: These measures are: (1) The number of firms that received assistance in preparing their petition, (2) the number of firms that received assistance in preparing their Adjustment Proposal, (3) the actual government outlays for each firm implementing their Adjustment Proposal, and (4) the actual firm outlays for implementing the Adjustment Proposal. Most of these measures are recorded by the TAACs, but EDA has not required TAACs to report on them to EDA.

EXHIBIT 23—FY 2010 DATA COLLECTION PLAN FOR THE 14 MEASUREMENTS REQUIRED FOR THE ANNUAL REPORT TO CONGRESS

Measurement	Collected by EDA?	Recordkeeping system	Procedure/policy changes required
1. Number of Firm Inquiries	No	New Management Information system (MIS).	TAACs should have a written record of their response to firm inquiries and submit a copy of this notice along with the firm's DUNS number to EDA in the TAAC's quarterly report. A new information system will need to be designed to record the information collected from the TAAC quarterly reports.
2. Number of Petitions	Yes	MIS	None.
3. Number of Petitions Certified and Denied.	Yes	MIS	None.
4. Average Petition Processing Time.	Yes	Derived from MIS	None.
5. Number of Petitions and Certifications by Congressional District.	No	MIS	Form ED–840P will be revised so that a firm's congressional district will be recorded. The MIS has been modified to include this information.
6. Number of Firms that Received Assistance in Preparing their Petitions.	To some extent	MIS	Currently, EDA receives all petitions directly from the TAACs. Form ED–840P will be revised so that firms can indicate whether they received assistance. The MIS will be modified to include this information.
7. Number of Firms that Received Assistance in Developing Their Adjustment Proposal.	To some extent	MIS	Currently, EDA receives all Adjustment Proposals directly from the TAACs. TAACs have been advised to indicate the type of assistance received by the firms in the adjustment proposals submitted to EDA. The MIS will be modified to include this information.
8. Number of Adjustment Proposals Approved and Denied.	Yes	MIS	None
9. Sales, Employment, and Productivity at Time of Certification.	Yes	MIS	For the large number of firms in varying industries being measured, few employ or track the same productivity measures. EDA chose to use the simplest and most universal metric for productivity: sales per employee.
10. Sales, Employment, and productivity at Each Firm Upon Completion of the Program and Each Year for the Two-Year Period Thereafter.	No	New MIS	EDA will request this information from TAACs in their quarterly reports. Also, EDA may continue to track firms through the Dun and Bradstreet database to collect sales and employment figures.
11. Financial Assistance Received by Each Firm Participating in the Program.	To some extent	New MIS	EDA records the proposed government expenditures on each project, but does not request information on actual outlays for each firm. EDA will request this information from TAACs in their quarterly reports.
12. Financial Contribution Made by Each Firm Participating in the Program.	To some extent	New MIS	EDA records firms' proposed expenditures on each project, but does not request information on actual outlays for each firm. EDA will request this information from TAACs in their quarterly reports.
13. Types of Technical Assistance Included in the Adjustment Proposals of Firms.	Yes	MIS	This information is now recorded by EDA. Previously this information was submitted to EDA, but not recorded in any MIS.
14. Number of Firms Leaving the Program Before Completing the Project(s) in their AP and the Reason.	No	New MIS	TAACs will be advised to include this measure in their quarterly activity reports.
Classification of Data by TAAC, State, and National Totals.	Yes	MIS	None.

EDA is considering several steps to address the collection of the remaining measures.

Following is a list of the steps EDA will take to address the current data collection gaps.

(1) TAACs were instructed to upgrade their Adobe software to facilitate data collection. TAACs that only have Adobe Reader can use the Adobe fillable forms, but they cannot save the information on their computers. Upgrading the Adobe software will allow the remaining TAACs to save electronic records of the forms, and will allow EDA to automatically upload information into its management information system and no longer require EDA to re-type all of the information into the system.

(2) EDA will issue several new procedures and guidelines to simplify data collection through a revised template for the quarterly TAAC activity reports.

(3) As resources become available, the management information system (MIS) will be expanded to facilitate reporting.

(4) EDA is in the process of seeking OMB clearance for a revised Form ED–840P to collect all required data.

Conclusion

Overall, there has been an increase in the demand for the TAAF Program in FY 2009, as demonstrated by the increase in the number of petitions for certification and Adjustment Proposals submitted to EDA.

Due to the spike in petitions and Adjustment Proposals, EDA experienced challenges in meeting the new 40-day processing deadline for petitions accepted for filing immediately after the new rule's implementation. However, since the fourth quarter of FY 2009, the average processing time for petitions declined below the 40-day requirement. New TAAF program staff members are expected to help improve processing time even further for FY 2010.

TAACs effectively targeted small and medium-sized firms in FY 2009. The average employment, net sales, and productivity of firms certified in FY 2009 declined in comparison to the previous fiscal year. More than half of all firms proposed to implement a marketing/sales project or production/engineering project in their Adjustment Proposals.

Of the 14 measures required for reporting, EDA was unable to provide any information on four measures, and provided limited information on another four measures. EDA is taking steps to collect and report on all of the missing measures for the FY 2010 Annual Report.

Dated: January 7, 2010.

Bryan Borlik,

Director, Trade Adjustment Assistance for Firms Program.

[FR Doc. 2010–561 Filed 1–14–10; 8:45 am]

BILLING CODE 3510–24–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List: Proposed Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed Additions to Procurement List.

SUMMARY: The Committee is proposing to add to the Procurement List services to be provided by nonprofit agencies employing persons who are blind or have other severe disabilities.

Comments Must Be Received On or Before: February 15, 2010.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

FOR FURTHER INFORMATION OR TO SUBMIT COMMENTS CONTACT: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or e-mail *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C 47(a) (2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions: If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice will be required to provide the services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will provide the services to the Government.

2. If approved, the action will result in authorizing small entities to provide the services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the services proposed for addition to the Procurement List.

Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

End of Certification

The following services are proposed for addition to the Procurement List to be provided by the nonprofit agencies listed:

Services

Service Type/Location: Custodial and Grounds Maintenance Services, Federal Building & U.S. Courthouse, 100 N. Church St., Las Cruces, NM.

NPA: Tresco, Inc., Las Cruces, NM.

Contracting Activity: GSA Public Buildings Service, PBS OK/NM Section, Albuquerque, NM.

Service Type/Location: Facilities Management, Joint Base Fort Lewis, McChord Air Force Base (JBLM), WA.

NPA: Professional Contract Services, Inc., Austin, TX.

Contracting Activity: Department Of The Army, Mission And Installation Contracting Command, Ft. Lewis, WA.

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2010–645 Filed 1–14–10; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Corrections

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: A correction is made to the **Federal Register** published by the Committee in proposing to add to and delete from the Procurement List a product and services on January 11, 2010 (75 FR 1354–1355). The correct date that comments should be received is February 11, 2010.

Action: A correction is made to the **Federal Register** published by the Committee in adding services to and deleting from the Procurement List products and services on January 11, 2010 (75 FR 1355–1356). The correct effective date should be February 11, 2010.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

For Further Information or To Submit Comments Contact: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or e-mail *CMTEFedReg@AbilityOne.gov.*

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2010–644 Filed 1–14–10; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket No. DoD–2009–HA–0137

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by February 16, 2010.

Title and OMB Number: An Outcome Evaluation of the SOS Suicide Prevention Program; OMB Control Number 0720–TBD.

Type of Request: New.

Number of respondents: 399.

Responses Per Respondent: 2.

Annual Responses: 798.

Average Burden Per Response: 1 Hour.

Annual Burden Hours: 798 hours.

Needs and Uses: The information collection requirement is necessary to evaluate the effectiveness of the SOS Suicide Prevention Program which is used as suicide prevention programming in middle and high schools throughout the country. The surveys are completed in school and then returned to the University of Connecticut's Institute for Public Health Research for analysis.

Affected Public: Individuals or households.

Frequency: Semi-annually.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Mr. John Kraemer.

Written comments and recommendations on the proposed information collection should be sent to Mr. Kraemer at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DoD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 1777 North Kent Street, RPN, Suite 11000, Arlington, VA 22209–2133.

Dated: January 6, 2010.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2010–596 Filed 1–14–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket No. DoD–2008–HA–0019]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by February 16, 2010.

Title and OMB Number: TRICARE Dual Eligible Fiscal Intermediary (TDEFIC) Provider Satisfaction Survey, OMB Control Number 0720–TBD.

Type of Request: New.

Number of Respondents: 46,800.

Responses Per Respondent: 1.

Annual Responses: 46,800.

Average Burden Per Response: 15 minutes.

Annual Burden Hours: 11,700 hours.

Needs and Uses: The survey Wisconsin Physician Services (WPS) is to administer is a contract requirement that the Government has accepted and paid for as part of the contract award. This survey is conducted on a monthly basis, and the sample will be drawn from all providers that have had a claim processed in the previous week and therefore is not limited to just Network Providers. WPS will use the survey to assess provider satisfaction, attitudes, and perceptions regarding the claims processing and customer services provided by WPS for the TDEFIC in order to improve internal operations and customer services to increase provider satisfaction.

Affected Public: Individuals or households; Business or other for profit; Federal government.

Frequency: Monthly.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Mr. John Kraemer.

Written comments and recommendations on the proposed information collection should be sent to Mr. Kraemer at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DoD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 1777 North Kent Street, RPN, Suite 11000, Arlington, VA 22209–2133.

Dated: January 6, 2010.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2010–597 Filed 1–14–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Manual for Courts-Martial; Proposed Amendments

AGENCY: Joint Service Committee on Military Justice (JSC).

ACTION: Notice of Public Response to Proposed Amendments to the Manual

for Courts-Martial, United States (2008 ed.) (MCM).

SUMMARY: The JSC is forwarding final proposed amendments to the MCM to the Department of Defense. The proposed changes constitute the 2009 annual review required by the MCM and DoD Directive 5500.17, "Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice," May 3, 2003. The proposed changes concern the rules of procedure and evidence and the punitive articles applicable in trials by courts-martial. These proposed changes have not been coordinated within the Department of Defense under DoD Directive 5500.1, "Preparation, Processing and Coordinating Legislation, Executive Orders, Proclamations, Views Letters Testimony," June 15, 2007, and do not constitute the official position of the Department of Defense, the Military Departments, or any other Government agency.

ADDRESSES: Comments and materials received from the public are available for inspection or copying at the Office of the Judge Advocate General, Criminal Law Division (Code 20), 1254 Charles Morris Street, SE., Suite B01, Washington Navy Yard, District of Columbia between 9 a.m. and 4 p.m., Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Commander Stacia Gawronski, Executive Secretary, Joint Service Committee on Military Justice, 1254 Charles Morris Street, SE., Suite B01, Washington Navy Yard, District of Columbia 20374, (202) 685–7683, (202) 685–7084 fax.

SUPPLEMENTARY INFORMATION:

Background

On 17 September 2009, the JSC published a notice of Proposed Amendments to the Manual for Courts-Martial and a Notice of Public Meeting to receive comments on these proposals. The public meeting was held on 29 October 2009. One individual representing an organization spoke at the public meeting to announce that the organization would be submitting written comments. One individual and one organization submitted comments through the **Federal Register** electronic bulletin board.

Discussion of Comments and Changes

The JSC considered the public comments and decided to modify the proposed addition of a paragraph addressing child pornography under Article 134 in Part IV of the MCM. The JSC is satisfied the other proposed amendments are appropriate to implement without modification. The JSC will forward the public comments and proposed amendments to the Department of Defense.

The public comments regarding the proposed changes follow:

a. Recommended that the proposed 'Child pornography' addition to Article 134, UCMJ, should be broadened to include the female breast. The JSC considered that broadening the definition in this way would be over inclusive and did not want to unintentionally criminalize conduct or depictions not sexual in nature (for example, a picture of a baby in the bath).

b. Opined the proposed change to Military Rule of Evidence (M.R.E.) 504 regarding spousal privilege does not seem to limit the privilege in a logical manner. For example, if a husband and wife both provided illegal drugs to a 12-year-old, the spouses would not be allowed to invoke their privilege against testifying against each other. However, if the wife was engaged in a sexual relationship with the same non-relative, 12-year-old (and not acting *in loco parentis*), and the wife told the husband about the relationship, the marital privilege would remain intact. The JSC considered that adultery is a crime against the person of the other spouse for purposes of M.R.E. 504(c)(2)(A) under *U.S.* v. *Taylor,* 64 M.J. 416 (C.A.A.F. 2007), and therefore, the marital privilege would not remain intact in the second example given.

c. Raised several concerns regarding the adequacy of the rule-making process itself. The JSC considered these concerns and determined that the rulemaking process is adequate, satisfies statutory requirements, and provides meaningful opportunity for public participation.

Proposed Amendments After Period for Public Comment

The proposed recommended amendments to the Manual for Courts-Martial to be forwarded through the DoD for action by Executive Order of the President of the United States are as follows:

Section 1. Part III of the Manual for Courts-Martial, United States, is amended as follows:

(a) M.R.E. 504 (c)(2)(D) is added to read as follows:

"(D) Where both parties have been substantial participants in illegal activity, those communications between the spouses during the marriage regarding the illegal activity in which they have jointly participated are not marital communications for purposes of the privilege in subdivision (b), and are not entitled to protection under the privilege in subdivision (b)."

(b) The following amendments conform M.R.E. 609 to F.R.E. 609:

(1) M.R.E. 609 (a) is amended to substitute the words "character for truthfulness" for the word "credibility."

(2) M.R.E. 609 (a)(2) is amended to substitute the words "regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness" for the words "if it involved dishonesty or false statement, regardless of the punishment."

(3) M.R.E. 609 (c) is amended to substitute the words "a subsequent crime that was punishable by death, dishonorable discharge, or imprisonment in excess of one year" for the words "a subsequent crime which was punishable by death, dishonorable discharge, or imprisonment in excess of one year."

Section 2. Part IV of the Manual for Courts-Martial, United States, is amended as follows:

(a) Paragraph 13, Article 89, Disrespect toward a superior commissioned officer, paragraph c.(1) is amended to substitute the words "uniformed service" for "armed forces" everywhere the words "armed forces" appear in that paragraph. This change is made to clarify that the uniformed officers of the Public Health Service and the National Oceanographic and Atmospheric Administration, when assigned to and serving with the armed forces, are included in the definition of a superior commissioned officer.

(b) A clerical amendment is made to Paragraph 35, Article 111, Drunken or reckless operation of vehicle, aircraft or vessel, paragraph f to read as follows:

"(f) *Sample Specification.*

In that ____ (personal jurisdiction data), did (at/on board—location) (subject matter jurisdiction data, if required), on or about ____, 20__, (in the motor pool area) (near the Officer's Club) (at the intersection of ____ and ____) (while in the Gulf of Mexico) (while in flight over North America) physically control [a vehicle, to wit: (a truck) (a passenger car) (____)] [an aircraft, to wit: (an AH–64 helicopter) (an F–14A fighter) (a KC–135 tanker) (____)] [a vessel, to wit: (the aircraft carrier USS ____ (the Coast Guard Cutter ____) (____)], [while drunk] [while impaired by ____] [while the alcohol concentration in his (blood or breath) equaled or exceeded the applicable limit under subparagraph (b) of the text of the statute in paragraph 35 as shown by

chemical analysis] [in a (reckless) (wanton) manner by (attempting to pass another vehicle on a sharp curve) (by ordering that the aircraft be flown below the authorized altitude)] [and did thereby cause said (vehicle) (aircraft) (vessel) to (strike and) (injure____)]."

(c) A clerical amendment is made to Paragraph 48, Article 123, Forgery, paragraph c.(4) to add the word "to" after the word "liability" the second time it appears in the fifth sentence.

(d) Paragraph 68b. is added as follows:

"68b. Article 134—(Child pornography)

a. *Text. See* paragraph 60.

b. *Elements.*

(1) *Possessing, receiving, or viewing child pornography.*

(a) That the accused knowingly and wrongfully possessed, received or viewed child pornography; and

(b) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(2) *Possessing child pornography with intent to distribute.*

(a) That the accused knowingly and wrongfully possessed child pornography;

(b) That the possession was with the intent to distribute; and

(c) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(3) *Distributing child pornography.*

(a) That the accused knowingly and wrongfully distributed child pornography to another; and

(b) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(4) *Producing child pornography.*

(a) That the accused knowingly and wrongfully produced child pornography; and

(b) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) "Child Pornography" means any visual depiction of a minor, or what appears to be a minor, engaging in sexually explicit conduct, even if the minor depicted was not an actual person or did not actually exist.

(2) An accused may not be convicted of possessing, receiving, viewing, distributing, or producing child pornography, if he was not aware that the images were of minors, or what appeared to be minors, engaged in sexually explicit conduct. Awareness may be inferred from circumstantial evidence such as the name of a computer file or folder, the name of the host Web site from which a visual depiction was viewed or received, search terms used, and the number of images possessed.

(3) "Distributing" means delivering to the actual or constructive possession of another.

(4) "Minor" means any person under the age of 18 years;

(5) "Possessing" means exercising control of something. Possession may be direct physical custody like holding an item in one's hand, or it may be constructive, as in the case of a person who hides something in a locker or a car to which that person may return to retrieve it. Possession must be knowing and conscious. Possession inherently includes the power or authority to preclude control by others. It is possible for more than one person to possess an item simultaneously, as when several people share control over an item.

(6) "Producing" means creating or manufacturing. As used in this paragraph, it refers to making child pornography that did not previously exist. It does not include reproducing or copying.

(7) "Sexually explicit conduct" means actual or simulated:

(a) Sexual intercourse or sodomy, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(b) Bestiality;

(c) Masturbation;

(d) Sadistic or masochistic abuse; or

(e) Lascivious exhibition of the genitals or pubic area of any person.

(8) "Visual depiction" includes any developed or undeveloped photograph, picture, film or video; any digital or computer image, picture, film or video made by any means, including those transmitted by any means including streaming media, even if not stored in a permanent format; or any digital or electronic data capable of conversion into a visual image.

(9) "Wrongfulness." Any facts or circumstances which show that a visual depiction of child pornography was unintentionally or inadvertently acquired are relevant to wrongfulness, including, but not limited to, the method by which the visual depiction was acquired, the length of time the visual depiction was maintained, and whether the visual depiction was promptly, and in good faith, destroyed or reported to law enforcement.

(10) On motion of the government, in any prosecution under this paragraph, except for good cause shown, the name, address, social security number, or other nonphysical identifying information, other than the age or approximate age, of any minor who is depicted in any child pornography or visual depiction or copy thereof shall not be admissible and may be redacted from any otherwise admissible evidence, and the panel shall be instructed, upon request of the Government, that it can draw no inference from the absence of such evidence.

d. *Lesser included offenses.*

(1) *Possessing, receiving, or viewing child pornography*
Article 80—attempts

(2) *Possessing child pornography with intent to distribute*
Article 80—attempts
Article 134—possessing child pornography

(3) *Distributing child pornography*
Article 80—attempts
Article 134—possessing child pornography
Article 134—possessing child pornography with intent to distribute

(4) *Producing child pornography*
Article 80—attempts
Article 134—possessing child pornography

e. *Maximum punishment.*

(1) *Possessing, receiving or viewing child pornography.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(2) *Possessing child pornography with intent to distribute.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

(3) *Distributing child pornography.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(4) *Producing child pornography.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.

f. *Sample specification.* Possessing, receiving, viewing, possessing with intent to distribute, distributing or producing child pornography.

In that ___ (personal jurisdiction data), did, at ___, on or about ___ knowingly and wrongfully (possess) (receive) (view) (distribute) (produce) child pornography, to wit: a (photograph) (picture) (film) (video)

(digital image) (computer image) of a minor, or what appears to be a minor, engaging in sexually explicit conduct(, with intent to distribute the said child pornography)."

Section 3. These amendments shall take effect 30 days from the date of this order.

(a) Nothing in these amendments shall be construed to make punishable any act done or omitted prior to the effective date of this order that was not punishable when done or omitted.

(b) Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceedings, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to the effective date of this order, and any such nonjudicial punishment, restraint, investigation, referral of charges, trial, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.

The White House

Changes to the Discussion Accompanying the Manual for Courts Martial, United States

(a) A clerical amendment is made to the first paragraph of the Discussion following R.C.M. 1107(d)(1) to correctly reference R.C.M. 1003(b)(5) and (6) instead of R.C.M. 1003(b)(6) and (7).

Dated: December 18, 2009.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2010–600 Filed 1–14–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2010–OS–0003]

Privacy Act of 1974; System of Records

AGENCY: National Security Agency/ Central Security Service, DoD.

ACTION: Notice to amend a system of records.

SUMMARY: The National Security Agency/Central Security Service is proposing to amend a system of records notice in its existing inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on February 16, 2010 unless comments are received which result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

* *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

* *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Anne Hill at (301) 688–6527.

SUPPLEMENTARY INFORMATION: The National Security Agency/Central Security Service systems of records notices subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the contact above (*see* **FOR FURTHER INFORMATION CONTACT**).

The specific change to the records system being amended is set forth below followed by the notice, as amended, published in its entirety. The proposed amendment is not within the purview of subsection (r) of the Privacy Act of 1974 (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: January 12, 2010.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

GNSA 09

SYSTEM NAME:

NSA/CSS Personnel File (January 7, 2009; 74 FR 698).

CHANGES:

* * * * *

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with "National Security Agency Act of 1959, Public Law 86–36, (codified at 50 U.S.C. 402); 5 U.S.C. and certain implementing Office of Personnel Management regulations contained within 5 CFR part 293, Personnel Records; 10 U.S.C. 1124, Cash awards for disclosures, suggestions, inventions, and scientific achievements; 44 U.S.C. 3101, Records management by agency heads; general duties and E.O. 9397 (SSN), as amended."

* * * * *

GNSA 09

SYSTEM NAME:

NSA/CSS Personnel File.

SYSTEM LOCATION:

Primary location: National Security Agency/Central Security Service, Ft. George G. Meade, MD 20755–6000.

Decentralized segments: Each staff, line, contract and field element and supervisor as authorized and appropriate.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Civilian employees, personnel under contract, military assignees, dependents of NSA/CSS personnel assigned to field elements, individuals integrated into the cryptologic reserve program, custodial and commercial services personnel.

CATEGORIES OF RECORDS IN THE SYSTEM:

File contains personnel papers and forms including but not limited to applications, transcripts, correspondence, notices of personnel action, performance appraisals, internal staffing resume, professionalization documentation and correspondence, training forms, temporary duty, letters of reprimand, special assignment documentation, letters of commendation, promotion documentation, field assignment preference, requests for transfers, permanent change of station, passport, transportation, official orders, awards, suggestions, pictures, complaints, separation, retirement, time utilization, scholarship/fellowship or other school appointments, military service, reserve status, military check in/out sheets, military orders, security appraisal, career battery and other test results, language capability, military personnel utilization survey, work experience, notes and memoranda on individual aspects of performance, productivity and suitability, information on individual eligibility to serve on various boards and committees, emergency loan records, other information relevant to personnel management, housing information where required.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

National Security Agency Act of 1959, Public Law 86–36, (codified at 50 U.S.C. 402); 5 U.S.C. and certain implementing Office of Personnel Management regulations contained within 5 CFR part 293, Personnel Records; 10 U.S.C. 1124, Cash awards for disclosures, suggestions, inventions, and scientific achievements; 44 U.S.C. 3101, Records management by agency heads; general duties and E.O. 9397 (SSN), as amended.

PURPOSE(S):

To support the personnel management program; personnel training and career development; personnel planning; staffing and counseling; administration and personnel supervision; workforce study and analysis; manpower requirements studies; emergency loan program and training curricula planning and research.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To gaining employers or to financial institutions when individual has applied for credit; to contractor employees to make determinations as noted in the purpose above; to hearing examiners; the judicial branch or to other gaining government organization as required and appropriate; biographical information may be provided to the White House as required in support of the Senior Cryptologic Executive Service awards program.

To the Office of the Director of National Intelligence (ODNI) for Intelligence Community aggregate workforce planning, assessment, and reporting purposes. Records provided to the ODNI for this routine use will not include any individual's name or Social Security Number (SSN).

The DoD 'Blanket Routine Uses' set forth at the beginning of the NSA/CSS' compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records in files folders and electronic storage media.

RETRIEVABILITY:

By name, Social Security Number (SSN) or Employee Identification Number.

SAFEGUARDS:

Buildings are secured by a series of guarded pedestrian gates and checkpoints. Access to facilities is limited to security-cleared personnel and escorted visitors only. Within the facilities themselves, access to paper and computer printouts are controlled by limited-access facilities and lockable containers. Access to electronic means is limited and controlled by computer password protection. Access to information is limited to those individuals authorized and responsible for personnel management or supervision.

RETENTION AND DISPOSAL:

Primary System—Those forms, notices, reports and memoranda considered to be of permanent value or required by law or regulation to be preserved are retained for the period of employment or assignment and then forwarded to the gaining organization or retained indefinitely. If the action is separation or retirement, these items are forwarded to the Office of Personnel Management or retired to the Federal Records Center at St. Louis as appropriate. Those items considered to be relevant for a temporary period only are retained for that period and either transferred with the employee or assignee or destroyed when they are no longer relevant or at time of separation or retirement. Computerized portion is purged and updated as appropriate. Records relating to adverse actions, grievances, excluding EEO complaints and performance-based actions, except SF–50s, will be retained for four years. Personnel summary, training, testing and past activity segments retained permanently. All other portions deleted at end of tenure.

Decentralized System—Files are transferred to gaining organization or destroyed upon separation as appropriate. Computer listings of personnel assigned to an organization are destroyed upon receipt of updated listings.

SYSTEM MANAGER(S) AND ADDRESS:

The Associate Director, Human Resources, National Security Agency/Central Security Service, Ft. George G. Meade, MD 20755–6000.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the National Security Agency/Central Security Service, Freedom of Information Act/Privacy Act Office, 9800 Savage Road, Ft. George G. Meade, MD 20755–6000.

Written inquiries should contain the individual's full name, Social Security Number (SSN) and mailing address.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the National Security Agency/Central Security Service, Freedom of Information Act/Privacy Act Office, 9800 Savage Road, Ft. George G. Meade, MD 20755–6000.

Written inquiries should contain the individual's full name, Social Security Number (SSN) and mailing address.

CONTESTING RECORD PROCEDURES:

The NSA/CSS rules for contesting contents and appealing initial determinations are published at 32 CFR part 322 or may be obtained by written request addressed to the National Security Agency/Central Security Service, Freedom of Information Act/Privacy Act Office, 9800 Savage Road, Ft. George G. Meade, MD 20755–6000.

RECORD SOURCE CATEGORIES:

Forms used to collect and process individual for employment, access or assignment, forms and memoranda used to request personnel actions, training awards, professionalization, transfers, promotion, organization and supervisor reports and requests, educational institutions, references, Office of Personnel Management and other governmental entities as appropriate, and other sources as appropriate and required.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Portions of this file may be exempt pursuant to 5 U.S.C. 552a(k)(1), (k)(4), (k)(5), and (k)(6), as applicable.

An exemption rule for this record system has been promulgated according to the requirements of 5 U.S.C. 553(b)(1), (2), and (3), (c) and (e) and published in 32 CFR part 322. For additional information contact the system manager.

[FR Doc. 2010–669 Filed 1–14–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

TRICARE, Formerly Known as the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); Fiscal Year 2010 Mental Health Rate Updates

AGENCY: Office of the Secretary, DoD.

ACTION: Notice of Updated Mental Health Rates for Fiscal Year 2010.

SUMMARY: This notice provides the updated regional per diem rates for low volume mental health providers; the update factor for hospital-specific per-diems; the updated cap per diem for high-volume providers; the beneficiary per-diem cost-share amount for low-volume providers; and the updated per-

diem rates for both full-day and half-day TRICARE Partial Hospitalization Programs for Fiscal Year 2010.

DATES: *Effective Date:* The Fiscal Year 2010 rates contained in this notice are effective for services on or after October 1, 2009.

ADDRESSES: TRICARE Management Activity (TMA), Medical Benefits and Reimbursement Branch, 16401 East Centretech Parkway, Aurora, CO 80011–9066.

FOR FURTHER INFORMATION CONTACT: Ann N. Fazzini, Medical Benefits and Reimbursement Branch, TMA, telephone (303) 676–3803.

SUPPLEMENTARY INFORMATION: The final rule published in the **Federal Register** on September 6, 1988, (53 FR 34285) set forth reimbursement changes that were effective for all inpatient hospital admissions in psychiatric hospitals and exempt psychiatric units occurring on or after January 1, 1989. The final rule published in the **Federal Register** on July 1, 1993, (58 FR 35–400) set forth maximum per-diem rates for all partial hospitalization admissions on or after September 29, 1993. Included in these final rules were provisions for updating reimbursement rates for each federal Fiscal Year. As stated in the final rules, each per-diem shall be updated by the Medicare update factor for hospitals and units exempt from the Medicare Prospective Payment System (i.e., this is the same update factor used for the inpatient prospective payment system). For Fiscal Year 2010, Medicare has recommended a rate of increase of 2.1 percent. TRICARE will adopt this update factor for Fiscal Year 2010 as the final update factor. Hospitals and units with hospital specific rates (hospitals and units with high TRICARE volume) and regional-specific rates for psychiatric hospitals and units with low TRICARE volume will have their TRICARE rates for Fiscal Year 2010 updated by 2.1 percent.

Partial hospitalization rates for full-day and half-day programs will also be updated by 2.1 percent for Fiscal Year 2010.

The cap amount for high-volume hospitals and units will also be updated by 2.1 percent for Fiscal Year 2010.

The Standard non-active duty family member cost share for low volume hospitals and units will also be updated by 2.1 percent for Fiscal Year 2010.

Per 32 CFR 199.14, the same area wage indexes used for the CHAMPUS Diagnosis-Related Group (DRG)-based payment system shall be applied to the wage portion of the applicable regional per diem for each day of the admission. The wage portion shall be the same as that used for the CHAMPUS DRG-based payment system. For wage index values greater than 1.0, the wage portion of the regional rate subject to the area wage adjustment is 68.8 percent for Fiscal Year 2010. For wage index values less than or equal to 1.0, the wage portion of the regional rate subject to the area wage adjustment is 62 percent.

Additionally, 32 CFR 199.14, requires that hospital specific and regional per diems shall be updated by the Medicare update factor for hospitals and units exempt from the Medicare Prospective Payment System.

The following reflect an update of 2.1 percent for Fiscal Year 2010.

REGIONAL SPECIFIC RATES FOR PSYCHIATRIC HOSPITALS AND UNITS WITH LOW TRICARE VOLUME FOR FISCAL YEAR 2010

United States census region	Regional rate
Northeast:	
New England	$745
Mid-Atlantic	718
Midwest:	
East North Central	620
West North Central	585
South:	
South Atlantic	738
East South Central	790
West South Central	673
West:	
Mountain	672
Pacific	794
Puerto Rico	506

Beneficiary cost share: Beneficiary cost-share (other than dependents of active duty members) for care paid on the basis of a regional per diem rate is the lower of $197 per day or 25 percent of the hospital billed charges effective for services rendered on or after October 1, 2009. Cap Amount: Updated cap amount for hospitals and units with high TRICARE volume is $936 per day for services on or after October 1, 2009.

The following reflect an update of 2.1 percent for Fiscal Year 2010 for the partial hospitalization rates.

PARTIAL HOSPITALIZATION RATES FOR FULL-DAY AND HALF-DAY PROGRAMS

[Fiscal year 2010]

United States census region	Full-day rate (6 hours or more)	Half-day rate (3–5 hours)
Northeast:		
New England (Maine, N.H., Vt., Mass., R.I., Conn.)	$299	$222
Mid-Atlantic:		
(N.Y., N.J., Penn.)	325	244
Midwest:		
East North Central (Ohio, Ind., Ill., Mich., Wis.)	286	213
West North Central:		
(Minn., Iowa, Mo., N.D., S.D., Neb., Kan.)	286	213
South:		
South Atlantic (Del., Md., DC, Va., W.Va., N.C., S.C., Ga., Fla.)	307	231
East South Central:		
(Ky., Tenn., Ala., Miss.)	332	250
West South Central:		
(Ark., La., Texas, Okla.)	332	250
West:		
Mountain (Mon., Idaho, Wyo., Col., N.M., Ariz., Utah, Nev.)	335	253
Pacific (Wash., Ore., Calif., Alaska, Hawaii)	329	246
Puerto Rico	213	161

The above rates are effective for services rendered on or after October 1, 2009.

Dated: December 18, 2009.

Patricia Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2010–598 Filed 1–14–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army; Army Corps of Engineers

Notice of Intent To Prepare a Joint Environmental Impact Statement and Environmental Impact Report for the Lower San Joaquin River Feasibility Study

AGENCY: Department of the Army, U.S. Army Corps of Engineers; DOD.

ACTION: Notice of intent.

SUMMARY: The action being taken is the preparation of a joint environmental impact statement/environmental impact report (EIS/EIR) for the Lower San Joaquin River Feasibility Study (LSJRFS). The EIS/EIR will be prepared in accordance with the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA). The U.S. Army Corps of Engineers (USACE) will serve as lead agency for compliance with NEPA, and the San Joaquin Area Flood Control Agency (SJAFCA) will serve as lead agency for compliance with CEQA. The LSJRFS will evaluate alternatives, including a locally preferred plan, for providing flood damage reduction and ecosystem restoration along the lower (northern) portion of the San Joaquin River system in the Central Valley of California. The approximate area of the proposed action and analysis is identified in Figure 1.

DATES: Written comments regarding the scope of the environmental analysis should be received at (*see* **ADDRESSES**) by February 15, 2010.

ADDRESSES: Written comments concerning this study and requests to be included on the LSJRFS mailing list should be submitted to Mr. Doug Edwards, U.S. Army Corps of Engineers, Sacramento District, *Attn:* Planning Division (CESPK–PD–R), 1325 J Street, Sacramento, CA 95814.

FOR FURTHER INFORMATION CONTACT: Mr. Doug Edwards via telephone at (916) 557–7062, e-mail at *Douglas.M.Edwards@usace.army.mil*, or regular mail at (*see* **ADDRESSES**).

SUPPLEMENTARY INFORMATION:

1. *Proposed Action.* USACE is preparing an EIS/EIR to analyze the environmental impacts associated with a range of alternatives for providing flood damage reduction and ecosystem restoration along the lower (northern) portion of the San Joaquin River system (Figure 1).

2. *Alternatives.* The EIS/EIR will address an array of alternatives for providing flood risk management alternatives that are intended to reduce flood risk within the project area. Alternatives analyzed during the investigation may include, but are not limited to, a combination of one or more of the following flood damage reduction measures: adding, modifying, and/or re-regulating storage on major tributaries; new transitory storage within flood plains, increasing conveyance by raising levees; widening channels and floodway areas; dredging; and constructing or modifying weirs and bypasses; and various floodplain management measures. Ecosystem restoration measures may include, but are not limited to, restoring riparian, wetland, and floodplain habitats, and/or constructing setback levees for habitat restoration.

3. *Scoping Process.*

a. A public scoping meeting will be held to present an overview of the LSJRFS and the EIS/EIR process, and to afford all interested parties with an opportunity to provide comments regarding the scope of analysis and potential alternatives. The public scoping meeting will be held at the University of Pacific, Regent's Dining Room, 3601 Pacific Avenue, Stockton, CA on January 27, 2010, from 6–8 p.m.

b. Potentially significant issues to be analyzed in depth in the EIS/EIR include project specific and cumulative effects on hydraulics, wetlands and other waters of the U.S., vegetation and wildlife resources, special-status species, esthetics, cultural resources, recreation, land use, fisheries, water quality, air quality, and transportation.

c. USACE is consulting with the State Historic Preservation Officer to comply with the National Historic Preservation Act and with the U.S. Fish and Wildlife Service and National Marine Fisheries Service to comply with the Endangered Species Act. USACE is also coordinating with the U.S. Fish and Wildlife Service to comply with the Fish and Wildlife Coordination Act.

d. A 45-day public review period will be provided for all interested parties individuals and agencies to review and comment on the draft EIS/EIR. All interested parties are encouraged to respond to this notice and provide a current address if they wish to be notified of the draft EIS/EIR circulation.

4. *Availability.* The draft EIS/EIR is currently scheduled to be available for public review and comment in 2014.

Dated: December 29, 2009.

Thomas Chapman,

COL, EN Commanding.

[FR Doc. 2010–686 Filed 1–14–10; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Notice of Solicitation for Estuary Habitat Restoration Program

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of solicitation for project applications.

SUMMARY: Congress has appropriated limited funds to the U.S. Army Corps of Engineers (Corps) and the National Oceanic and Atmospheric Administration (NOAA) for implementation of the Estuary Habitat Restoration Program as authorized in Section 104 of the Estuary Restoration Act of 2000, Title I of the Estuaries and Clean Waters Act of 2000 (Pub. L. 106–457) (accessible at *http://www.usace.army.mil/CECW/ERA/Pages/home.aspx).* On behalf of the Estuary Habitat Restoration Council (Council) the Corps is soliciting proposals for estuary habitat restoration projects. The Council requests that all proposals address the potential effects of sea level change and other impacts related to climate change on the viability of the proposed restoration. This may take the form of considering climate change in the planning, design, siting, and construction of the project, or in testing new restoration technologies that may help to alleviate effects of climate change. This document describes project criteria and evaluation criteria the Council will use to determine which projects to recommend. Recommended projects must provide ecosystem benefits, have scientific merit, be technically feasible, and be cost-effective. Proposals selected for Estuary Habitat Restoration Program funding may be implemented in accordance with a cost-share agreement with the Corps; or a cooperative agreement with the Corps or NOAA, subject to availability of funds.

In addition to this solicitation and the application form, a Supplemental Guide for Prospective Applicants is available at: *http://www.usace.army.mil/CECW/*

ERA/Pages/pps.aspx and *http://era.noaa.gov/.*

DATES: Proposals must be received on or before March 16, 2010.

ADDRESSES: Ms. Jenni Wallace, NOAA Restoration Center, SSMC3 F/HC3 Room 14730, 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Ms. Jenni Wallace, (301) 713–0174 x183, e-mail: *Jenni.Wallace@noaa.gov* or Ms. Ellen Cummings, (202) 761–4750, e-mail: *Ellen.M.Cummings@usace.army.mil.*

SUPPLEMENTARY INFORMATION:

I. Introduction

Under the Estuary Habitat Restoration Program, the U.S. Army Corps of Engineers (Corps), Department of the Interior (acting through the U.S. Fish and Wildlife Service), National Oceanic and Atmospheric Administration, Environmental Protection Agency, and Department of Agriculture are authorized to carry out estuary habitat restoration projects. The Estuary Habitat Restoration Council (Council) is responsible for soliciting, reviewing and evaluating project proposals. The agencies may only fund projects on the prioritized list provided by the Council. The Estuary Habitat Restoration Strategy prepared by the Council contains introductory information about the program and provides the context in which projects will be evaluated and the program will be administered. The Strategy was published in the **Federal Register** (67 FR 71942) on December 3, 2002. It is also accessible at *http://www.usace.army.mil/CECW/ERA/Pages/home.aspx* in PDF format.

An emphasis will be placed on achieving cost-effective restoration of ecosystems while promoting increased partnerships among agencies and between public and private sectors. Projects funded under this program will contribute to the Estuary Habitat Restoration Strategy goal of restoring 1,000,000 acres of estuary habitat.

For purposes of this program, *estuary* is defined as "a part of a river or stream or other body of water that has an unimpaired connection with the open sea and where the sea water is measurably diluted with fresh water from land drainage." Estuary also includes the "* * * near coastal waters and wetlands of the Great Lakes that are similar in form and function to estuaries * * *" For this program, an estuary is considered to extend from the head of tide to the boundary with the open sea (to downstream terminus features or structures such as barrier islands, reefs, sand bars, mud flats, or headlands in close proximity to the connection with the open sea). In the Great Lakes, riparian and nearshore areas adjacent to the mouths of creek or rivers entering the Great Lakes will be considered to be estuaries. Estuary habitat includes the estuary and its associated ecosystems, such as: Salt, brackish, and fresh water coastal marshes; coastal forested wetlands and other coastal wetlands; maritime forests; coastal grasslands; tidal flats; natural shoreline areas; shellfish beds; sea grass meadows; kelp beds; river deltas; and river and stream corridors under tidal influence.

II. Eligible Restoration Activities

Section 103 of the Estuary Restoration Act of 2000 (the Act) defines the term *estuary habitat restoration activity* to mean "an activity that results in improving degraded estuaries or estuary habitat or creating estuary habitat (including both physical and functional restoration), with the goal of attaining a self-sustaining system integrated into the surrounding landscape." Projects funded under this program will be consistent with this definition and should include consideration of potential changes in future conditions due to climate change.

Eligible habitat restoration activities include reestablishment of chemical, physical, hydrologic, and biological features and components associated with an estuary. Restoration may include, but is not limited to, improvement of estuarine wetland tidal exchange or reestablishment of historic hydrology; dam or berm removal; improvement or reestablishment of fish passage; appropriate reef/substrate/habitat creation; planting of native estuarine wetland and submerged aquatic vegetation; reintroduction of native species; control of invasive species by altering conditions so they are less conducive to the invasive species; and establishment of riparian buffer zones in the estuary. Cleanup of pollution for the benefit of estuary habitat may be considered, as long as it does not meet the definition of excluded activities under the Act (see section III, *EXCLUDED ACTIVITIES*).

In general, proposed projects should clearly demonstrate anticipated benefits to habitats such as those habitats listed in the *INTRODUCTION.* Although the Council recognizes that water quality and land use issues may impact habitat restoration efforts and must be considered in project planning, the Estuary Habitat Restoration Program is intended to fund physical habitat restoration projects, not measures such as storm water detention ponds, wastewater treatment plant upgrades or combined sewer outfall improvements.

III. Excluded Activities

Estuary Habitat Restoration Program funds will not be used for any activity that constitutes mitigation required under any Federal or State law for the adverse effects of an activity regulated or otherwise governed by Federal or State law, or that constitutes restoration for natural resource damages required under any Federal or State law. Estuary Habitat Restoration Program funds will not be used for remediation of any hazardous substances regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601–9675). Additionally, Estuary Habitat Restoration Program funds will not be used to carry out projects on Federal lands.

The Council recognizes that water quality issues can impact estuary habitat restoration efforts. However, this solicitation is intended to fund on-the-ground habitat restoration projects that will have significant and tangible ecological impacts. Projects dealing *only* with water quality improvement measures are not eligible. Ineligible projects include, but are not limited to, wastewater treatment plant upgrades, combined sewer outfalls, and non-point source pollution projects such as replacement of failing septic systems, implementation of farm waste management plans, and stormwater management projects. Other examples of activities that would not qualify would be restoration of an oyster bed with significant areas open to commercial harvest or a fish hatchery. Educational facilities such as classrooms, botanical gardens, or recreational facilities such as trails or boat ramps would also not qualify for cost sharing under this program although they may be included in the project if they do not conflict with the environmental benefits expected from project implementation.

IV. Project Sponsor and Cost Sharing

The Non-Federal Sponsor may be a State, a political subdivision of a State, a Tribe, or a regional or interstate agency. A non-governmental organization may serve as a Non-Federal Sponsor as determined by the Secretary of the Army (Secretary) in consultation with appropriate State and local governmental agencies and Tribes. For purposes of this act the term "non-governmental organization" does not include for profit enterprises. The Non-Federal Sponsor must be able to provide the real estate interests necessary for implementation, operation,

maintenance, repair, rehabilitation and replacement of the project. In most cases this means the Non-Federal Sponsor must have fee title to the lands necessary for the project although in some cases an easement may be sufficient.

The Federal share of the cost of an estuary habitat restoration project shall not exceed 65 percent in most cases. The exception to this is when the project deals with pilot testing or demonstrating an innovative technology or approach. In the latter case, the Federal share shall be 85 percent of the incremental additional cost of pilot testing or demonstration of an innovative technology or approach having the potential for improved cost-effectiveness. Innovative technology or approach are defined as novel processes, techniques and/or materials to restore habitat, or the use of existing processes, techniques, and/or materials in a new restoration application. Applicants must justify in the proposal why a particular project is innovative. In addition, the Council has final say as to whether a proposed project is innovative. The difference in the cost of the project related to the use of the innovative technique or approach must be clearly described. Please refer to the Supplemental Guidance for Prospective Applicants for an example of how to calculate the cost share for an innovative technology/approach application.

Prior to initiation of a project, the Non-Federal Sponsor must enter into an agreement with the funding agency in which the Non-Federal Sponsor agrees to provide its share of the project cost; including necessary lands, easements, rights-of-way, and relocations and long-term maintenance. The value of the required real estate interests will be credited towards the Non-Federal Sponsor's share of the project cost. The Non-Federal Sponsor may also receive credit for services and in-kind contributions toward its share of the project cost, including cost shared monitoring. Adaptive management will be a non-Federal responsibility; it will not be cost shared. Credit for the value of in-kind contributions is subject to satisfactory compliance with applicable Federal labor laws covering non-Federal construction, including but not limited to the Davis-Bacon Act (40 U.S.C. 276a *et seq.,*) the Contract Work Hours and Safety Standards Act (40 U.S.C. 327 *et seq.*), and the Copeland Anti-Kickback Act (40 U.S.C. 276c). Credit may be afforded for the value of required work undertaken by volunteers, using the hourly value in common usage for grants programs but not to exceed the Federal estimate of the cost of activity. The Non-Federal Sponsor shall also have a long-term responsibility for all costs associated with operating, maintaining, replacing, repairing, and rehabilitating these projects. The cost of these activities will not be included in the total project cost and will not count toward the Non-Federal Sponsor's minimum 35 percent share of the project cost.

Other Federal funds, *i.e.,* funds appropriated to agencies other than the agency signing the cost-share agreement or cooperative agreement, may not be used by the Non-Federal Sponsor to meet its share of the project cost unless the other Federal agency verifies in writing that expenditure of funds for such purpose is expressly authorized by statute. Otherwise, other Federal funds may be used for the proposed project if consistent with the other agency's authorities and will count as part of the Federal share of the project cost. Any non-Federal funds or contributions used as a match for those other Federal funds may be used toward the project but will not be considered in determining the non-Federal share in relation to any Federal Estuary Habitat Restoration Program funds.

Credit will be provided only for work necessary for the specific project being funded with Estuary Habitat Restoration Program funds. For example, a non-Federal entity is engaged in the removal of ten dams, has removed six dams, and now seeks assistance for the removal of the remaining four dams as an Estuary Habitat Restoration Program project. None of the costs associated with the removal of the prior six dams is creditable as part of the non-Federal share of the project for removal of the remaining four dams.

If a Corps cost-share agreement is required, funds will not be transferred to the Non-Federal Sponsor. Instead, the Corps will use the funds to implement (construct) some portion of the proposed project as well as cover its management responsibilities. If the project meets the Corps conditions for implementation under a cooperative agreement or if NOAA funds a project, funds will be transferred to the Non-Federal Sponsor under a cooperative agreement. In all cases the funding agencies will use the planning, evaluation, and design products provided by the applicant to the extent possible. The Federal funding agency will be responsible for assuring compliance with Federal environmental statutes, assuring the project is designed to avoid adverse impacts on other properties and that the project can reasonably be expected to provide the desired benefits. Corps activities related to implementation of projects under this authority will be part of the Federal cost of the project, and the Non-Federal Sponsor should consider these costs in developing the project cost estimate. The Non-Federal Sponsor should coordinate with the appropriate Corps district office during preparation of the proposal to obtain an estimate of the funds required and other available information which may improve the proposal. Information on district locations and boundaries may be found at *http://www.usace.army.mil/about/Pages/Locations.aspx.* If additional assistance regarding the Corps process or contacts is required please contact Ms. Cummings (see **FOR FURTHER INFORMATION CONTACT** section).

V. Funding Availability

Limited funds have been appropriated for implementation of projects under the Estuary Habitat Restoration Program. The Council will only accept proposals that request at least $100,000 and no more than $1,000,000 from this program. Projects will be funded subject to the availability of funds. The number of proposals funded as a result of this notice will depend on the number of eligible proposals received, the estimated amount of funds required for each selected project, and the merit and ranking of the proposals. The exact amount of the Federal and non-Federal cost share for each selected project will be specified in the agreement (See *PROJECT SPONSOR AND COST SHARING,* Section IV). Projects selected for funding must be capable of producing the ecosystem benefits described in the proposal in the absence of Federal funding beyond that provided in the cost-share or cooperative agreement.

VI. Proposal Review Process

Proposals will be screened as discussed in section VII.A. below to determine eligibility. The staff of the agencies represented on the Council will conduct a technical review of the eligible proposals in accordance with the criteria described in section VII.B. below. Each agency will score and rank the proposals; the five agencies will use these rankings as the basis for a consolidated recommendation to the Council. The recommendation will include indications as to which agency should fund a project, NOAA or the Corps. The Council will consider the recommendation, the items discussed in sections VII.C. and D. below, and possibly other factors when preparing its prioritized list of recommended projects for the Secretary's use.

VII. Proposal Review Criteria

This section describes the criteria that will be used to review and select projects to be recommended to the Secretary for funding under the Act. Project proposals should clearly address the criteria set forth under the following four subsections: Initial Screening of Project Proposals (VII.A.); Evaluation of Project Proposals (VII.B.); Priority Elements (VII.C.); and Other Factors (VII.D.).

A. Initial Screening of Project Proposals

Proposals will be screened according to the requirements listed in sections 104(b) and 104(c)(2) of the Act as described below. Proposed projects must not include excluded activities as discussed in Section III above. Additionally, the letter of assurance must indicate that the primary property owner and the party responsible for long-term maintenance have reviewed and support the proposal. Proposals that do not meet all of these initial screening criteria will not be evaluated further. To be accepted the proposal must:

(1) Originate from a Non-Federal Sponsor (section 104(b));

(2) Address restoration needs identified in an estuary habitat restoration plan (section 104 (c)(2)(A)). The Act defines "estuary habitat restoration plan" as any Federal, State, or regional plan for restoration of degraded estuary habitat that was developed with substantial participation of the public. (section 103(6));

(3) Be consistent with the Estuary Habitat Restoration Strategy (section 104(c)(2)(B)) by:

(a) Including eligible restoration activities that provide ecosystem benefits;

(b) Addressing estuary habitat trends (including historic losses) in the project region, and indicating how these were considered in developing the project proposal;

(c) Involving a partnership approach, and

(d) Clearly describing the benefits expected to be realized by the proposed project;

(4) Include a post-construction monitoring plan that is consistent with standards developed by NOAA under section 104(c)(2)(C). The standards are available at: *http://www.usace.army.mil/CECW/ERA/Pages/monitor_db.aspx* and *http://era.noaa.gov/htmls/era/era_monitoring.html,* or from the contacts listed in the **FOR FURTHER INFORMATION CONTACT** section. Minimum monitoring requirements include monitoring over a period of five years post-construction and tracking of at least one structural and one functional element. Examples of structural and functional elements are contained in the monitoring document cited above, and;

(5) Include satisfactory assurances that the Non-Federal Sponsor has adequate authority and resources to carry out items of local cooperation and properly maintain the project (section 104(c)(2)(D)).

B. Evaluation of Project Proposals

Proposals that meet the initial screening criteria in A. above will be eligible for further review using the criteria listed below. Reviewers will assign scores to applications ranging from 0 to 100 points based on the evaluation criteria and respective weights specified below. Applications that best address these criteria will be the most competitive. The following criteria are listed in order of relative importance with the assigned points used in evaluation. If the reviewers find that a response to any of the first four criteria is not included in the proposal, or not adequate, the proposal will be rejected. For each of the listed criteria the focus will be on the factors mentioned below but other factors may also be considered.

(1) *Ecosystem Benefits* (15 points)—Proposals will be evaluated based on the extent of proposed habitat restoration activities and the type(s) of habitat(s) that will be restored. Following are specific factors that reviewers will consider as part of this criterion:

(a) Prevention or reversal of estuary habitat loss or degradation in the project area and the nature and extent of the proposed project's potential contribution to the long-term conservation of estuary habitat function and adaptation to climate change,

(b) Benefits for Federally listed threatened or endangered species, species proposed for Federal listing, recently delisted species or designated or proposed critical habitat in the project area,

(c) Extent to which the project will provide, restore, or improve habitat important for estuary-dependent fish and/or migratory birds (*e.g.,* breeding, spawning, nursery, foraging, or staging habitat),

(d) Prevention or reduction of nonpoint source pollution or other contaminants to estuary habitats or restoration of estuary habitats that are already contaminated, and

(e) Benefits to nearby existing habitat areas, or contribution to the creation of wildlife/ecological corridors connecting existing habitat areas.

(2) *Cost-Effectiveness* (15 points)—Reviewers will evaluate the relationship between estimated project costs, including the costs of remaining planning, design, construction, required lands, and monitoring, to the monetary and non-monetary benefits described in the proposal. Clear quantitative and qualitative descriptions of the proposed outputs will facilitate this evaluation. Examples of units of measure include: Acres restored, stream miles opened to fish passage, flood damage reduction levels, changes in water quality parameters, increases in the productivity of various species, and presence and absence of certain species. The estimated persistence of the proposed project outputs through time will be considered. For example, will the area be maintained as a wetland, or allowed to erode or become upland? Is the project designed to adapt to climate change and potential changes in sea level? Will the proposed project produce additional benefits due to synergy between the proposed project and other ongoing or proposed projects? Reviewers will consider if the proposed project is a cost-effective way to achieve the project goals. In some instances the costs and benefits of proposed projects may be compared to the costs and benefits of other similar projects in the area. The significance of the proposed outputs is also a factor to be considered as part of cost-effectiveness. The significance of restoration outputs should be recognized in terms of institutional (such as laws, adopted plans, or policy statements), public (such as support for the project), or technical (such as if it addresses scarcity, increases limiting habitat, or improves or increases biodiversity) importance.

(3) *Technical Feasibility* (15 points)—Reviewers will evaluate the extent to which, given current and projected environmental conditions of the restoration site—*e.g.,* soils, flood regime, presence of invasive species, surrounding land use—the proposed project is likely to succeed. Consideration will also be given to:

(a) Potential success of restoration techniques, based on a history of successful implementation in field or pilot projects, and ability to adapt to climate change and potential changes in sea level,

(b) Implementation schedule,

(c) Expected length of time before success can be demonstrated,

(d) Proposed corrective actions using monitoring information,

(e) Project management plans, and

(f) Experience and qualifications of project personnel.

(4) *Scientific Merit* (15 points)—

Reviewers will evaluate the extent to which the project design is based on sound ecological principles and is likely to meet project goals. This may be indicated by the following factors:

(a) Goals of the project are reasonable considering the existing and former habitat types present at the site and other local influences,

(b) The proposed restoration methodology demonstrates an understanding of habitat function, and has a good chance of meeting project goals and achieving long-term sustainability.

(5) *Agency Coordination* (10 points)—

Reviewers will evaluate the degree to which the project will encourage increased coordination and cooperation among Federal, State, and local government agencies. Some of the indicators used to evaluate coordination are:

(a) The State, Federal, and local agencies involved in developing the project and their expected roles in implementation,

(b) The nature of agency coordination, *e.g.,* joint funding, periodic multi-agency review of the project, collaboration on adaptive management decisions, joint monitoring, opportunities for future collaboration, etc., and

(c) Whether a formal agreement, such as a Memorandum of Understanding (MOU), exists between/among agencies as part of the project.

(6) *Public/Private Partnerships* (10 points)—

One of the focuses of the Act is the encouragement of new public/private partnerships. Reviewers will evaluate the degree to which the project will foster public/private partnerships and uses Federal resources to encourage increased private sector involvement. Indicators of the success at meeting this criterion follow. How will the project promote collaboration or create partnerships among public and private entities, including potential for future new or expanded public/private partnerships? What mechanisms are being used to establish the partnership, *e.g.,* joint funding, shared monitoring, joint decision-making on adaptive management strategies? Is there a formal agreement, such as a Memorandum of Understanding, between/among the partners as part of the project? Also important is the extent to which the project creates an opportunity for long-term partnerships among public and private entities.

(7) *Monitoring Plan* (10 points)—

Reviewers will consider the following factors in evaluating the quality of the monitoring plan:

(a) Linkage between the monitoring methods and the project goals, including accomplishment targets,

(b) How results will be evaluated (statistical comparison to baseline or reference condition, trend analysis, or other quantitative or qualitative approach),

(c) How baseline conditions will be established for the parameters to be measured,

(d) If applicable, the use and selection of reference sites, where they are located, how they were chosen, and whether they represent target conditions for the habitat or conditions at the site without restoration,

(e) Frequency and timing of measurements, and location to be sampled (at a minimum, one functional and one structural parameter must be measured),

(f) Provisions for adaptive management, and data reporting, and

(g) Whether the length of the proposed monitoring plan is appropriate for the project goals. The minimum required monitoring period is five years post-construction.

(8) *Level of Contribution* (5 points)—

Reviewers will consider the level and type (cash or in-kind) of Non-Federal Sponsor's contribution. Providing more than the minimum 35-percent share will be rated favorably. It must be clear how much of the total project cost the Estuary Habitat Restoration Program is expected to provide, how much is coming from other Federal sources, how much is coming directly from the sponsor, and how much is available or expected to be provided by other sources (either cash or in-kind). Preference may be given to projects with the majority of the funding confirmed.

(9) *Multiple Benefits* (3 points)—

In addition to the ecosystem benefits discussed in criterion (1) above, restored estuary habitats may provide additional benefits. Among those the reviewers will consider are: flood damage reduction, protection from storm surge, adaptation to climate change, water quality and/or quantity for human uses, recreational opportunities, and benefits to commercial fisheries.

(10) *Supports Regional Restoration Goals* (1 point)—

Describe the project's regional/local priority based on specific recovery planning goals or on publicly vetted restoration plans, watershed assessments, or other priority setting planning documents.

(11) *Part of a Federal or State Plan* (1 point)—

If the proposed project is part of a Federal or state plan, describe how the project would contribute to meeting and/or strengthening the plan's needs, goals, objectives and restoration priorities.

C. Priority Elements

Section 104 (c)(4) of the Act directs the Secretary to give priority consideration to a project that merits selection based on the above criteria if it:

(1) Occurs within a watershed where there is a program being implemented that addresses sources of pollution and other activities that otherwise would adversely affect the restored habitat; or

(2) Includes pilot testing or demonstration of an innovative technology or approach having the potential to achieve better restoration results than conventional technologies, or comparable results at lower cost in terms of energy, economics, or environmental impacts.

The Council will also consider these priority elements in ranking proposals.

D. Other Factors

In addition to considering the composite ratings developed in the evaluation process and the priority elements listed in C. above, the Council will consider other factors when preparing its prioritized list for the Secretary's use. These factors include (but may not be limited to) the following:

(1) Readiness of the project for implementation. Among the factors to be considered when evaluating readiness are the steps that must be taken prior to project implementation, for example is the project a concept, a detailed plan, or completed design; potential delays to project implementation; and the status of real estate acquisition. Proposed projects that have completed more of the pre-construction activities will generally receive more favorable consideration.

(2) Balance between large and small projects, to the extent possible given the program funding constraints.

(3) Geographic distribution of the projects.

VIII. Project Selection and Notification

The Secretary will select projects for funding from the Council's prioritized list of recommended projects after considering the criteria contained in section 104(c) of the Act, availability of funds and any reasonable additional factors. It is expected that the Secretary will select proposals for implementation approximately 100 days after the close of this solicitation or 30 days after

receiving the list from the Council, whichever is later. The Secretary will also recommend the lead Federal agency for each project to be funded. The Non-Federal Sponsor of each proposal will be notified of its status at the conclusion of the selection process. Staff from the appropriate Federal agency will work with the Non-Federal Sponsor of each selected project to develop the cost-sharing agreements and schedules for project implementation.

IX. Structure and Content of Application Submission

Each application should include:

_____ PART I questions completed (see Project Application)

_____ Project description organized according to the Project Application, including descriptions of:

_____ how regional habitat trends were considered in developing the project proposal

_____ expected ecosystem benefits, their significance/importance, when the benefits will be realized, and the project's expected lifetime

_____ the roles and contributions of project partners

_____ how the long-term operation and maintenance of the project will be handled

_____ Monitoring plan specifying at least one structural and one functional parameter to be measured and that monitoring will occur for five years post-construction

_____ Name and link to Federal or State restoration plan the project will address

_____ Detailed budget broken out by object class (see Supplemental Guidance for Prospective Applicants for more detail on creating a budget, including a budget table template and example narrative)

_____ Justification for an innovative project. If an applicant feels their project could be considered innovative, they should develop two budgets—one considering it innovative and one considering it as a standard project

_____ Map showing the project site and key features

_____ Description of compliance activities (*e.g.,* NEPA) if any are completed

_____ Brief resumes of key staff (no more than one page per person, not more than 5 individuals)

_____ Letter of assurance stating adequate personnel, funding, and authority to conduct the project

_____ Signed certification form (see Project Application) that the project is not an excluded activity (for a list of excluded activities see section III *EXCLUDED ACTIVITIES*)

A complete application package should be submitted in accordance with the guidelines in this solicitation.

X. Application Process

Proposal application forms, including Supplemental Guidance for Prospective Applicants, are available at *http://www.usace.army.mil/CECW/ERA/Pages/pps.aspx* and *http://era.noaa.gov* or by contacting Ms. Jenni Wallace (see **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT** sections). Project proposals may be submitted electronically, by mail, or by courier. Electronic submissions are preferred. The application form has been approved by OMB in compliance with the Paper Work Reduction Act and is OMB No. 0710–0014 with an expiration date of November 30, 2011. Send electronic submissions to *Jenni.Wallace@noaa.gov.* Questions may also be sent to the same e-mail address. If it is not feasible to provide an electronic submission, hard copy submissions may be sent or delivered to Ms. Jenni Wallace, NOAA Restoration Center, SSMC3 F/HC3 Room 14730, 1315 East-West Highway, Silver Spring, MD 20910. The part of the proposal prepared to address the "proposal elements" portion of the application should be no more than twelve double-spaced pages, using a 10 or 12-point font. Paper copies should be printed on 8.5 in. x 11 in. paper and may be double sided but must not be bound as multiple copies will be necessary for review. Only one hard copy is required. A PC-compatible CD–ROM in either Microsoft Word or PDF format may accompany the paper copy. Nominations for multiple projects submitted by the same applicant must be submitted in separate e-mail messages and/or envelopes.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2010–681 Filed 1–14–10; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before March 16, 2010.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: January 12, 2010.

Stephanie Valentine,

Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.

Office of Postsecondary Education

Type of Review: New.

Title: Annual Performance Report for the Historically Black Colleges and Universities Master's Degree Program (HBCU).

Frequency: Annually.

Affected Public: Business or other for-profit; Not-for-profit institutions.

Reporting and Recordkeeping Hour Burden:

Responses: 18.

Burden Hours: 360.

Abstract: The Department is requesting authorization to annually collect performance report data for the new Historically Black Colleges and Universities (HBCU) Masters Degree Program. This information is being collected to comply with the Government Performance and Results Act (GPRA) of 1993, Section 4 (1115), and the Education Department General Administrative Regulations (EDGAR), 34 CFR 75.253. EDGAR states that recipients of multi-year discretionary grants must submit an APR demonstrating that substantial progress has been made towards meeting the approved objectives of the project. Further, the APR lends itself to the collection of quantifiable data needed to respond to the requirements of OMB's Program Assessment Rating Tool process. In addition, grantees will be required to report on their progress towards meeting the performance measures established for the HBCU Master's Degree Program.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov*, by selecting the "Browse Pending Collections" link and by clicking on link number 4155. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2010–749 Filed 1–14–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Innovation and Improvement; Overview Information; Arts in Education Model Development and Dissemination Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2010

Catalog of Federal Domestic Assistance (CFDA) Number: 84.351D.

Dates:

Applications Available: January 15, 2010.

Deadline for Notice of Intent to Apply: February 16, 2010.

Deadline for Transmittal of Applications: March 16, 2010.

Deadline for Intergovernmental Review: May 17, 2010.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The Arts in Education Model Development and Dissemination (AEMDD) Program supports the enhancement, expansion, documentation, evaluation, and dissemination of innovative, cohesive models that are based on research and have demonstrated that they effectively—(1) Integrate standards-based arts education into the core elementary and middle school curriculum; (2) strengthen standards-based arts instruction in these grades; and (3) improve students' academic performance, including their skills in creating, performing, and responding to the arts. Projects funded through the AEMDD Program are intended to increase the amount of nationally available information on effective models for arts education that integrate the arts with standards-based education programs.

Priorities: This competition includes one absolute priority, one competitive preference priority, and five invitational priorities.

Absolute Priority: This priority is from the notice of final priority, requirements, and definitions for this program, published in the **Federal Register** on March 30, 2005 (70 FR 16234). For FY 2010 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3) we consider only applications that meet this priority.

This priority is:

This priority supports projects that enhance, expand, document, evaluate, and disseminate innovative, cohesive models that are based on research and have demonstrated their effectiveness in (1) Integrating standards-based arts education into the core elementary or middle school curriculum, (2) strengthening standards-based arts instruction in the elementary or middle school grades, and (3) improving the academic performance of students in elementary or middle school grades, including their skills in creating, performing, and responding to the arts.

In order to meet this priority, an applicant must demonstrate that the model project for which it seeks funding (1) serves only elementary school or middle school grades, or both, and (2) is linked to State and national standards intended to enable all students to meet challenging expectations and to improve student and school performance.

Note: *National standards* refer to the arts standards developed by the Consortium of National Arts Education Association. The standards outline what students should know and be able to do in the arts. These are not Department standards.

Competitive Preference Priority: This priority is from the notice of final priority for Scientifically Based Evaluation Methods published in the **Federal Register** on January 25, 2005 (70 FR 3586). For FY 2010 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, this priority is a competitive preference priority. Under 34 CFR 75.105(c)(2)(i) we award up to an additional 20 points to an application, depending on how well the application meets this competitive preference priority. These points are in addition to any points the application earns under the selection criteria.

When using the priority to give competitive preference to an application, we will review the applications using a two-stage review process. In the first stage, we will review the applications without taking the competitive preference priority into account. In the second stage of the process, we will review the applications rated highest in the first stage of the process to determine whether they will receive the competitive preference points. We will consider awarding additional (competitive preference) points only to those applicants with top-ranked scores based on the selection criteria. We expect that approximately 50 applicants will receive these additional competitive preference points.

This priority is:

The Secretary establishes a priority for projects proposing an evaluation plan that is based on rigorous scientifically based research methods to assess the effectiveness of a particular

intervention. The Secretary intends that this priority will allow program participants and the Department to determine whether the project produces meaningful effects on student achievement or teacher performance.

Evaluation methods using an experimental design are best for determining project effectiveness. Thus, when feasible, the project must use an experimental design under which participants—*e.g.,* students, teachers, classrooms, or schools—are randomly assigned to participate in the project activities being evaluated or to a control group that does not participate in the project activities being evaluated.

If random assignment is not feasible, the project may use a quasi-experimental design with carefully matched comparison conditions. This alternative design attempts to approximate a randomly assigned control group by matching participants—*e.g.,* students, teachers, classrooms, or schools—with non-participants having similar pre-program characteristics.

In cases where random assignment is not possible and participation in the intervention is determined by a specified cut-off point on a quantified continuum of scores, regression discontinuity designs may be employed.

For projects that are focused on special populations in which sufficient numbers of participants are not available to support random assignment or matched comparison group designs, single-subject designs such as multiple baseline or treatment-reversal or interrupted time series that are capable of demonstrating causal relationships can be employed.

Proposed evaluation strategies that use neither experimental designs with random assignment nor quasi-experimental designs using a matched comparison group nor regression discontinuity designs will not be considered responsive to the priority when sufficient numbers of participants are available to support these designs. Evaluation strategies that involve too small a number of participants to support group designs must be capable of demonstrating the causal effects of an intervention or program on those participants.

The proposed evaluation plan must describe how the project evaluator will collect—before the project intervention commences and after it ends—valid and reliable data that measure the impact of participation in the program or in the comparison group.

Points awarded under this priority will be determined by the quality of the proposed evaluation method. In determining the quality of the evaluation method, we will consider the extent to which the applicant presents a feasible, credible plan that includes the following:

(1) The type of design to be used (that is, random assignment or matched comparison). If matched comparison, include in the plan a discussion of why random assignment is not feasible.

(2) Outcomes to be measured.

(3) A discussion of how the applicant plans to assign students, teachers, classrooms, or schools to the project and control group or match them for comparison with other students, teachers, classrooms, or schools.

(4) A proposed evaluator, preferably independent, with the necessary background and technical expertise to carry out the proposed evaluation. An independent evaluator does not have any authority over the project and is not involved in its implementation.

In general, depending on the implemented program or project, under a competitive preference priority, random assignment evaluation methods will receive more points than matched comparison evaluation methods.

Invitational Priorities: For FY 2010 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, these priorities are invitational priorities. Under 34 CFR 75.105(c)(1) we do not give an application that meets these invitational priorities a competitive or absolute preference over other applications.

These priorities are:

Invitational Priority 1. Applications that support activities to enable students to achieve proficiency or advanced proficiency in mathematics.

Invitational Priority 2. Applications that support activities to enable students to achieve proficiency or advanced proficiency in reading.

Invitational Priority 3. Applications that support activities to enable students attending schools in corrective action or restructuring under Title I of the Elementary and Secondary Education Act of 1965, as amended (ESEA) to achieve proficiency or advanced proficiency in reading and mathematics.

Invitational Priority 4. Applications that focus on increasing access to arts education for students who attend rural schools, as defined by the National Center for Education Statistics.

Invitational Priority 5. Applications that provide for the development and dissemination of grant products and results through Open Educational Resources (OER). OER are teaching, learning, and research resources that reside in the public domain or have been released under an intellectual property license that permits their free use or repurposing by others. This invitational priority encourages applications that describe how the applicants will make their AEMDD grant products and resources freely available online, in an effort to share arts content, proven teaching strategies, and lessons learned in implementing AEMDD projects with the wider community of educators.

Note: Each applicant addressing this priority is encouraged to include plans for how the applicant will disseminate resources, for example through a Web site that is freely available to all users. Each of these applicants is also encouraged to include plans specifying how the project will identify quality resources, such as lesson plans, primary source activities, reading lists, teacher reflections, and video of quality arts education teaching and student learning in action, for presentation to the wider community.

While we will not score applicants based on the invitational priorities, we encourage applicants to take advantage of the competitive preference priority if their model allows them to do so.

Application Requirement

To be eligible for AEMDD funds, applicants must propose to address the needs of low-income children by carrying out projects that serve at least one elementary or middle school in which 35 percent or more of the children enrolled are from low-income families (based on data used in meeting the poverty criteria in Title I, Section 1113(a)(5) of the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001 (ESEA)).

Definitions

As used in the absolute priority in this notice—

Arts includes music, dance, theater, media arts, and visual arts, including folk arts.

Integrating means (i) encouraging the use of high-quality arts instruction in other academic/content areas and (ii) strengthening the place of the arts as a core academic subject in the school curriculum.

Based on research, when used with respect to an activity or a program, means that, to the extent possible, the activity or program is based on the most rigorous theory, research, and evaluation data available and is effective in improving student achievement and performance and other program objectives.

As used in the competitive preference priority in this notice—

Scientifically based research (section 9101(37) of the ESEA, 20 U.S.C. 7801(37)):

(A) Means research that involves the application of rigorous, systematic, and objective procedures to obtain reliable and valid knowledge relevant to education activities and programs; and

(B) Includes research that—

(i) Employs systematic, empirical methods that draw on observation or experiment;

(ii) Involves rigorous data analyses that are adequate to test the stated hypotheses and justify the general conclusions drawn;

(iii) Relies on measurements or observational methods that provide reliable and valid data across evaluators and observers, across multiple measurements and observations, and across studies by the same or different investigators;

(iv) Is evaluated using experimental or quasi-experimental designs in which individuals, entities, programs, or activities are assigned to different conditions and with appropriate controls to evaluate the effects of the condition of interest, with a preference for random-assignment experiments, or other designs to the extent that those designs contain within-condition or across-condition controls;

(v) Ensures that experimental studies are presented in sufficient detail and clarity to allow for replication or, at a minimum, offer the opportunity to build systematically on their findings; and

(vi) Has been accepted by a peer-reviewed journal or approved by a panel of independent experts through a comparably rigorous, objective, and scientific review.

Random assignment or experimental design means random assignment of students, teachers, classrooms, or schools to participate in a project being evaluated (treatment group) or not participate in the project (control group). The effect of the project is the difference in outcomes between the treatment and control groups.

Quasi-experimental designs include several designs that attempt to approximate a random assignment design.

Carefully matched comparison groups design means a quasi-experimental design in which project participants are matched with non-participants based on key characteristics that are thought to be related to the outcome.

Regression discontinuity design means a quasi-experimental design that closely approximates an experimental design. In a regression discontinuity design, participants are assigned to a treatment or control group based on a numerical rating or score of a variable unrelated to the treatment such as the rating of an application for funding. Eligible students, teachers, classrooms, or schools above a certain score ("cut score") are assigned to the treatment group and those below the score are assigned to the control group. In the case of the scores of applicants' proposals for funding, the "cut score" is established at the point where the program funds available are exhausted.

Single subject design means a design that relies on the comparison of treatment effects on a single subject or group of single subjects. There is little confidence that findings based on this design would be the same for other members of the population.

Treatment reversal design means a single subject design in which a pre-treatment or baseline outcome measurement is compared with a post-treatment measure. Treatment would then be stopped for a period of time, a second baseline measure of the outcome would be taken, followed by a second application of the treatment or a different treatment. For example, this design might be used to evaluate a behavior modification program for disabled students with behavior disorders.

Multiple baseline design means a single subject design to address concerns about the effects of normal development, timing of the treatment, and amount of the treatment with treatment-reversal designs by using a varying time schedule for introduction of the treatment and/or treatments of different lengths or intensity.

Interrupted time series design means a quasi-experimental design in which the outcome of interest is measured multiple times before and after the treatment for program participants only.

Program Authority: 20 U.S.C. 7271.

Applicable Regulations: (a) The Education Department General Administration Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98, and 99. (b) The notice of final priority, requirements, and definitions for this program, published in the **Federal Register** on March 30, 2005 (70 FR 16234). (c) The notice of final priority for Scientifically Based Evaluation Methods, published in the **Federal Register** on January 25, 2005 (70 FR 3586).

Note: The regulations in 34 CFR part 79 apply to all applicants except Federally recognized Indian Tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $7,700,000.00.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2011 from the list of unfunded applicants from this competition.

Estimated Range of Awards: $250,000–$300,000 for the first year of the project. Funding for the second, third, and fourth years is subject to the availability of funds and the approval of continuation awards (*see* 34 CFR 75.253).

Estimated Average Size of Awards: $275,000.

Estimated Number of Awards: 28.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 48 months.

Note: The first 12 months of the project period may be used to build capacity to effectively carry out the comprehensive activities involved in the evaluation plan described in the competitive preference priority.

III. Eligibility Information

1. Eligible Applicants

(1) One or more local educational agencies (LEAs), including charter schools that are considered LEAs under State law and regulations, that may work in partnership with one or more of the following:

- A State or local non-profit or governmental arts organization.
- A State educational agency (SEA) or regional educational service agency.
- An institution of higher education.
- A public or private agency, institution, or organization, such as a community- or faith-based organization; or

(2) One or more State or local non-profit or governmental arts organizations that must work in partnership with one or more LEAs and may partner with one or more of the following:

- An SEA or regional educational service agency.
- An institution of higher education.
- A public or private agency, institution, or organization, such as a community- or faith-based organization.

Note: If more than one LEA or arts organization wishes to form a consortium and jointly submit a single application, they must follow the procedures for group applications described in 34 CFR 75.127 through 75.129 of EDGAR.

2.a. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

b. *Supplement-Not-Supplant:* This program involves supplement-not-supplant funding requirements. Under section 5551(f)(2) of the ESEA, the Secretary requires that assistance provided under this program be used only to supplement, and not to supplant, any other assistance or funds made available from non-Federal sources for the activities assisted under this program. This restriction also has the effect of allowing projects to recover indirect costs only on the basis of a restricted indirect cost rate, according to the requirements in 34 CFR 75.563 and 34 CFR 76.564 through 76.569. As soon as they decide to apply, applicants are urged to contact the ED Indirect Cost Group at (202) 377–3840 for guidance about obtaining a restricted indirect cost rate to use on the Budget Information form (ED Form 524) included with the application package.

3. *Coordination Requirement:* Under section 5551(f)(1) of the ESEA, the Secretary requires that each entity funded under this program coordinate, to the extent practicable, each project or program carried out with funds awarded under this program with appropriate activities of public or private cultural agencies, institutions, and organizations, including museums, arts education associations, libraries, and theaters.

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: Education Publications Center, P.O. Box 1398, Jessup, MD 20794–1398. Telephone, toll free: 1–877–433–7827. FAX: (301) 470–1244. 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 84.351D.

To obtain a copy from the program office, contact: Diane Austin, U.S. Department of Education, 400 Maryland Avenue, SW., Room 4W223, Washington, DC 20202–5950. Telephone: (202) 260–1280 or by e-mail: *artsdemo@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 program contact person listed in this section.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

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 program. 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 Diane Austin at *artsdemo@ed.gov.*

Applicants that fail to provide this e-mail notification may still apply for funding.

Page Limit: The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. Applicants are strongly encouraged to limit the application narrative (Part III) to the equivalent of no more than 40 single-sided 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 not be accepted.

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the résumés, the bibliography, or the letters of support. However, the page limit does apply to all of the application narrative section (Part III).

3. *Submission Dates and Times:*

Applications Available: January 15, 2010.

Deadline for Notice of Intent To Apply: February 16, 2010.

Deadline for Transmittal of Applications: March 16, 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: May 17, 2010.

4. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. We reference 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 Arts in Education Model Development and Dissemination Grant Program—CFDA Number 84.351D 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 program 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: Diane Austin, U.S. Department of Education, 400 Maryland Avenue, SW., Room 4W223, Washington, DC 20202–5900. FAX: (202) 205–5630.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. Submission of Paper Applications by Mail

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.351D), 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 84.351D), 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 competition are from section 34 CFR 75.210. The maximum score for all the selection criteria is 100 points. The maximum score for each criterion is indicated in parentheses. Each criterion also includes the factors that the reviewers will consider in determining how well an application meets the criterion. The *Note* following selection criterion (6) is guidance to help applicants in preparing their applications and is not required by statute or regulations. The selection criteria are as follows:

(1) *Need for project (15 points).* The Secretary considers the need for the proposed project by considering the following factors:

(a) The extent to which the proposed project will provide services or otherwise address the needs of students at risk of educational failure.

(b) The extent to which specific gaps or weaknesses in services, infrastructure, or opportunities have been identified and will be addressed by the proposed project, including the nature and magnitude of those gaps or weaknesses.

(2) *Significance (10 points).* The Secretary considers the significance of the proposed project by considering the following factor:

The likely utility of the products (such as information, materials, processes, or techniques) that will result from the proposed project, including the potential for their being used effectively in a variety of other settings.

(3) *Quality of the project design (25 points).* The Secretary considers the quality of the design of the proposed project by considering the following factors:

(a) The extent to which the design of the proposed project reflects up-to-date knowledge from research and effective practices.

(b) The extent to which the proposed project is part of a comprehensive effort to improve teaching and learning and support rigorous academic standards for students.

(c) The extent to which the proposed project is designed to build capacity and yield results that will extend beyond the period of Federal financial assistance.

(4) *Quality of project personnel (10 points).* The Secretary considers the quality of the personnel who will carry out the proposed project. In determining the quality of project personnel, the Secretary considers the extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

In addition, the Secretary considers the following factor:

The qualifications, including relevant training and experience, of key project personnel.

(5) *Quality of the management plan (20 points).* The Secretary considers the quality of the management plan for the proposed project by considering the following factors:

(a) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks.

(b) The extent to which the time commitments of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed project.

(c) The adequacy of procedures for ensuring feedback and continuous improvement in the operation of the proposed project.

(6) *Quality of the project evaluation (20 points).* The Secretary considers the quality of the evaluation to be conducted of the proposed project by considering the following factors:

(a) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible.

(b) The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes.

Note: A strong evaluation plan should be included in the application narrative and should be used, as appropriate, to shape the development of the project from the beginning of the grant period. The evaluation plan should include benchmarks to monitor progress toward specific project objectives and also outcome measures to assess the impact on teaching and learning, or other important outcomes for project participants. More specifically, the plan should identify the individual or organization that has agreed to serve as evaluator for the project and describe the qualifications of that evaluator. The plan should describe the evaluation design, indicating: (1) What types of data will be collected; (2) when various types of data will be collected; (3) what methods will be used; (4) what instruments will be developed and when these instruments will be developed; (5) how the data will be analyzed; (6) when reports of results and outcomes will be available; and (7) how the applicant will use the information collected through the evaluation to monitor progress of the funded project and to provide accountability information both about success at the initial site and about effective strategies for replication in other settings. Applicants are encouraged to devote an appropriate level of resources to project evaluation.

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. *Grant Administration:* Applicants should budget for a three-day meeting for project directors to be held in Washington, DC.

4. *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*.

5. *Performance Measures:* The Department has established the following Government Performance and Results Act of 1993 (GPRA) performance measures for the Arts in Education Model Development and Dissemination Grant Program: (1) The percentage of students participating in arts model projects funded through the AEMDD Program who demonstrate proficiency in mathematics compared to those in control or comparison groups and (2) the percentage of students participating in arts model projects who demonstrate proficiency in reading compared to those in control or comparison groups.

These measures constitute the Department's indicators of success for this program. Consequently, we advise an applicant for a grant under this program to give careful consideration to these measures in conceptualizing the approach and evaluation for its proposed project. Each grantee will be required to provide, in its annual performance and final reports, data about its progress in meeting these measures.

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Diane Austin, U.S. Department of Education, 400 Maryland Avenue, SW., Room 4W223, Washington, DC 20202–5950. Telephone: (202) 260–1280 or by e-mail: *artsdemo@ed.gov*.

If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.*, braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Electronic Access to This Document: 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: January 12, 2010.

James H. Shelton, III,

Assistant Deputy Secretary for Innovation and Improvement.

[FR Doc. 2010–702 Filed 1–14–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Public Hearing

AGENCY: U.S. Department of Education, National Assessment Governing Board.

ACTION: Notice of public hearing.

SUMMARY: The National Assessment Governing Board is announcing a public hearing on January 28, 2010 to obtain comment on the draft Technological Literacy Assessment Framework for the National Assessment of Educational Progress (NAEP).

Public and private parties and organizations are invited to present written and/or oral testimony. The hearing will be held at the Washington Court Hotel, 525 New Jersey Avenue, NW., Washington, DC 20001 from 9:30 a.m. to 2:00 p.m. EST.

This notice sets forth the schedule and proposed agenda of a forthcoming public hearing of the National Assessment Governing Board. This notice also describes the functions of the Board. Notice of this meeting is required under Section 10 (a)(2) of the Federal Advisory Committee Act. This document is intended to notify members of the general public of their opportunity to provide comment. Individuals who will need special accommodations in order to attend the hearing (such as interpreting services, assistive listening devices, materials in alternative format) should notify Munira Mwalimu at 202–357–6938 or at *Munira.Mwalimu@ed.gov* no later than January 21, 2010. We will attempt to meet requests after this date, but cannot guarantee availability of the requested accommodation. The meeting site is accessible to individuals with disabilities.

DATES: January 28, 2010.

Location: Washington Court Hotel, 525 New Jersey Avenue, NW., Washington, DC 20001.

Time: 9:30 a.m. to 2:00 p.m. EST

Background: Under Public Law 107–279, the National Assessment Governing Board (NAGB) is responsible for determining the content and methodology of the National Assessment of Educational Progress (NAEP). The assessment is required to provide a fair and accurate measurement of student academic achievement through a random sampling process that produces representative data for the nation, the states, and other participating jurisdictions. The Board's responsibilities include selecting subject areas to be assessed, developing assessment specifications and frameworks, designing the methodology of the assessment, developing appropriate student achievement levels for each grade and subject tested, developing standards and procedures for interstate and national comparisons, developing guidelines for reporting and disseminating results, and releasing initial NAEP results to the public.

In preparation for a new assessment in the area of Technological Literacy, the Governing Board has contracted with WestEd to convene broad-based panels of policymakers, business representatives, educators, engineers, information communication experts, and others to recommend student knowledge and skills at the 4th, 8th, and 12th grades for a planned assessment of

Technological Literacy. The framework covers a broad range of content and practices related to technology and society; design and systems; and information and communication technology. The draft framework was developed during a multi-year, widely-inclusive process. WestEd has conducted numerous forums and other outreach activities to obtain input and feedback on earlier drafts of the assessment framework. This public hearing scheduled for January 28, 2010 is the final forum for interested individuals and organizations to provide feedback on the framework, prior to Board action in early March 2010.

The draft framework is available on the Governing Board Web site at *http://www.nagb.org* and on the Technological Literacy project Web site at *http://www.naeptech2012.org*. Other related material on the Governing Board and NAEP may be found at *http://www.nagb.org* and at *http://www.nces.ed.gov/nationsreportcard*.

The Board is seeking comment from policymakers, teachers, researchers, state and local school administrators, business representatives, members of interested organizations, and members of the public. Representatives of the Governing Board will conduct the hearing to receive testimony and ask clarifying questions or respond to presentations. Oral testimony should not exceed ten minutes. Testimony will become part of the public record.

To register to present oral testimony on January 28, 2010 at the Washington Court Hotel, in Washington, DC, please call Tessa Regis, of the National Assessment Governing Board staff, at 202–357–7500 or send an e-mail to *tessa.regis@ed.gov* by 4:00 p.m. (Eastern Time) on Tuesday, January 26, 2010. Written testimony should be sent by mail, fax or e-mail for receipt in the Board office by January 28, 2010. All views will be considered by the Board's Assessment Development Committee and by the full Board. It is anticipated that the Committee will make recommendations to the Governing Board at the Governing Board meeting on March 4–6, 2010.

The Board will make an effort to receive testimony from all persons who wish to present testimony at the hearing, without prior registration, but may not be able to do so. Speakers are encouraged to register in advance and to bring written statements for distribution at the hearing.

Testimony should be sent to: National Assessment Governing Board, 800 North Capitol Street, NW., Suite 825, Washington, DC 20002, *Attention:* Tessa Regis, *Fax:* (202) 357–6945, *e-mail: tessa.regis@ed.gov*.

FOR FURTHER INFORMATION CONTACT: Tessa Regis or Mary Crovo, National Assessment Governing Board, 800 North Capitol Street, NW., Suite 825, Washington, DC 20002–4233, *Telephone:* (202) 357–6938.

SUPPLEMENTARY INFORMATION: The National Assessment Governing Board is established under section 412 of the National Education Statistics Act of 1994, as amended. The Board formulates policy guidelines for the National Assessment of Educational Progress (NAEP).

Specific questions that the Board seeks responses to include the following:

1. Does the content described in the draft framework represent important information and reasonable expectations for student achievement in technological literacy?

2. Is there an appropriate balance among different areas of technological literacy at grades 4, 8, and 12?

3. Are the skills and practices in the framework treated satisfactorily with appropriate emphasis?

4. Is there an appropriate mix of item types—multiple-choice, short answer, and long constructed response?

5. Does the draft framework provide clear information about the content and format of this NAEP assessment? Are the organization and format of the document appropriate for its intended audiences, including the general public, teachers, policy makers, curriculum specialists, and others?

6. The Board intends to change the assessment title, "Technological Literacy," to another more appropriate title, which clearly communicates the broad-based nature of the assessment. What are some recommendations for a new title and why are those choices more appropriate than Technological Literacy?

A detailed summary of the hearing that is informative to the public and consistent with the policy of section 5 U.S.C. 552b(c) will be available to the public within 14 days of the meeting. Records are kept of all Board proceedings and are available for public inspection at the U.S. Department of Education, National Assessment Governing Board, Suite 825, 800 North Capitol Street, NW., Washington, DC, from 9:00 a.m. to 5:00 p.m. Eastern Time, Monday through Friday.

Electronic Access to This Document: You may 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/index.html*. To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

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: January 12, 2010.

Cornelia S. Orr,

Executive Director, National Assessment Governing Board, U.S. Department of Education.

[FR Doc. 2010–711 Filed 1–14–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

January 7, 2010.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC10–33–000.

Applicants: CPV Keenan II Renewable Energy Company.

Description: CPV Renewable Energy Co., LLC *et al.* submits joint application for authorization under Section 203 of the Federal Power Act, etc.

Filed Date: 01/05/2010.

Accession Number: 20100105–4002.

Comment Date: 5 p.m. Eastern Time on Tuesday, January 26, 2010.

Docket Numbers: EC10–34–000.

Applicants: Northbrook New York, LLC, Fort Chicago Holdings U.S. Inc.

Description: Application for Authorization for Disposition of Jurisdictional Facilities and request for expedited and privileged treatment of Exhibit 1 re Northbrook New York, LLC et al.

Filed Date: 01/05/2010.

Accession Number: 20100106–0220.

Comment Date: 5 p.m. Eastern Time on Tuesday, January 26, 2010.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER03–762–014.

Applicants: Alliant Energy Corporate Services, Inc.

Description: Alliant Energy Corporate Services, Inc. Notice of Change in Status.

Filed Date: 01/06/2010.

Accession Number: 20100106–5088.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 27, 2010.

Docket Numbers: ER10–268–001.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection, LLC submits amendments to Schedule 12 Appendix of their Open Access Transmission Tariff to incorporate cost responsibility assignments, etc.

Filed Date: 12/30/2009.

Accession Number: 20100104–0060.

Comment Date: 5 p.m. Eastern Time on Monday, February 1, 2010.

Docket Numbers: ER10–406–000.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection, LLC submits for filing executed interconnection service agreements among PJM Interconnection, LLC et al.

Filed Date: 12/10/2009.

Accession Number: 20091211–0054.

Comment Date: 5 p.m. Eastern Time on Thursday, January 14, 2010.

Docket Numbers: ER10–417–001.

Applicants: PJM Interconnection, LLC.

Description: PJM Interconnection, LLC submits Notices of Cancellation of Interconnection Service Agreements submitted in Attachments C, F, and Q with Virginia Electric and Power Co.

Filed Date: 12/28/2009.

Accession Number: 20091229–0127.

Comment Date: 5 p.m. Eastern Time on Tuesday, January 19, 2010.

Docket Numbers: ER10–476–000.

Applicants: Southern California Edison Company.

Description: Southern California Edison Company submits a revised rate sheet reflecting the cancellation of the Interconnection Facilities Agreement with PPM Energy, Inc, FERC Electric Tariff, Second Revised Volume 6, Service Agreement 36.

Filed Date: 12/23/2009.

Accession Number: 20091224–0086.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 13, 2010.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES10–16–001.

Applicants: Westar Energy, Inc.

Description: Amended Section 204 Application of Westar Energy, Inc.

Filed Date: 01/07/2010.

Accession Number: 20100107–5014.

Comment Date: 5 p.m. Eastern Time on Thursday, January 28, 2010.

Take notice that the Commission received the following open access transmission tariff filings:

Docket Numbers: OA10–3–000.

Applicants: Crystal Lake Wind II, LLC.

Description: Crystal Lake Wind II, LLC Petition for Waiver of Commission Rules.

Filed Date: 01/05/2010.

Accession Number: 20100105–5086.

Comment Date: 5 p.m. Eastern Time on Tuesday, January 26, 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. 2010–634 Filed 1–14–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

January 5, 2010.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC05–110–002.

Applicants: MidAmerican Energy Holdings Company, PacifiCorp.

Description: PacifiCorp requests approval to remove the Market Monitor installed upon MidAmerican Energy Holdings Company's acquisition of PacifiCorp in 2005.

Filed Date: 12/28/2009.

Accession Number: 20100104–0203.

Comment Date: 5 p.m. Eastern Time on Tuesday, January 19, 2010.

Docket Numbers: EC10–14–001.

Applicants: Foote Creek II, LLC, Foote Creek III, LLC, Foote Creek IV, LLC, Ridge Crest Wind Partners, LLC, Oak Creek Wind Power, LLC, Terra-Gen VG Wind, LLC, Terra-Gen 251 Wind, LLC, Chandler Wind Partners, LLC.

Description: On January 4, 2010 Chandler Wind Partners, LLC, *et al.* filed an Expedited Supplemental Authorization Request. And On January 5, 2010 filed a Request for Supplemental Authorization to January 4, 2010 Supplement.

Filed Date: 01/04/2010; 01/05/2010.

Accession Number: 20100104–5041; 20100105–5034.

Comment Date: 5 p.m. Eastern Time on Tuesday, January 19, 2010.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER99–2311–014; ER97–2846–017.

Applicants: Florida Power Corporation, Carolina Power & Light Company.

Description: Amendment to Notice of Change in Status for Florida Power Corporation, *et al.*

Filed Date: 01/04/2010.

Accession Number: 20100104–5014.

Comment Date: 5 p.m. Eastern Time on Monday, January 25, 2010.

Docket Numbers: ER99–2948–018; ER00–2918–017; ER10–346–003; ER05–261–010; ER01–556–016; ER01–1654–

020; ER02–2567–017; ER05–728–010; ER04–485–015; ER07–247–009; ER07–245–009; ER07–244–009.

Applicants: Baltimore Gas and Electric Company, Constellation Power Source Generation, Inc., Calvert Cliffs Nuclear Power Plant LLC, Constellation Energy Commodities Group, Inc., Handsome Lake Energy, LLC, Nine Mile Power Nuclear Station, LLC, Constellation NewEnergy, Inc., Constellation Energy Commodities Group Maine, LLC, R.E. Ginna Nuclear Power Plant, Raven One, LLC, Raven Two, LLC, Raven Three, LLC.

Description: Constellation MBR Entities and Affiliated MBR Entities submits their Request for Determination of Category 1 Seller in the Southwest Power Pool, Southwest and Northwest Regions *etc.*

Filed Date: 12/31/2009.

Accession Number: 20100104–0152.

Comment Date: 5 p.m. Eastern Time on Thursday, January 21, 2010.

Docket Numbers: ER09–1417–001.

Applicants: Wabash Valley Power Association, Inc.

Description: Wabash Valley Power Association, Inc submits First Revised Rate Schedules to replace certain Rate Schedules and cancelling certain Rate Schedules previously filed on 7/6/09 in compliance with Order No 614.

Filed Date: 12/31/2009.

Accession Number: 20100104–0154.

Comment Date: 5 p.m. Eastern Time on Thursday, January 21, 2010.

Docket Numbers: ER10–507–000.

Applicants: ERA MA, LLC.

Description: ERA MA, LLC submits an application for market-based rate authority and designation of Category 1 Status.

Filed Date: 12/31/2009.

Accession Number: 20100104–0151.

Comment Date: 5 p.m. Eastern Time on Thursday, January 21, 2010.

Docket Numbers: ER10–522–000.

Applicants: Pacific Gas and Electric Company.

Description: Pacific Gas and Electric Company submits an amended Appendix A to the Interconnection Agreement with United States Department of Energy Office of Science *etc.*

Filed Date: 12/28/2009.

Accession Number: 20091231–0238.

Comment Date: 5 p.m. Eastern Time on Tuesday, January 19, 2010.

Docket Numbers: ER10–536–000; ER10–538–000.

Applicants: Puget Sound Energy, Inc.

Description: Puget Sound Energy, Inc submits a Network Integration Transmission Agreement dated as of 12/29/09 with Bonneville Power Administration designated as Original Service Agreement 484, Original Sheets 1 through 19.

Filed Date: 12/31/2009.

Accession Number: 20100104–0070.

Comment Date: 5 p.m. Eastern Time on Thursday, January 21, 2010.

Docket Numbers: ER10–547–000.

Applicants: Golden Spread Electric Cooperative, Inc.

Description: Golden Spread Electric Cooperative, Inc submits Revised Sheet 104 *et al.* to First Revised Rate Schedule 23 through 33.

Filed Date: 12/31/2009.

Accession Number: 20100104–0153.

Comment Date: 5 p.m. Eastern Time on Thursday, January 21, 2010.

Docket Numbers: ER10–549–000.

Applicants: PJM Interconnection, LLC.

Description: PJM Interconnection, LLC submits amendments to Schedule 12—Appendix of the PJM Tariff.

Filed Date: 12/31/2009.

Accession Number: 20100104–0149.

Comment Date: 5 p.m. Eastern Time on Monday, February 1, 2010.

Docket Numbers: ER10–550–000.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc submits revisions to the Open Access Transmission Tariff to incorporate revisions *etc.*

Filed Date: 12/31/2009.

Accession Number: 20100104–0150.

Comment Date: 5 p.m. Eastern Time on Thursday, January 21, 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 dockets(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. 2010–636 Filed 1–14–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

January 6, 2010.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER02–537–027; ER03–983–024; ER07–758–020; ER06–739–024; ER06–738–024; ER07–501–023; ER08–649–016.

Applicants: Cogen Technologies Linden Venture, L.P., Fox Energy Company LLC, Birchwood Power Partners, L.P., Shady Hills Power Company, LLC, East Coast Power Linden Holding, LLC, EFS Parlin Holdings, LLC, Inland Empire Energy Center, LLC.

Description: Notice of Non-Material Changes in Status of East Coast Power Linden Holding, LLC, *et al.*

Filed Dated: 01/04/2010.

Accession Number: 20100104–5074.

Comment Date: 5 p.m. Eastern Time on Monday, January 25, 2010.

Docket Numbers: ER06–278–005; ER08–654–004.

Applicants: Nevada Hydro Company, Inc.; California Independent System Operator Corporation.

Description: Response of the Nevada Hydro Company, Inc. Request for Clarification.

Filed Dated: 01/05/2010.

Accession Number: 20100105–5022.

Comment Date: 5 p.m. Eastern Time on Tuesday, January 26, 2010.

Docket Numbers: ER06–739–023; ER06–738–023; ER07–501–022; ER08–649–015.

Applicants: Cogen Technologies Linden Venture, L.P., East Coast Power Linden Holding, LLC, Birchwood Power Partners, L.P., EFS Parlin Holdings, LLC.

Description: Notice of Non-Material Change in Status of East Coast Power Linden Holding, LLC, *et al.*

Filed Dated: 01/04/2010.

Accession Number: 20100104–5072.

Comment Date: 5 p.m. Eastern Time on Monday, January 25, 2010.

Docket Numbers: ER09–408–003.

Applicants: PacifiCorp.

Description: Compliance Filing of PacifiCorp.

Filed Dated: 01/04/2010.

Accession Number: 20100104–5078.

Comment Date: 5 p.m. Eastern Time on Monday, January 25, 2010.

Docket Numbers: ER09–412–010.

Applicants: PJM Interconnection, LLC.

Description: PJM Interconnection, LLC submits Fifth Revised Sheet 572 *et al* to FERC Electric Tariff, Sixth Revised Volume 1.

Filed Dated: 12/29/2009.

Accession Number: 20091231–0044.

Comment Date: 5 p.m. Eastern Time on Tuesday, January 19, 2010.

Docket Numbers: ER09–1114–002; ER09–1115–002.

Applicants: RRI Energy Services, Inc.; RRI Energy Solutions East, LLC.

Description: Supplement to the December 14, 2009 Category One Request Filing of RRI Energy Services, Inc. and RRI Energy Solutions East, LLC.

Filed Dated: 01/06/2010.

Accession Number: 20100106–5017.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 27, 2010.

Docket Numbers: ER09–1542–001.

Applicants: California Independent System Operator Corporation.

Description: The California Independent System Operator Corporation submits the Second Revised Sheet134 *et al* to FERC Electric Tariff, Fourth Replacement Volume 11542.

Filed Dated: 12/31/2009.

Accession Number: 20100104–0067.

Comment Date: 5 p.m. Eastern Time on Thursday, January 21, 2010.

Docket Numbers: ER10–517–000.

Applicants: New England Power Pool.

Description: The New England Power Pool Participants Committee submits transmittal letter, counterpart signature pages etc.

Filed Dated: 12/30/2009.

Accession Number: 20091231–0042.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 20, 2010.

Docket Numbers: ER10–519–000.

Applicants: MidAmerican Energy Company.

Description: MidAmerican Energy Company submits Service Agreement for Transmission Operator Services including but not limited to performance of Certain Activities etc.

Filed Dated: 12/30/2009.

Accession Number: 20091231–0041.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 20, 2010.

Docket Numbers: ER10–520–000.

Applicants: PJM Interconnection, LLC.

Description: PJM Interconnection, LLC submits executed version of the revised Wholesale Market Participation Agreement with WM Renewable Energy, LLC *et al.*

Filed Dated: 12/30/2009.

Accession Number: 20091231–0040.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 20, 2010.

Docket Numbers: ER10–521–000.

Applicants: Southern California Edison Company.

Description: Southern California Edison Company submits revised rate sheet to a letter agreement.

Filed Dated: 12/30/2009.

Accession Number: 20091231–0039.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 20, 2010.

Docket Numbers: ER10–528–001.

Applicants: Portland General Electric Company.

Description: Portland General Electric Company submits the errata and the revised pages for Attachments 9 and 10 to the 12/29/09 filing.

Filed Dated: 12/31/2009.

Accession Number: 20100104–0061.

Comment Date: 5 p.m. Eastern Time on Thursday, January 21, 2010.

Docket Numbers: ER10–534–000.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc. submits an executed Large Generator Interconnection Agreement with Shooting Star Power Partners, LLC *et al.*

Filed Dated: 12/31/2009.

Accession Number: 20100104–0072.

Comment Date: 5 p.m. Eastern Time on Thursday, January 21, 2010.

Docket Numbers: ER10–535–000.

Applicants: Puget Sound Energy, Inc.

Description: Puget Sound Energy Inc. submits an Interconnection and Operating Agreement effective 1/1/2010.

Filed Dated: 12/31/2009.

Accession Number: 20100104–0071.

Comment Date: 5 p.m. Eastern Time on Thursday, January 21, 2010.

Docket Numbers: ER10–537–000.

Applicants: Palmco Power MD, LLC.

Description: Palmco Power MD, LLC submits an amendment for the Petition for Acceptance of Initial Tariff, Waivers and Blanket Authority, FERC Electric Tariff, Original Volume 1.

Filed Dated: 01/05/2010.

Accession Number: 20100105–0205.

Comment Date: 5 p.m. Eastern Time on Tuesday, January 26, 2010.

Docket Numbers: ER10–539–000.

Applicants: Palmco Power OH, LLC.

Description: Palmco Power OH, LLC submits an amendment for the Petition for Acceptance of Initial Rate Schedule, Waivers and Blanket Authority.

Filed Dated: 01/05/2010.

Accession Number: 20100105–0206.

Comment Date: 5 p.m. Eastern Time on Tuesday, January 26, 2010.

Docket Numbers: ER10–540–000.

Applicants: Wabash Valley Power Association, Inc.

Description: Wabash Valley Power Association, Inc submits Original Sheet 1 *et al.* to FERC First Revised Rate Schedule 5 to be effective 3/11/10.

Filed Dated: 12/31/2009.

Accession Number: 20100104–0110.

Comment Date: 5 p.m. Eastern Time on Thursday, January 21, 2010.

Docket Numbers: ER10–541–000.

Applicants: Midwest Independent Transmission System, Xcel Energy Services Inc.

Description: Northern States Power Company *et al.* submits the Second Revised Sheet No. 2751 to FERC Electric Tariff, Fourth Revised Volume 1 to be effective 1/1/10.

Filed Dated: 12/31/2009.

Accession Number: 20100104–0069.

Comment Date: 5 p.m. Eastern Time on Thursday, January 21, 2010.

Docket Numbers: ER10–542–000.

Applicants: Southern California Edison Company.

Description: Southern California Edison Company submits the Service Agreement No. 31 *et al.* to FERC Electric Tariff, Second Revised Volume 6 *et al.*

Filed Dated: 12/31/2009.

Accession Number: 20100104–0066.

Comment Date: 5 p.m. Eastern Time on Thursday, January 21, 2010.

Docket Numbers: ER10–543–000.

Applicants: West Georgia Generating Company, LLC.

Description: Southern Power Company submits Notice of Cancellation of West Georgia's market based rate tariff, FERC Electric Tariff, First Revised Volume 1.

Filed Dated: 12/31/2009.

Accession Number: 20100104–0063.

Comment Date: 5 p.m. Eastern Time on Thursday, January 21, 2010.

Docket Numbers: ER10–544–000.

Applicants: Southern California Edison Company.

Description: Southern California Edison Company submits the amended Service Agreement for Wholesale Distribution Service No. 20 etc.

Filed Dated: 12/31/2009.

Accession Number: 20100104–0064.

Comment Date: 5 p.m. Eastern Time on Thursday, January 21, 2010.

Docket Numbers: ER10–545–000.

Applicants: Idaho Power Company.

Description: Idaho Power Company submits the Fourth Revised Service Agreement No. 159 to FERC Electric Tariff, First Revised Volume 6 to be effective 1/1/10.

Filed Dated: 12/31/2009.

Accession Number: 20100104–0065.

Comment Date: 5 p.m. Eastern Time on Thursday, January 21, 2010.

Docket Numbers: ER10–546–000.

Applicants: Southern California Edison Company.

Description: Southern California Edison Company submits the amended Project System Facilities Agreement with Blythe Energy LLC, Service Agreement No. 13 etc.

Filed Dated: 12/31/2009.

Accession Number: 20100104–0062.

Comment Date: 5 p.m. Eastern Time on Thursday, January 21, 2010.

Docket Numbers: ER10–551–000.

Applicants: Hartwell Energy Limited Partnership.

Description: Hartwell Energy Limited Partnership submits Notice of Cancellation of Rate Schedule FERC No. 1.

Filed Dated: 01/04/2010.

Accession Number: 20100104–0211.

Comment Date: 5 p.m. Eastern Time on Monday, January 25, 2010.

Docket Numbers: ER10–552–000.

Applicants: Heard County Power, LLC.

Description: Heard County Power, LLC submits Notice of Cancellation of Electric Tariff.

Filed Dated: 01/04/2010.

Accession Number: 20100104–0212.

Comment Date: 5 p.m. Eastern Time on Monday, January 25, 2010.

Docket Numbers: ER10–554–000.

Applicants: New York Independent System Operator, Inc.

Description: New York Independent System Operator, Inc. *et al.* submits an executed Small Generator Interconnection Agreement with National Grid, and Innovative Energy Systems, Inc.

Filed Dated: 01/05/2010.

Accession Number: 20100105–0210.

Comment Date: 5 p.m. Eastern Time on Tuesday, January 26, 2010.

Docket Numbers: ER10–555–000.

Applicants: New York Independent System Operator, Inc.

Description: New York Independent System Operator, Inc. *et al.* submits an executed Small Generator Interconnection Agreement with National Grid, and Chautauqua County.

Filed Dated: 01/05/2010.

Accession Number: 20100105–0211.

Comment Date: 5 p.m. Eastern Time on Tuesday, January 26, 2010.

Docket Numbers: ER10–556–000.

Applicants: Kansas City Power & Light Company.

Description: Kansas City Power & Light Company submits revised pages to the Facilities Use Agreement with enXco Develop.m.ent Corp.

Filed Dated: 01/05/2010.

Accession Number: 20100105–0208.

Comment Date: 5 p.m. Eastern Time on Tuesday, January 26, 2010.

Docket Numbers: ER10–557–000.

Applicants: Virginia Electric and Power Company.

Description: Virginia Electric and Power Company submits Third Revised Sheet 314F *et al.* to FERC Electric Tariff, Sixth Revised Volume 1 to PJM Interconnection, LLC's open-access transmission tariff etc.

Filed Dated: 01/05/2010.

Accession Number: 20100105–0209.

Comment Date: 5 p.m. Eastern Time on Tuesday, January 26, 2010.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES10–22–000.

Applicants: Rochester Gas and Electric Corporation.

Description: Application of Rochester Gas and Electric Corporation for Authorization to Issue Short-Term Debt Under Section 204 of the Federal Power Act.

Filed Dated: 01/05/2010.

Accession Number: 20100105–5075.

Comment Date: 5 p.m. Eastern Time on Tuesday, January 26, 2010.

Docket Numbers: ES10–23–000.

Applicants: New York State Electric & Gas Corp.

Description: Application of New York State Electric & Gas Corporation for Authorization to Issue Short-Term Debt Under Section 204 of the Federal Power Act.

Filed Dated: 01/05/2010.

Accession Number: 20100105–5076.

Comment Date: 5 p.m. Eastern Time on Tuesday, January 26, 2010.

Docket Numbers: ES10–24–000.

Applicants: Central Maine Power Company.

Description: Application of Central Maine Power Company for Authorization to Issue Short-Term Debt Under Section 204 of the Federal Power Act.

Filed Dated: 01/06/2010.

Accession Number: 20100106–5041.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 27, 2010.

Take notice that the Commission received the following open access transmission tariff filings:

Docket Numbers: OA08–61–003.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc. submits an errata to its 11/2/09 filing proposing revisions to their transmission planning process etc.

Filed Dated: 12/30/2009.

Accession Number: 20091231–0043.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 20, 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. 2010–635 Filed 1–14–10; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2006–0394; FRL–9103–7; EPA ICR No. 1569.07; OMB Control No. 2040–0153]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Approval of State Coastal Nonpoint Pollution Control Programs (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before February 16, 2010.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OW–2006–0394, to (1) EPA online using *http://www.regulations.gov* (our preferred method), by e-mail to *OW-Docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Water Docket—Mail Code 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Don Waye, Assessment and Watershed Protection Division, Office of Wetlands Oceans and Watersheds, Mail Code 4503–T, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 566–1170; fax number: (202) 566–1333; e-mail address: *waye.don@epa.gov*.

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On July 31, 2009 (74 FR 38182), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OW–2006–0394, which is available for online viewing at *http://www.regulations.gov*, or in person viewing at the Water Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Water Docket is 202–566–2426.

Use EPA's electronic docket and comment system at *http://www.regulations.gov*, to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select "docket search," then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing 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 public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov*.

Title: Approval of State Coastal Nonpoint Pollution Control Programs (Renewal).

ICR numbers: EPA ICR No. 1569.07, OMB Control No. 2040–0153.

ICR Status: This ICR is scheduled to expire on 01/31/2010. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. 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 title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: Under the provisions of national Program Development and Approval Guidance implementing section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) which was jointly developed and published by EPA and the National Oceanic and Atmospheric Administration (NOAA), 29 coastal States and 5 coastal Territories with Federally approved Coastal Zone Management Programs have developed and submitted to EPA and NOAA Coastal Nonpoint Pollution Programs. EPA and NOAA have fully approved 16 States and 5 Territories, and conditionally approved 13 States. The conditional approvals will require States and Territories to submit additional information in order to obtain final program approval. CZARA section 6217 requires States and Territories to obtain final approval of their Coastal Nonpoint Pollution Programs in order to retain their full share of funding available to them under section 319 of the Clean Water Act and section 306 of the Coastal Zone Management Act.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 125 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and

maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: 13 coastal States with conditionally approved Coastal Nonpoint Pollution Control Programs.

Estimated Number of Respondents: 13.

Frequency of Response: On occasion.

Estimated Total Annual Hour Burden: 1,625 hours.

Estimated Total Annual Cost: $60,125, this includes $0 annualized capital or O&M costs.

Changes in the Estimates: There is a decrease of 500 hours in the annual estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This decrease is the result of EPA and NOAA having fully approved 21 of the 34 programs.

Dated: January 11, 2010.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2010–750 Filed 1–14–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2006–0408; FRL–9103–8]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; EPA's WaterSense Program (Renewal); EPA ICR No. 2233.04, OMB Control No. 2040–0272

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA)(44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before February 16, 2010.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OW–2006–0408 to (1) EPA online using *http://www.regulations.gov* (our preferred method), *OW-Docket@epa.gov,* or by mail to: EPA Docket Center, Water Docket, Environmental Protection Agency, Mailcode: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Tara O'Hare, OW, WaterSense Program (MC 4204M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202–564–8836; fax number: 202–501–2396; e-mail address: *ohare.tara@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On July 28, 2009 (74 FR 37212), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OW–2006–0408, which is available for online viewing at *http://www.regulations.gov,* or in person viewing at the Water Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Water Docket is 202–566–2426.

Use EPA's electronic docket and comment system at *http://www.regulations.gov,* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select "docket search," then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing 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 public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov.*

Title: EPA's WaterSense Program (Renewal)

ICR numbers: EPA ICR No. 2233.04, OMB Control No. 2040–0272.

ICR Status: This ICR is scheduled to expire on January 31, 2010. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. 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 title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: WaterSense is a voluntary program designed to create self-sustaining markets for water-efficient products and services via a common label. The program provides incentives for manufacturers to design, produce, and market water-efficient products. In addition, the program provides incentives for certified professionals (*e.g.* certified irrigation auditors, designers, or installation and maintenance professionals) to deliver water-efficient services. The program also encourages consumers and commercial and institutional purchasers of water-using products and systems to choose water-efficient products and engage in water-efficient practices.

As part of strategic planning efforts, EPA encourages programs to develop meaningful performance measures, set ambitious targets, and link budget expenditures to results. Data collected under this ICR will assist the WaterSense program in demonstrating results and evaluating program effectiveness to ensure continual program improvement. In addition, data will help EPA monitor market penetration and inform future product categories and specifications.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 19 hours per response for organizational partners, who are not manufacturers and who are not applying for an award. The average burden is 35 hours for manufacturing partners who must also complete New Certified Product Notification Forms.

Award applicants are estimated to spend an additional 20 hours on average to complete the awards application. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Estimated Number of Respondents: 357 state and local government; 1,319 private sector organizations, and 668 individuals per year.

Frequency of Response: Varies.

Estimated Total Annual Hour Burden: 21,250 hours.

Estimated Total Annual Cost: $3,369,814, this includes $1,793,181 in operation & maintenance costs.

Changes in the Estimates: The WaterSense program has been modified and expanded since the original ICR was approved. The program is expanding in the number of products certified, new partners joining and reporting, and the addition of the New Homes portion of the program. Despite this expansion, the overall burden estimate for this collection is 28,830 hours lower than the current ICR because EPA also has a better understanding of how long it actually takes partners to complete program forms now that the program is underway. Operation and maintenance cost estimates have risen substantially however, since product testing by certifying bodies was found to be more expensive than previously estimated and many more products are expected to undergo this testing in the next three years.

Dated: January 4, 2010.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2010–748 Filed 1–14–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2009–0378; FRL–9103–5]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NESHAP for Area Sources: Polyvinyl Chloride and Copolymer Production, Primary Copper Smelting, Secondary Copper Smelting, and Primary Nonferrous Metals—Zinc, Cadmium, and Beryllium (Renewal); EPA ICR Number 2240.03, OMB Control Number 2060–0596

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR which is abstracted below describes the nature of the collection and the estimated burden and cost.

DATES: Additional comments may be submitted on or before February 16, 2010.

ADDRESSES: Submit your comments, referencing docket ID number EPA–HQ–OECA–2009–0378, to (1) EPA online using *http://www.regulations.gov* (our preferred method), or by e-mail to *docket.oeca@epa.gov,* or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, mail code 28221T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Learia Williams, Compliance Assessment and Media Programs Division, Office of Compliance, Mail Code 2223A, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 564–4113; fax number: (202) 564–0050; e-mail address: *williams.learia@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On July 8, 2009 (74 *FR* 32580), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under docket ID number EPA–HQ–OECA–2009–0378, which is available for public viewing online at *http://www.regulations.gov,* in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket is (202) 566–1752.

Use EPA's electronic docket and comment system at *http://www.regulations.gov,* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select "docket search," then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper will be made available for public viewing 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 public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov.*

Title: NESHAP for Area Sources: Polyvinyl Chloride and Copolymer Production, Primary Copper Smelting, Secondary Copper Smelting, and Primary Nonferrous Metals—Zinc, Cadmium, and Beryllium (Renewal).

ICR Numbers: EPA ICR Number 2240.03, OMB Control Number 2060–0596.

ICR Status: This ICR is schedule to expire on January 31, 2010. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. 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 title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, and displayed either by publication in

the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: NESHAP for Area Sources: Polyvinyl Chloride and Copolymer Production, Primary Copper Smelting, Secondary Copper Smelting, and Primary Nonferrous Metals—Zinc, Cadmium, and Beryllium (Renewal), were proposed on October 16, 2006, and promulgated on January 23, 2007. These regulations apply to any new and existing primary copper smelter, a new secondary copper smelter, a new or existing primary zinc production facility or a primary beryllium production facility that is an area source of hazardous air pollutant (HAP) emissions. An affected source is existing, if they commenced construction or reconstruction before October 6, 2006, and a new source if they commenced construction or reconstruction on or after October 6, 2006.

Owners and operators of a new and existing area source is subject to the General Provision (40 CFR part 63, subpart A). An existing affected source is required to submit an initial notification of applicability and a notification of compliance status. They are also required to certify initial compliance with particulate matter (PM) limits based on previous performance test results. These notifications, reports, and records are essential in determining compliance, and are required of all affected facilities subject to NESHAP.

Any owner or operator subject to the provisions of this subpart must maintain a file of these measurements, and retain the file for at least five years following the collection of such measurements, maintenance reports, and records.

All reports are sent to the delegated State or local authority. In the event that there is no such delegated authority, the reports are sent directly to the EPA regional office. This information is being collected to assure compliance with 40 CFR part 63, subpart EEEEEE; 40 CFR part 63, subpart FFFFFF; 40 CFR part 63, subpart DDDDDD; 40 CFR part 63, subpart GGGGGG; 40 CFR part 61, subpart F; 40 CFR part 61, subpart C; as authorized in sections 112 and 114(a) of the Clean Air Act. The required information consists of emissions data and other information that has been determined to be private.

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 Number for EPA regulations listed in 40 CFR part 9 and 48 CFR chapter 15, are identified on the form and/or instrument, if applicable.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information estimated to average 12 hour per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose and 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. All existing ways will have to adjust to comply with any previously applicable instructions and requirements that have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Polyvinyl Chloride and Copolymer Production, Primary Copper Smelting, Secondary Copper Smelting, and Primary Nonferrous Metals—Zinc, Cadmium, and Beryllium.

Estimated Number of Respondents: 5.

Frequency of Response: Initially.

Estimated Total Annual Hour Burden: 46.

Estimated Total Annual Cost: $4,326, which includes $4,326 in labor costs, no capital/startup costs, and no operation and maintenance (O&M) costs.

Changes in the Estimates: In this ICR, we have accounted for all five sources as compared to the previous ICR. There are no new sources and are not anticipated to change over the next three year; the growth rate for the industry is very low, negative or nonexistent, thus, there is no significant change in the overall number of sources. A change in the cost burden was due to an increase in the hourly labor rates.

Dated: January 6, 2010.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2010–731 Filed 1–14–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9103–4]

Agency Information Collection Activities OMB Responses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This document announces the Office of Management and Budget (OMB) responses to Agency Clearance requests, in compliance with the Paperwork Reduction Act (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 currently valid OMB control number. The OMB control numbers for EPA regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

FOR FURTHER INFORMATION CONTACT: Rick Westlund (202) 566–1682, or e-mail at *westlund.rick@epa.gov* and please refer to the appropriate EPA Information Collection Request (ICR) Number.

SUPPLEMENTARY INFORMATION:

OMB Responses to Agency Clearance Requests

OMB Approvals

EPA ICR Number 1156.11; NSPS for Synthetic Fiber Production Facilities; 40 CFR part 60, subpart A and 40 CFR part 60, subpart HHH; was approved on 12/01/2009; OMB Number 2060–0059; expires on 12/31/2012; Approved without change.

EPA ICR Number 0659.11; NSPS for Surface Coating of Large Appliances; 40 CFR part 60, subpart A and 40 CFR part 60, subpart SS; was approved on 12/01/2009; OMB Number 2060–0108; expires on 12/31/2012; Approved without change.

EPA ICR Number 1901.04; NSPS for Emission Guidelines and Compliance Times for Small Municipal Waste Combustion Units Constructed on or before August 30, 1999; 40 CFR part 60, subpart A and 40 CFR part 60, subpart BBBB; was approved on 12/01/2009; OMB Number 2060–0424; expires on 12/31/2012; Approved without change.

EPA ICR Number 0663.10; NSPS for Beverage Can Surface Coating; 40 CFR part 60, subpart A and 40 CFR part 60, subpart WW; was approved on 12/01/2009; OMB Number 2060–0001; expires on 12/31/2012; Approved without change.

EPA ICR Number 2344.03; Auto-Body Compliance Assessment Pilot Project (New); was approved on 12/01/2009;

OMB Number 2020–0034; expires on 08/31/2012; Approved without change.

EPA ICR Number 2299.02; Tribal Capacity: Determining Status of Technology to Publish and Exchange Environmental Data; was approved on 12/06/2009; OMB Number 2025–0011; expires on 12/31/2010; Approved with change.

EPA ICR Number 2357.02; Regulations.gov Exchange Information Collection; was approved on 12/08/2009; OMB Number 2025–0008; expires on 12/31/2012; Approved without change.

EPA ICR Number 2362.01; Information Collection Effort for New and Existing Coal- and Oil-fired Electric Utility Steam Generating Units (New Collection); was approved on 12/24/2009; OMB Number 2060–0631; expires on 12/31/2012; Approved with change.

EPA ICR Number 2076.03; EPA's National Partnership for Environmental Priorities (Renewal); was approved on 12/30/2009; OMB Number 2050–0190; expires on 12/31/2012; Approved with change.

Comment Filed

EPA ICR Number 2370.01; Ambient Oxides of Sulphur Monitoring Regulations: Revisions to Network Design Requirements (Proposed Rule); in 40 CFR part 58; OMB filed comment on 12/11/2009.

Dated: January 4, 2010.

John Moses,

Director, Collections Strategies Division.

[FR Doc. 2010–733 Filed 1–14–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2003–0073; FRL–9103–6]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Distribution of Offsite Consequence Analysis Information Under Section 112(r)(7)(H) of the Clean Air Act (CAA) (Renewal); EPA ICR No. 1981.04; OMB Control No. 2050–0172

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before February 16, 2010.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OAR–2003–0073, to (1) EPA online using *http://www.regulations.gov* (our preferred method), by e-mail to *a-and-r-Docket@epa.gov* or by mail to: EPA Docket Center, Environmental Protection Agency, Air Docket, Mail Code: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Sicy Jacob, Office of Emergency Management, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 564–8019; fax number: (202) 564–2620; e-mail address: *jacob.sicy@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On June 25, 2009 (74 FR 30291), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OAR–2003–0073, which is available for online viewing at *http://www.regulations.gov,* or in person viewing at the Air Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Air Docket is 202–566–1742.

Use EPA's electronic docket and comment system at *http://www.regulations.gov,* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select "docket search," then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing 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 public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov.*

Title: Distribution of Offsite Consequence Analysis Information under Section 112(r)(7)(H) of the Clean Air Act (CAA) (Renewal).

ICR number: EPA ICR No. 1981.04, OMB Control No. 2050–0172.

ICR Status: This ICR is scheduled to expire on January 31, 2010. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. 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 title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: Clean Air Act (CAA) section 112(r)(7) required EPA to promulgate reasonable regulations and appropriate guidance to provide for the prevention and detection of accidental releases and for responses to such releases. The regulations include requirements for submittal of a risk management plan (RMP) to EPA. The RMP includes information on offsite consequence analyses (OCA) as well as other elements of the risk management program.

On August 5, 1999, the President signed the Chemical Safety Information, Site Security, and Fuels Regulatory Relief Act (CSISSFRRA). The Act required the President to promulgate regulations on the distribution of OCA information (CAA section 112(r)(7)(H)(ii)). The President delegated to EPA and the Department of Justice (DOJ) the responsibility to promulgate regulations to govern the dissemination of OCA information to the public. The final rule was published on August 4, 2000 (65 FR 48108). The regulations imposed minimal requirements on the public, state and local agencies that request OCA data from EPA. The state

and local agencies who decide to obtain OCA information must send a written request on their official letterhead to EPA certifying that they are covered persons under Public Law 106–40, and that they will use the information for official use only. EPA will then provide paper copies of OCA data to those agencies as requested. The rule authorizes and encourages state and local agencies to set up reading rooms. The local reading rooms would provide read-only access to OCA information for all the sources in the LEPC's jurisdiction and for any source where the vulnerable zone extends into the LEPC's jurisdiction.

Members of the public requesting to view OCA information at federal reading rooms would be required to sign in and self certify. If asking for OCA information from federal reading rooms for the facilities in the area where they live or work, they would be required to provide proof that they live or work in that area. Members of the public are required to give their names, telephone number, and the names of the facilities for which OCA information is being requested, when they contact the central office to schedule an appointment to view OCA information.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average approximately 2 hours per response. 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.

Respondents/Affected Entities: State and local agencies and the public.

Estimated Number of Respondents: 4,155.

Frequency of Response: Annual, On occasion.

Estimated Total Annual Burden Hours: 9,330 hours.

Estimated Total Annual Cost: $322,095, which includes $100 annual O&M cost.

Changes in the Estimates: There is slight decrease in burden and costs from the previous ICR due to updated data on the number of people visiting the reading rooms to obtain OCA data, therefore reducing the burden on state and local agencies to provide the data.

Dated: January 4, 2010.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2010–729 Filed 1–14–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–8987–4]

Environmental Impacts Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–1399 or *http://www.epa.gov/compliance/nepa/*

Weekly Receipt of Environmental Impact Statements

Filed 01/04/2010 Through 01/08/2010 Pursuant to 40 CFR 1506.9

Notice: In accordance with Section 309(a) of the Clean Air Act, EPA is required to make its comments on EISs issued by other Federal agencies public. Historically, EPA has met this mandate by publishing weekly notices of availability of EPA comments, which includes a brief summary of EPA's comment letters, in the **Federal Register**. Since February 2008, EPA has been including its comment letters on EISs on its Web site at: *http://www.epa.gov/compliance/nepa/eisdata.html*. Including the entire EIS comment letters on the Web site satisfies the Section 309(a) requirement to make EPA's comments on EISs available to the public. Accordingly, after March 31, 2010, EPA will discontinue the publication of this notice of availability of EPA comments in the **Federal Register**.

EIS No. 20100000, Draft EIS, DOE, SD, South Dakota Prairie Winds Project, Proposes to Construct, Own, Operate, and Maintain a 151.5 megawatt (MW) Nameplate Capacity Wind-Powered Generation Facility, Aurora, Brule, and Jerauld, Tripp Counties, SD, Comment Period Ends: 03/01/2010, Contact: Liana Reilly 800–336–7288.

EIS No. 20100001, Final EIS, FERC, 00, Ruby Pipeline Project, Proposed Natural Gas Pipeline Facilities, Right-of-Way Grants (and/or Temporary Use or Special Use Permits), WY, UT, NV and OR, Wait Period Ends: 02/16/2010, Contact: Julia Bovey 1–866–208–3372.

EIS No. 20100002, Final EIS, USFS, NV, Middle Kyle Canyon Complex Project, Construction and Operation of a Recreation Complex within the Spring Mountains National Recreation Area, Humboldt-Toiyabe National Forest, Clark County, NV, Wait Period Ends: 02/16/2010, Contact: Hal Peterson 702–839–5572.

EIS No. 20100003, Draft EIS, USAF, ND, Grand Forks Air Force Base Project, Beddown and Flight Operations of Remotely Piloted Aircraft, Base Realignment and Closure, (BRAC), ND, Comment Period Ends: 03/01/2010, Contact: Doug Allbright 618–229–0841.

EIS No. 20100004, Draft EIS, NOAA, 00, Amendment 11 to the Atlantic Mackerel, Squid, and Butterfish (MSB), Fishery Management Plan (FMP), Establish an Atlantic Mackerel Limited Access Program, Implementation, Comment Period Ends: 03/01/2010, Contact: Patricia A. Kurkul 978–281–9250.

Amended Notices

EIS No. 20090368, Draft EIS, NSA, TN, Y–12 National Security Complex Project, to Support the Stockpile Stewardship Program and to Meet the Mission Assigned to Y–12, Oak Ridge, TN, Comment Period Ends: 01/29/2010, Contact: Pam Gorman 865–576–9903.

Revision to FR Notice Published 10/30/2009: Extending Comment Period from 01/04/2010 to 01/29/2010.

EIS No. 20090437, Final EIS, USACE, NC, Western Wake Regional Wastewater Management Facilities, Proposed Construction of Regional Wastewater Pumping, Conveyance, Treatment, and Discharge Facilities to Serve the Towns of Apex, Cary, Holly Springs and Morrisville, Research Triangle Park, Wake County, NC, Wait Period Ends: 02/09/2010, Contact: Henry Wicker 910–251–4930.

Revision to FR Notice Published: 12/18/2009 Extending Comment Period from 01/19/2010 to 02/09/2010.

Dated: January 12, 2010.

Robert W. Hargrove,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2010–755 Filed 1–14–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–8987–4]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared pursuant to the Environmental Review Process (ERP), under section 309 of the Clean Air Act and Section 102(2)(c) of the National Environmental Policy Act as amended.

Requests for copies of EPA comments can be directed to the Office of Federal Activities at 202–564–7146 or *http://www.epa.gov/compliance/nepa/.* An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated July 17, 2009 (74 FR 34754).

Notice

In accordance with Section 309(a) of the Clean Air Act, EPA is required to make its comments on EISs issued by other Federal agencies public. Historically, EPA has met this mandate by publishing weekly notices of availability of EPA comments, which includes a brief summary of EPA's comment letters, in the **Federal Register**. Since February 2008, EPA has been including its comment letters on EISs on its Web site at: *http://www.epa.gov/compliance/nepa/eisdata.html.* Including the entire EIS comment letters on the Web site satisfies the Section 309(a) requirement to make EPA's comments on EISs available to the public. Accordingly, after March 31, 2010, EPA will discontinue the publication of this notice of availability of EPA comments in the **Federal Register**.

Draft EISs

EIS No. 20090324, ERP No. D–AFS–H65031–00, Nebraska National Forests and Grassland Travel Management Project, Proposes to Designate Routes and Areas Open to Motorized Travel, Buffalo Gap National Grassland, Oglala National Grassland, Samuel R. McKelvie National Forest, and the Pine Ridge and Bessey Units of the Nebraska National Forest, Fall River, Custer, Pennington, Jackson Counties; SD and Sioux, Dawes, Cherry, Thomas and Blaine Counties, NE.

Summary: EPA expressed environmental concerns about soil and water quality impacts. Rating EC2.

EIS No. 20090337, ERP No. D–BLM–L65522–OR, Vegetation Treatments Using Herbicides on Bureau of Land Management (BLM) Lands in Oregon, Implementation, OR.

Summary: EPA does not object to the proposed action. Rating LO.

EIS No. 20090343, ERP No. D–AFS–L65523–OR, Deschutes and Ochoco National Forest and the Crooked River National Grassland Travel Management Project, Implementation, Deschutes, Jefferson, Crook, Klamath, Lake, Grant and Wheeler County, OR.

Summary: EPA expressed environmental concerns about the spread invasive plant, heritage resources, and impacts to native plants, and recommended additional dispersed camping mitigation measures. Rating EC2.

EIS No. 20090360, ERP No. D–NGB–B11026–VT, 158th Fighter Wing Vermont Air National Guard Project, Proposed Realignment of National Guard Avenue and Main Gate Construction, Burlington International Airport in South Burlington, VT.

Summary: While EPA has no objections to the proposed project, we requested that the National Guard Bureau consider the use of Low Impact Development options. Rating LO.

EIS No. 20090367, ERP No. D–USA–G15002–00, Fort Bliss Army Growth and Force Structure Realignment Project, Implementing Land Use Changes and Improving Training Infrastructure to Support the Growth the Army (GTA) Stationing Decision, El Paso County, TX and Dona Ana and Otero Counties, NM.

Summary: EPA does not object to the proposed action. Rating LO.

EIS No. 20090372, ERP No. D–FRB–L99012–WA, Federal Reserve Bank of San Francisco, Propose to sell the Property at 1015 Second Avenue that is Eligible for Listing on the National Register of Historic Places, located in Seattle, WA.

Summary: EPA does not object to the proposed action. Rating LO.

EIS No. 20090374, ERP No. D–DOE–E09812–MS, Kemper County Integrated Gasification Combined-Cycle (IGCC) Project, Construction and Operation of Advanced Power Generation Plant, U.S. Army COE Section 404 Permit, Kemper County, MS.

Summary: EPA expressed environmental concerns about air quality, water resources, wetlands, waste, and floodplain impacts. Rating EC2.

EIS No. 20090376, ERP No. D–AFS–K65381–CA, Piute Fire Restoration Project, Proposes to Salvage Dead and Dying Trees, Treat Excess Fuels, and Plant Trees, Kern River Ranger District, Sequoia National Forest, Kern County, CA.

Summary: EPA expressed environmental concerns about air quality and pesticide impacts. EPA also requested information on how climate change may affect the proposed project, particularly reforestation efforts. Rating EC2.

EIS No. 20090390, ERP No. D–NOA–E91029–00, Amendment 31 to the Fishery Management Plan for Reef Fish Resources, Addresses Bycatch of Sea Turtles in the Bottom Longline Component of the Reef Fish Fishery, Gulf of Mexico.

Summary: EPA expressed environmental concerns about impacts associated with the use of squid bait and societal effects on longliners, particularly EJ fishers. Rating EC2.

EIS No. 20090397, ERP No. D–USA–G39052–00, PROGRAMMATIC—Louisiana Coastal Area (LCA) Beneficial Use of Dredged Material (BUDMAT) Program Study, To Establish the Structure and Management Architecture of the BUDMAT Program, Implementation, MS, TX, and LA.

Summary: EPA does not object to the proposed action. Rating LO.

EIS No. 20090400, ERP No. D–AFS–F65087–WI, Twin Ghost Project, Proposes to Implement Vegetation and Transportation Management Activities, Great Divide Ranger District, Chequamegon-Nicolet National Forest, Ashland, Bayfield, Sawyer Counties, WI.

Summary: EPA continues to have environmental concerns about cumulative impacts. Rating EC2.

EIS No. 20090392, ERP No. DS–FHW–K40229–HI, Saddle Road (HI–200) Improvements Project. Proposed Improvement from Mamaloha Highway (HI–190) to Milepost 41, Hawaii County, HI.

Summary: EPA does not object to the project. Rating LO.

EIS No. 20090396, ERP No. DS–CGD–E02013–AL, Bienville Offshore Energy Terminal (BOET) Deepwater Port License Application Amendment (Docket # USCG–2006–24644), Proposes to Construct and Operate a Liquefied Natural Gas Receiving and Regasification Facility, Outer Continental Shelf of the Gulf of Mexico, South of Fort Morgan, AL.

Summary: While EPA's previous issues have been resolved, we continue to have environmental concerns about

air emissions and impacts on ichthyoplankton and other planktonic forms. Rating EC2.

Final EISs

EIS No. 20090334, ERP No. F–FRC–B03007–00, Hubline/East to West Project, Proposes to Modify its Existing Natural Gas Transmission Pipeline System in MA, CT, RI, and NJ.

Summary: EPA does not object to the project as proposed.

EIS No. 20090370, ERP No. F–NOA–B91030–00, Amendment 16 to the Northwest Multispecies Fishery Management Plan, Propose to Adopt, Approval and Implementation Measures to Continue Formal Rebuilding Program for Overfishing and to End Overfishing on those Stock where it Occurs, Gulf of Maine.

Summary: EPA does not object to the proposed action.

EIS No. 20090380, ERP No. F–NPS–E61077–GA, Chattahoochee River National Recreation Area General Management Plan, Preferred Alternative is F, Future Directions for the Management and Use of Chattachoochee River National Recreation Area, Implementation, Chattahoochee River, Atlanta, GA.

Summary: EPA does not object to the proposed project. EIS No. 20090393, ERP No. F–DOE–F09804–MN, Mesaba Energy Project, Proposes to Design, Construct and Operate a Coal-Based Integrated Gasification Cycle (IGCC) Electric Power Generating Facility, Located in the Taconite Tax Relief Area (TTRA), Itasca and St. Louis Counties, MN.

Summary: EPA expressed environmental concerns about wetland impacts and mitigation, air permitting, and greenhouse gas emission.

EIS No. 20090399, ERP No. F–NPS–A84030–00, PROGRAMMATIC—Servicewide Benefits Sharing Project, To Clarify the Rights and Responsibilities of Researchers and National Park Service (NPS) Management in Connection with the Use of Valuable Discoveries, Inventions, and Other Developments, across the United States.

Summary: No formal comment letter was sent to the preparing agency.

EIS No. 20090401, ERP No. F–IBR–K39118–CA, Delta-Mendota Canal/California Aqueduct Intertie Project, Construction and Operation of a Pumping Plant and Pipeline Connection, San Luis Delta-Mendota Water Authority Project, Central Valley Project, Alameda and San Joaquin Counties, CA.

Summary: EPA continues to have environmental concerns about the ability of the project to provide significant benefits given discrepancies between available water supply, demand, and contract water quantities.

EIS No. 20090404, ERP No. F–FAA–K51041–CA, ADOPTION—BART–Oakland International Airport Connector, extending South from the existing Coliseum BART Station, about 3.2 miles, to the Airport Terminal Area, Alameda County, CA.

Summary: EPA does not object to the proposed action.

EIS No. 20090417, ERP No. F–NOA–E91027–00, Comprehensive Ecosystem-Base Amendment 1 (CE–BA 1) for the South Atlantic Region, Implementation.

Summary: EPA's previous issues have been resolved; therefore, EPA does not object to the proposed action.

EIS No. 20090420, ERP No. F–FHW–F40446–IN, I–69 Evansville to Indianapolis, Indiana Project, Section 3, Washington to Crane NSWC (U.S. 50 to U.S. 231), Daviess, Greene, Knox, and Martin Counties, IN.

Summary: EPA's previous issues have been resolved, therefore, EPA does not object to the proposed action.

EIS No. 20090422, ERP No. F–IBR–H28002–KS, Equus Beds Aquifer Storage Recharge and Recovery Project, To Provide Municipal and Industrial (M&I) Water to City and Surrounding Region, Equus Beds Division, Wichita Project, Kansas, Harvey, Sedgwick, and Reno Counties, KS.

Summary: EPA's previous concerns have been resolved; therefore, EPA does not object to the proposed action.

EIS No. 20090336, ERP No. FB–FHW–B40029–VT, Southern Connector/Champlain Parkway Project (MEGC–M5000(1), Construction from Interchange of I–189 to Shelburne Street (U.S. Route 2) and Extending westerly and northerly to the City of Center District within the City of Burlington, Chittenden County, VT.

Summary: EPA does not object to the proposed project.

Dated: January 12, 2010.

Robert W. Hargrove,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2010–753 Filed 1–14–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9104–2]

Science Advisory Board Staff Office Notification of a Public Meeting of the Science Advisory Board Committee on Science Integration for Decisionmaking

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 February 10, 2010 from 9 a.m. to 5 p.m. and February 11, 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, 5 U.S.C., App. 2 (FACA), 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 Committee for Science Integration for Decision Making met on June 9–10, 2009 in Washington,

DC to begin its work on this study (see 74 FR 23187). The committee held a public teleconference on September 16, 2009 to discuss a draft work plan for the study (74 FR 43696–43697), which included fact-finding discussions with EPA program and regional offices. 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.*

At the upcoming public meeting, the committee will discuss the results of the fact-finding discussions and determine next steps to complete the evaluative study.

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 February 3, 2010 be placed on a list of public speakers for the meeting. *Written Statements:* Written statements should be received in the SAB Staff Office by February 3, 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: January 11, 2010.

Anthony F. Maciorowski,

Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. 2010–691 Filed 1–14–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9104–1]

Proposed Settlement Agreement for Recovery of Past Response Costs and Certain Other Costs Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as Amended; In Re: Commerce Street Plume Superfund Site, Located in Williston, VT

AGENCY: Environmental Protection Agency.

ACTION: Notice of proposed settlement; request for public comment.

SUMMARY: In accordance with the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA"), 42 U.S.C. 9601, *et seq.,* notice is hereby given of a proposed administrative settlement for recovery of past response costs and certain other costs in connection with the Commerce Street Plume Superfund Site, in Williston, Vermont. The proposed settlement requires Mitec Telecom, Inc. ("Settling Party") to reimburse the Environmental Protection Agency (the "Agency") for past response costs and certain other costs incurred in connection with the Commerce Street Plume Superfund Site in Williston, Vermont. The Settling Party will pay $120,000 plus interest calculated from the effective date of the settlement agreement. Payment will be made in four installments of $30,000 each, plus accrued interest. The proposed settlement includes a covenant not to sue the Settling Party pursuant to section 107(a) of CERCLA, 42 U.S.C. 9607(a) for past response costs and certain other costs identified in the settlement agreement.

For thirty (30) days following the date of publication of this notice, the Agency will receive written comments relating to the proposed settlement. The Agency will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate. The Agency's response to any comments received will be available for public inspection at 5 Post Office Square, Boston, MA 02109–3912.

DATES: Comments must be submitted on or before February 16, 2010.

ADDRESSES: Comments should be addressed to the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region I, 5 Post Office Square, Suite 100, Mailcode ORA 18–1, Boston, Massachusetts 02109–3912, and should refer to: In re: Commerce Street Plume Superfund Site, U.S. EPA Docket No. CERCLA–01–2008–0062.

FOR FURTHER INFORMATION CONTACT: Gregory Dain, U.S. Environmental Protection Agency, Region I, 5 Post Office Square, Suite 100, Mailcode OES 04–2, Boston, Massachusetts 02109–3912, (617) 918–1884. A copy of the proposed settlement agreement can be obtained from Gregory Dain.

Dated: December 23, 2009.

James T. Owens III,

Director, Office of Site Remediation and Restoration, U.S. EPA, Region I.

[FR Doc. 2010–740 Filed 1–14–10; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than January 29, 2010.

A. Federal Reserve Bank of Atlanta (Steve Foley, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30309:

1. Eugene Frey, Naples, Florida; to acquire voting shares of Naples Bancorp, Inc., and thereby indirectly acquire voting shares of Bank of Naples, both of Naples, Florida.

Board of Governors of the Federal Reserve System, January 11, 2010.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2010–601 Filed 1–14–10; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Federal Open Market Committee; Domestic Policy Directive of December 15 and 16, 2009

In accordance with § 271.25 of its rules regarding availability of information (12 CFR part 271), there is set forth below the domestic policy directive issued by the Federal Open Market Committee at its meeting held on December 15 and 16, 2009.[1]

The Federal Open Market Committee seeks monetary and financial conditions that will foster price stability and promote sustainable growth in output. To further its long–run objectives, the Committee seeks conditions in reserve markets consistent with federal funds trading in a range from 0 to ¼ percent. The Committee directs the Desk to purchase agency debt agency and agency MBS during the intermeeting period with the aim of providing support to private credit markets and economic activity. The timing and pace of these purchases should depend on conditions in the markets for such securities and on a broader assessment of private credit market conditions. The Desk is expected to execute purchases of about $175 billion in housing–related agency debt and about $1.25 trillion of agency MBS by the end of the first quarter of 2010. The Desk is expected to gradually slow the pace of these purchases as they near completion. The Committee anticipates that outright purchases of securities will cause the size of the Federal Reserve's balance sheet to expand significantly in coming months. The System Open Market Account Manager and the Secretary will keep the Committee informed of ongoing developments regarding the System's balance sheet that could affect the attainment over time of the Committee's objectives of maximum employment and price stability.

By order of the Federal Open Market Committee, January 7, 2010.

Brian F. Madigan,

Secretary, Federal Open Market Committee.

[FR Doc. 2010–678 Filed 1–14–10; 8:45 am]

BILLING CODE 6210–01–S

[1] Copies of the Minutes of the Federal Open Market Committee at its meeting held on December 15 and 16, 2009, which includes the domestic policy directive issued at the meeting, are available upon request to the Board of Governors of the Federal Reserve System, Washington, D.C. 20551. The minutes are published in the Federal Reserve Bulletin and in the Board's annual report.

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than February 12, 2010.

A. Federal Reserve Bank of New York (Ivan Hurwitz, Bank Applications Officer) 33 Liberty Street, New York, New York 10045–0001:

1. First Niagara Financial Group, Inc., Buffalo, New York; to become a bank holding company by acquiring 100 percent of the voting shares of Harleysville National Corporation, and thereby acquire The Harleysville National Bank and Trust Company, both of Harleysville, Pennsylvania.

In connection with this application, Applicant also has applied retain First Niagara Bank, Buffalo, New York, and First Niagara Commercial Bank, Lockport, New York, and thereby engage in operating a savings association, pursuant to section 225.28(b)(4); in extending credit and servicing loans, pursuant to section 225.28(b)(1); in leasing personal and real propoerty, pursuant to section 225.28(b)(3); and in the sale of credit related insurance, pursuant to section 225.28(b)(11), all of Regulation Y. Applicant also has applied to retain First Niagara Bank upon its conversion to a National Bank.

B. Federal Reserve Bank of Atlanta (Steve Foley, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30309:

1. State Bank Financial Corporation, Atlanta, Georgia; to become a bank holding company by acquiring 100 percent of the voting shares of State Bank and Trust Company, Macon (Pinehurst), Georgia.

C. Federal Reserve Bank of Minneapolis (Jacqueline G. King, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. Lake Central Financial, Inc., Annandale, Minnesota; to become a bank holding company by acquiring 100 percent of the voting shares of Annandale State Bank, Annandale, Minnesota.

Board of Governors of the Federal Reserve System, January 12, 2010.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2010–670 Filed 1–14–10; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act. Additional information on all

bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 29, 2010.

A. Federal Reserve Bank of Dallas (E. Ann Worthy, Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. One World Holdings, Inc., Dallas, Texas; to engage *de novo* through its subsidiary, One World Asset Management, Inc., Dallas, Texas, in lending activities, pursuant to section 225.28(b)(1) of Regulation Y.

Board of Governors of the Federal Reserve System, January 11, 2010.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2010–602 Filed 1–14–10; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Toxicology Program (NTP); Center for the Evaluation of Risks to Human Reproduction (CERHR); Availability of the Final Expert Panel Report on Soy Infant Formula; Request for Public Comment

AGENCY: National Institute of Environmental Health Sciences (NIEHS); National Institutes of Health (NIH); HHS.

ACTION: Announcement of report availability and request for comment.

SUMMARY: CERHR announces the availability of the final expert panel report on soy infant formula on January 15, 2010, from the CERHR Web site (*http://cerhr.niehs.nih.gov*) or in hardcopy from CERHR (*see* **ADDRESSES** below). The expert panel report is an evaluation of the developmental toxicity of soy infant formula conducted by an independent, 14-member expert panel composed of scientists from the public and private sectors convened by CERHR. CERHR invites the submission of public comments on this report (*see* **SUPPLEMENTARY INFORMATION** below). The expert panel met in public session (December 16–18, 2009) to review and revise the draft expert panel report and reach conclusions regarding whether exposure to soy infant formula is a hazard to human development. The expert panel also identified data gaps and research needs.

DATES: The final expert panel report on soy infant formula will be available for public comment on January 15, 2010. Written public comments on this report should be received by March 1, 2010.

ADDRESSES: Comments on the expert panel report and any other correspondence should be submitted to Dr. Kristina A. Thayer, Acting CERHR Director, NIEHS, P.O. Box 12233, MD K2–04, Research Triangle Park, NC 27709 (mail), 919–541–5021 (telephone), or *thayer@niehs.nih.gov* (e-mail). Courier address: NIEHS, 530 Davis Drive, Room K2154, Morrisville, NC 27560.

SUPPLEMENTARY INFORMATION:

Background

Soy infant formula is fed to infants as a supplement or replacement for human milk or cow milk formula. Soy infant formula contains isoflavones such as genistein (CAS RN: 446–72–0), daidzein (CAS RN: 486–66–8), and glycitein (CAS RN: 40957–83–3). Genistein, daidzein, glycitein, and the daidzein metabolite equol are non-steroidal, estrogenic compounds that occur naturally in some plants and are often referred to as "phytoestrogens." In plants, nearly all genistein, daidzein, and glycitein are linked to a sugar molecule and these isoflavone-sugar complexes are called genistin, daidzin, or glycitin.

On December 16–18, 2009, CERHR (74 FR 53508) convened an expert panel to conduct an updated evaluation of the potential developmental toxicity of soy infant formula and its predominant isoflavone constituents. CERHR selected soy infant formula for evaluation because of (1) The availability of numerous developmental toxicity studies in laboratory animals and humans, (2) the availability of information on exposures in infants, and (3) public concern for effects on infant or child development.

Following receipt of public comments on the final expert panel report on soy infant formula, CERHR staff will prepare the NTP monograph. NTP monographs are divided into three major sections: (1) The NTP Brief that provides the NTP's interpretation of the potential for the substance to cause adverse reproductive and/or developmental effects in exposed humans, (2) a roster of expert panel members, and (3) the final expert panel report. The NTP Brief is based on the expert panel report, public comments on that report, public and peer review comments on the draft NTP Brief, and any new, relevant information that becomes available after the expert panel meetings.

Request for Comments

CERHR invites written public comments on the expert panel report on soy infant formula. Written comments should be sent to Dr. Kristina A. Thayer (*see* **ADDRESSES** above). Persons submitting written comments are asked to include their name and contact information (affiliation, mailing address, telephone and facsimile numbers, e-mail, and sponsoring organization, if any). Any comments received will be posted on the CERHR Web site and the commenter identified by name, affiliation, and sponsoring organization, if applicable. All public comments will be considered by the NTP during preparation of the NTP Brief (*see* "Background" above).

Background Information on CERHR

The NTP established CERHR in 1998 (63 FR 68782). CERHR is a publicly accessible resource for information about adverse reproductive and/or developmental health effects associated with exposure to environmental and/or occupational exposures. CERHR follows a formal process for the evaluation of selected substances that includes multiple opportunities for public input.

CERHR invites the nomination of substances for review or scientists for its expert registry. Information about CERHR and the nomination process can be obtained from its homepage (*http://cerhr.niehs.nih.gov*) or by contacting Dr. Thayer (*see* **ADDRESSES** above). CERHR selects substances for evaluation based upon several factors including production volume, potential for human exposure from use and occurrence in the environment, extent of public concern, and extent of data from reproductive and developmental toxicity studies.

Dated: January 8, 2010.

John R. Bucher,

Associate Director, National Toxicology Program.

[FR Doc. 2010–674 Filed 1–14–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Call for Collaborating Partners for National Women's Health Week

AGENCY: Department of Health and Human Services, Office of the Secretary, Office of Public Health and Science, Office on Women's Health.

ACTION: Notice.

SUMMARY: The U.S. Department of Health and Human Services (HHS), Office on Women's Health (OWH)

invites public and private sector women's health-related organizations to participate in National Women's Health Week as collaborating partners to help create awareness of women's health issues and educate women about improving their health and preventing disease.

DATES: Representatives of women's health organizations should submit expressions of interest by February 28, 2010.

ADDRESSES: Expressions of interest, comments, and questions may be submitted by electronic mail to *Henrietta.Terry@hhs.gov* or by regular mail to Henrietta Terry, M.S., Public Health Advisor, Office on Women's Health, Department of Health and Human Services, 200 Independence Avenue, SW., Room 733E, Washington, DC 20201; or via fax to (202–690–7172).

FOR FURTHER INFORMATION CONTACT: Henrietta Terry, M.S., Public Health Advisor, Office on Women's Health, Department of Health and Human Services, 200 Independence Avenue, SW., Room 733E, Washington, DC 20201, (202) 205–1952 (telephone), or (202) 690–7172 (fax).

SUPPLEMENTARY INFORMATION: The OWH was established in 1991 to improve the health of American women by advancing and coordinating a comprehensive women's health agenda throughout HHS. This program has two goals: Development and implementation of model programs on women's health; and leading education, collaboration, and coordination on women's health. The program fulfills its mission through competitive contracts and grants to an array of community, academic, and other organizations at the national and community levels. National educational campaigns provide information about the important steps women can take to improve and maintain their health, such as National Women's Health Week.

National Women's Health Week is a week long health observance that kicks off on Mother's Day and seeks to educate women about improving their physical and mental health and preventing disease. With the 2010 theme "It's Your Time," OWH will focus on encouraging women to make their health a top priority and take simple steps for a longer, healthier and happier life. For more information about National Women's Health Week, please visit *http://www.womenshealth.gov/whw.*

Dated: January 7, 2010.

Frances Ashe-Goins,

Acting Director, Office on Women's Health.

[FR Doc. 2010–757 Filed 1–14–10; 8:45 am]

BILLING CODE 4150–33–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting of the Presidential Advisory Council on HIV/AIDS

AGENCY: Department of Health and Human Services, Office of the Secretary, Office of Public Health and Science.

ACTION: Notice.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the U.S. Department of Health and Human Service (DHHS) is hereby giving notice that the Presidential Advisory Council on HIV/AIDS (PACHA) will hold a meeting. The meeting will be open to the public.

DATES: The meeting will be held on February 2, 2010 from 9 a.m. to approximately 5 p.m.

ADDRESSES: South Court Auditorium, Eisenhower Executive Office Building, Pennsylvania Avenue and 17th Street, NW., Washington, DC 20501.

FOR FURTHER INFORMATION CONTACT: Mr. Melvin Joppy, Committee Manager, Presidential Advisory Council on HIV/AIDS, Department of Health and Human Services, 200 Independence Avenue, SW., Room 443H, Hubert H. Humphrey Building, Washington, DC 20201; (202) 690–5560. More detailed information about PACHA can be obtained by accessing the Council's Web site at *http://www.pacha.gov*.

SUPPLEMENTARY INFORMATION: PACHA was established by Executive Order 12963, dated June 14, 1995 as amended by Executive Order 13009, dated June 14, 1996. The Council was established to provide advice, information, and recommendations to the Secretary regarding programs and policies intended to (a) Promote effective prevention of HIV disease, (b) advance research on HIV and AIDS, and (c) promote quality services to persons living with HIV disease and AIDS. PACHA was established to serve solely as an advisory body to the Secretary of Health and Human Services.

The agenda for this Council meeting will be posted on the Council's Web site *http://www.pacha.gov*.

This meeting of the PACHA will be on White House property, thus, each person must be screened and cleared by the U.S. Secret Service. Pre-registration for public attendance is mandatory. Please contact: Natalie Pojman, Office of National AIDS Policy (202) 456–4533 or *npojman@who.eop.gov*. Members of the public will be accommodated on a first come first served basis as meeting room space is limited. Ms. Pojman will need your full name, social security number, date of birth, residency and country of origin to process public access attendance. Pre-registration must be submitted by close of business January 28, 2010.

Members of the public will have the opportunity to provide comments at the meeting. Any individual who wishes to participate in the public comment session must register at *http://www.pacha.gov;* registration for public comment will not be accepted by telephone. Public comment will be limited to two minutes per speaker. Any members of the public who wish to have printed material distributed to PACHA members for discussion at the meeting should submit, at a minimum, 30 copies of the materials to the Committee Manager, PACHA, no later than close of business January 29, 2010. Contact information for the PACHA Committee Manager is listed above.

Dated: January 12, 2010.

Christopher Bates,

Executive Director, Presidential Advisory Council on HIV/AIDS.

[FR Doc. 2010–744 Filed 1–14–10; 8:45 am]

BILLING CODE 4150–28–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Opportunity for Co-Sponsorship of the President's Challenge Physical Activity and Fitness Awards Program; Correction

AGENCY: President's Council on Physical Fitness and Sports.

ACTION: Notice; correction.

SUMMARY: The President's Council on Physical Fitness and Sports published a document in the **Federal Register** of December 28, 2009, concerning the opportunity for non-Federal entities to co-sponsor and administer a series of financially self-sustaining activities related to the President's Challenge Physical Activity and Fitness Awards Program. The document contained incorrect addresses and contact information.

FOR FURTHER INFORMATION CONTACT: Jane Wargo, 202.690.5157

Correction

In the **Federal Register** of December 28, 2009, in FR Doc. E9–30653, on page 68626, in the third column, correct the

3rd and 4th lines in the **ADDRESSES** and 3rd line in the **FOR FURTHER INFORMATION CONTACT** captions to read:

ADDRESSES: Proposals for co-sponsorship should be sent to Jane Wargo, Program Analyst, Office of the President's Council on Physical Fitness and Sports, 1101 Wootton Parkway, Suite 560, Rockville, MD 20852; Ph: (240) 276–9847, Fax: (240) 276–9860. Proposals may also be submitted by electronic mail to *jane.wargo@hhs.gov*.

FOR FURTHER INFORMATION CONTACT: Jane Wargo, Program Analyst, Office of the President's Council on Physical Fitness and Sports, Ph: (240) 276–9847, e-mail: *jane.wargo@hhs.gov*.

Dated: January 12, 2010.

Jane Wargo,

Program Analyst, President's Council on Physical Fitness and Sports, U.S. Department of Health and Human Services.

[FR Doc. 2010–760 Filed 1–14–10; 8:45 am]

BILLING CODE 4150–35–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–718–721, CMS–10303 and CMS–685]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS) is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Reinstatement with change of a previously approved collection; *Title of Information Collection:* Business Proposal Forms for Quality Improvement Organizations (QIOs); *Use:* The submission of proposal information by current quality improvement associations (QIOs) and other bidders, on the appropriate forms, will satisfy CMS's need for meaningful, consistent, and verifiable data with which to evaluate contract proposals. The data collected on the forms associated with this information collection request is used by CMS to negotiate QIO contracts. The revised business proposal forms will be useful in a number of important ways. The Government will be able to compare the costs reported by the QIOs on the cost reports to the proposed costs noted on the business proposal forms. Subsequent contract and modification negotiations will be based on historic cost data. The business proposal forms will be one element of the historical cost data from which we can analyze future proposed costs. In addition, the business proposal format will standardize the cost proposing and pricing process among all QIOs. With well-defined cost centers and line items, proposals can be compared among QIOs for reasonableness and appropriateness. *Form Number:* CMS–718–721 (OMB#: 0938–0579); *Frequency:* Reporting—Triennially; *Affected Public:* Business or other for-profits and Not-for-profit institutions; *Number of Respondents:* 21; *Total Annual Responses:* 21; *Total Annual Hours:* 1,785. (For policy questions regarding this collection contact Clarissa Whatley at 410–786–7154. For all other issues call 410–786–1326.)

2. *Type of Information Collection Request:* New collection; *Title of Information Collection:* Medicare Gainsharing Demonstration Evaluation: Physician Focus Groups; *Use:* The proposed physician focus groups are part of an overall evaluation of the Centers for Medicare & Medicaid Services CMS' congressionally mandated Medicare Gainsharing Demonstration Evaluation. The Congress, under Section 5007 of the Deficit Reduction Act (DRA) of 2005, requires CMS to conduct a qualified gainsharing program to test alternative ways that hospitals and physicians can share in efficiency gains. The primary goal of the demonstration is to evaluate gainsharing as a means to align physician and hospital incentives to improve quality and efficiency. The demonstration has two mandated Reports to Congress. Results from physician focus groups will be included in both Reports to Congress. *Form Number:* CMS–10303 (OMB#: 0938–New); *Frequency:* Once; *Affected Public:* Private Sector, Business or other for profits; *Number of Respondents:* 192; *Total Annual Responses:* 96; *Total Annual Hours:* 96. (For policy questions regarding this collection contact William Buczko at 410–786–6593. For all other issues call 410–786–1326.)

3. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* End Stage Renal Disease (ESRD) Network Semi-Annual Cost Report Forms and Supporting Regulations in 42 CFR section 405.2110 and 42 CFR 405.2112; *Use:* Section 1881(c) of the Social Security Act establishes End Stage Renal Disease (ESRD) Network contracts. The regulations found at 42 CFR 405.2110 and 405.2112 designated 18 ESRD Networks which are funded by renewable contracts. These contracts are on 3-year cycles. To better administer the program, CMS is requiring contractors to submit semi-annual cost reports. The purpose of the cost reports is to enable the ESRD Networks to report costs in a standardized manner. This will allow CMS to review, compare and project ESRD Network costs during the life of the contract. *Form Number:* CMS–685 (OMB#: 0938–0657); *Frequency:* Reporting—Semi-annually; *Affected Public:* Not-for-profit institutions; *Number of Respondents:* 18; *Total Annual Responses:* 36; *Total Annual Hours:* 108. (For policy questions regarding this collection contact Victoria Morgan at 410–786–7232. For all other issues call 410–786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web Site at *http://www.cms.hhs.gov/PaperworkReductionActof1995*, or E-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov*, or call the Reports Clearance Office on (410) 786–1326.

In commenting on the proposed information collections please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in one of the following ways by *March 16, 2010:*

1. *Electronically.* You may submit your comments electronically to *http://www.regulations.gov*. Follow the instructions for "Comment or Submission" or "More Search Options" to find the information collection document(s) accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic

Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: January 8, 2010.

Michelle Shortt,

Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2010–743 Filed 1–14–10; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier CMS–588, CMS–10079 and CMS–10311]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the Agency's function; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Reinstatement without change of a previously approved collection; *Title of Information Collection:* Electronic Funds Transfer Authorization Agreement; *Use:* Section 1815(a) of the Social Security Act provides the authority for the Secretary of Health and Human Services to pay providers/suppliers of Medicare services at such time or times as the Secretary determines appropriate (but no less frequently than monthly). Under Medicare, CMS, acting for the Secretary, contracts with Fiscal Intermediaries and Carriers to pay claims submitted by providers/suppliers who furnish services to Medicare beneficiaries. Under CMS' payment policy, Medicare providers/suppliers have the option of receiving payments electronically. Form number CMS–588 authorizes the use of electronic fund transfers (EFTs). *Form Number:* CMS–588 (OMB#: 0938–0626); *Frequency:* Reporting—On occasion; *Affected Public:* Business or other for-profit and Not-for-profit institutions; *Number of Respondents:* 100,000; *Total Annual Responses:* 100,000; *Total Annual Hours:* 100,000. (For policy questions regarding this collection contact Kim McPhillips at 410–786–5374. For all other issues call 410–786–1326.)

2. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Hospital Wage Index Occupational Mix Survey and Supporting Regulations in 42 CFR, Section 412.64; *Use:* Section 304(c) of Public Law 106–554 amended section 1886(d) (3) (E) of the Social Security Act to require CMS to collect data every 3 years on the occupational mix of employees for each short-term, acute care hospital participating in the Medicare program, in order to construct an occupational mix adjustment to the wage index, for application beginning October 1, 2004 (the FY 2005 wage index). The purpose of the occupational mix adjustment is to control for the effect of hospitals' employment choices on the wage index. Refer to the summary of changes document for a list of current changes. *Form Number:* CMS–10079 (OMB#: 0938–0907); *Frequency:* Reporting—Yearly, Biennially and Occasionally ; *Affected Public:* Private Sector—Business or other for-profits and Not-for-profit institutions; *Number of Respondents:* 3,522; *Total Annual Responses:* 3,522; *Total Annual Hours:* 1,690,560. (For policy questions regarding this collection contact Taimyra Jones at 410–786–1562. For all other issues call 410–786–1326.)

3. *Type of Information Collection Request:* New collection; *Title of Information Collection:* Medicare Program/Home Health Prospective Payment System Rate Update for Calendar Year 2010: Physician Narrative Requirement and Supporting Regulation in 42 CFR 424.22; *Use:* The Centers for Medicare and Medicaid Services (CMS) require that a physician sign every patient's individual plan of care certifying or recertifying that the patient is homebound and the planned services are medically necessary in order for the home health agency to be reimbursed for Medicare covered services as stipulated in 42 CFR 424.22. CMS is relying on physicians to fulfill a role that is sometimes thought of as a "gatekeeper" by requiring the physician to provide a narrative located within the home health certification or recertification when skilled nursing management & evaluation of the plan of care, (PoC) is ordered. The physician's narrative is required when a patient's underlying condition or complication requires a registered nurse to ensure that essential non-skilled care is achieving its purpose, The narrative must be located immediately prior to the physician's signature. If the narrative exists as an addendum to the certification or recertification form, in addition to the physician's signature on the certification or recertification form, the physician must sign immediately following the narrative in the addendum. This change supports Medicare's home health coverage criteria for skilled services as stipulated in the CFR, (see 42 CFR 409.42). *Form Number:* CMS–10311 (OMB#: 0938–New); *Frequency:* Annually; *Affected Public:* Business or other for-profit and Not-for-profit institutions; *Number of Respondents:* 345,600; *Total Annual Responses:* 345,600; *Total Annual Hours:* 28,800. (For policy questions regarding this collection contact Randy Throndset at 410–786–0131. For all other issues call 410–786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS Web Site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995,* or E-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

To be assured consideration, comments and recommendations for the proposed information collections must be received by the OMB desk officer at the address below, no later than 5 p.m. on *February 16, 2010.* OMB, Office of Information and Regulatory Affairs, *Attention:* CMS Desk Officer, *Fax Number:* (202) 395–6974, *E-mail: OIRA_submission@omb.eop.gov.*

Dated: *January 8, 2010.*

Michelle Shortt,

Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2010–712 Filed 1–14–10; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Health Center Program

AGENCY: Health Resources and Services Administration, HHS

ACTION: Notice of Noncompetitive Replacement Award to Regional Health Care Affiliates.

SUMMARY: The Health Resources and Services Administration (HRSA) will be transferring Health Center Program (section 330 of the Public Health Service Act) funds originally awarded to Trover Health System to Regional Health Care Affiliates to ensure the provision of critical primary health care services to underserved populations in Webster and McLean Counties, Kentucky.

SUPPLEMENTARY INFORMATION:

Former Grantee of Record: Trover Health System.

Original Period of Grant Support: June 1, 2009 to February 28, 2011.

Replacement awardee: Regional Health Care Affiliates.

Amount of Replacement Award: $17,000.

Period of Replacement Award: The period of support for the replacement award is September 1, 2009, to February 28, 2011.

Authority: Section 330 of the Public Health Service Act, 42 U.S.C. 245b.

CFDA Number: 93.224.

Justification For The Exception To Competition: Under the original grant application approved by HRSA, Regional Health Care Affiliates (RHCA) was identified as the provider of health care services on behalf of the Trover Health System, while Trover Health System was to serve in an administrative capacity for the grant. After the award was issued, Trover Health System and RHCA notified HRSA that RHCA's organizational structure had changed to enable it to carry out both administrative and programmatic requirements. The two parties requested that full responsibility for the grant be transferred from Trover Health System to RHCA. RHCA provided documentation that it meets Section 330 statutory and regulatory requirements as well as applicable grant management requirements.

Regional Health Care Affiliates will directly initiate primary health care services in Webster and McLean Counties to the more than 5,250 low income, underserved and uninsured individuals in the original service area, Webster and McLean Counties, KY, as had been proposed in funded grant application.

Regional Health Care Affiliates can provide primary health care services immediately, is located in the same geographical area where the Trover Health System's primary health care services have been provided, and will be able to provide continuity of care to patients of the former grantee.

This underserved target population has an immediate need for vital primary health care services and would be negatively impacted by any delay caused by a competition. As a result, in order to ensure that critical primary health care services are available to the original target population in a timely manner, this replacement award will not be competed.

FOR FURTHER INFORMATION CONTACT: Marquita Cullom-Stott via email at *MCullom-Stott@hrsa.gov* or 301–594–4300.

Dated: January 11, 2010.

Mary K. Wakefield,

Administrator.

[FR Doc. 2010–673 Filed 1–14–10; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of Biotechnology Activities; Office of Science Policy; Office of the Director; Notice of a Meeting of the NIH Blue Ribbon Panel

The purpose of this notice is to inform the public about a meeting of the NIH Blue Ribbon Panel to Advise on the Risk Assessment of the National Emerging Infectious Diseases Laboratories at Boston University Medical Center.

There will be a meeting of the NIH Blue Ribbon Panel to advise on the Risk Assessment of the National Emerging Infectious Diseases Laboratories (NEIDL) at Boston University Medical Center. The meeting will be held on Friday, February 12, 2010, at the Hyatt Regency Bethesda Hotel, located at 7400 Wisconsin Avenue, Bethesda, Maryland 20814, from approximately 8:30 a.m. to 2 p.m. This meeting is the second in a series of public meetings with the National Research Council to review the ongoing supplementary risk assessment study.

Sign up for public comment will begin at approximately 8 a.m. In the event that time does not allow for all those interested in presenting oral comments, anyone may file written comments using the following address below.

An agenda and slides for the meeting can be obtained prior to the meeting by connecting to *http://nihblueribbonpanel-bumc-neidl.od.nih.gov/*. For additional information concerning this meeting, contact Ms. Laurie Lewallen, Advisory Committee Coordinator, Office of Biotechnology Activities, Office of Science Policy, Office of the Director, National Institutes of Health, 6705 Rockledge Drive, Room 750, Bethesda, MD 20892–7985; telephone 301–496–9838; e-mail *lewallenl@od.nih.gov*.

Dated: January 11, 2010.

Kelly R. Fennington,

Special Assistant to the Director, Office of Biotechnology Activities, National Institutes of Health.

[FR Doc. 2010–730 Filed 1–14–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0604]

Clinical Accuracy Requirements for Point of Care Blood Glucose Meters; Public Meeting; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public meeting; request for comments.

The Food and Drug Administration (FDA) is announcing a public meeting entitled: Clinical Accuracy Requirements for Point of Care Blood Glucose Meters. The purpose of the public meeting is to discuss the clinical accuracy requirements of blood glucose meters and other topics related to their use in point of care settings.

Dates and Times: The public meeting will be held on March 16, 2010, from 9 a.m. to 5 p.m. and on March 17, 2010, from 9 a.m. to 3:40 p.m.

Location: The public meeting will be held at the Hilton Hotel in Gaithersburg, MD, 620 Perry Pkwy., Gaithersburg, MD 20877. For directions, please refer to the meeting Web page at *http://www.fda.gov/MedicalDevices/NewsEvents/WorkshopsConferences/ucm187406.htm*.

Contact Person: Arleen Pinkos, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 5618, Silver Spring, MD 20993, 301–796–6152, FAX: 301–847–8573, e-mail: *Arleen.Pinkos@fda.hhs.gov*.

Registration: Persons interested in attending the meeting must register by February 15, 2010. If you wish to attend this public meeting, you must register

online at *http://www.fda.gov/MedicalDevices/NewsEvents/MeetingsConferences/ucm187406.htm* by close of business on February 15, 2010. Those without Internet access may register by contacting Christine Kellerman at 301–796–5711. When registering, you must provide your name, title, company or organization (if applicable), address, phone number, and e-mail address. There is no fee to register for the public meeting and registration will be on a first-come, first-served basis. Early registration is recommended because seating is limited. Registration on the day of the public meeting will be permitted on a space-available basis beginning at 8:45 a.m.

If you need special accommodations due to a disability, please contact the hotel at 301–977–8900 at least 7 days prior to the meeting.

Directions to the hotel and other information about the meeting may be found at *http://www.fda.gov/MedicalDevices/NewsEvents/WorkshopsConferences/ucm187406.htm*.

Comments: FDA is holding this public meeting to raise public awareness about the accuracy and clinical use of blood glucose meters, to share ideas on the challenges associated with their use, to seek public comments on this topic and to work towards identifying solutions. The deadline for submitting comments regarding this public meeting is April 20, 2010, by 5 p.m. EST.

Regardless of attendance at the meeting, interested persons may submit written or electronic comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.regulations.gov*. 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. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

SUPPLEMENTARY INFORMATION: The workshop will include 3 sessions on the following: (1) Clinical accuracy for blood glucose meters, (2) tight glycemic control in clinical settings, and (3) medications and other substances that interfere with the technologies the devices employ. Each session will include presentations from physicians, laboratories, government and industry representatives, and patient advocates who are experts in each area. Presentations will be followed by panel discussions of session topics and questions from the audience.

Glucose meters are used by millions of people with diabetes every day. These devices have become smaller, faster, and more accurate over the past 3 decades and now allow for better glycemic control by diabetics than in the past. Glucose meters are not only used by diabetics at home, they are also used by health care providers in a variety of settings such as hospitals, emergency response units, nursing homes, and physicians' offices.

Some in the clinical and patient communities have questioned whether the current FDA-recognized accuracy standards for blood glucose meters are acceptable and have challenged FDA to require tighter performance standards. Blood glucose meters are being used in clinical settings and at home in ways that are not within the intended use of the devices as evaluated by FDA. For example, glucose meters are increasingly being used to achieve tight glycemic control despite the fact that these devices have not been cleared for this use. There is currently no consensus that blood glucose meters currently on the market are accurate enough to be used in this way. Still, other stakeholders believe the current analytical performance of glucose meters is adequate and that there is no evidence to support the need for higher standards. Other factors affecting the performance of blood glucose meters include administered drugs, common physiological conditions (such as diabetic ketoacidosis), and user-interface issues. For example, the administration of therapies containing maltose, which are commonly prescribed to patients in the hospital, have resulted in falsely elevated glucose results. (FDA issued a Public Health Notification about this risk. See *http://www.fda.gov/MedicalDevices/Safety/AlertsandNotices/PublicHealthNotifications/ucm176992.htm* and *http://www.fda.gov/MedicalDevices/Safety/AlertsandNotices/PatientAlerts/ucm177189.htm* for more information.)

In response to the issues identified previously, FDA is reconsidering the current FDA-recognized glucose meter accuracy standards, and is considering whether FDA review criteria for these devices should be changed for reasons of public health. FDA is interested in hearing from clinical experts about the clinical requirements for blood glucose meter accuracy and precision, and the benefits and risks of using glucose meters to achieve and maintain tight glycemic control. The appropriate analytical and clinical accuracy requirements for blood glucose meters will be discussed during this meeting, as well as the potential benefits and challenges of meeting those requirements. We are seeking participation from all stakeholders including, but not limited to: Physicians, nurses, health care providers who work in intensive care settings, industry, diabetes educators, professional societies, consumers, and patient advocate groups.

Transcripts: Transcripts of the public workshop may be requested in writing from the Freedom of Information Office (HFI–35), Food and Drug Administration, 5600 Fishers Lane, rm. 6–30, Rockville, MD 20857, approximately 15 working days after the public workshop at a cost of 10 cents per page. A transcript of the public workshop will be available on the Internet at *http://www.fda.gov/MedicalDevices/NewsEvents/WorkshopsConferences/ucm187406.htm.*

Dated: January 8, 2010.

Jeffrey Shuren,

Acting Director, Center for Devices and Radiological Health.

[FR Doc. 2010–742 Filed 1–14–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health: 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 Mental Health Special Emphasis Panel; ITVA Conflicts.

Date: February 24, 2010.

Time: 1:30 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Francois Boller, MD, PhD, Scientific Review Officer, Division of

Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6142, MSC 9606, Bethesda, MD 20892–9606, 301–443–1513, *bollerf@mail.nih.gov*.

Name of Committee: National Institute of Mental Health Special Emphasis Panel, Review of NIMH Research Education Applications.

Date: March 2, 2010.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Dupont Hotel, 1500 New Hampshire Avenue NW., Washington, DC 20036.

Contact Person: Rebecca C. Steiner, PhD, Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6149, MSC 9608, Bethesda, MD 20892–9608, 301–443–4525, *steinerr@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: January 11, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–677 Filed 1–14–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

National Vaccine Injury Compensation Program: Revised Amount of the Average Cost of a Health Insurance Policy

The Health Resources and Services Administration (HRSA) is publishing an updated monetary amount of the average cost of a health insurance policy as it relates to the National Vaccine Injury Compensation Program (VICP).

Section 100.2 of the VICP's implementing regulation (42 CFR Part 100) states that the revised amounts of an average cost of a health insurance policy, as determined by the Secretary, are to be published periodically in a notice in the **Federal Register**. This figure is calculated using the most recent Medical Expenditure Panel Survey-Insurance Component (MEPS–IC) data available as the baseline for the average monthly cost of a health insurance policy. This baseline is adjusted by the annual percentage increase/decrease obtained from the most recent annual Kaiser Family Foundation and Health Research and Educational Trust (KFF/HRET) Employer Health Benefits survey or other authoritative source that may be more accurate or appropriate.

In 2009, MEPS–IC, available at *http://www.meps.ahrq.gov*, published the annual 2008 average total single premium per enrolled employee at private-sector establishments that provide health insurance. The figure published was $4,386. This figure is divided by 12-months to determine the cost per month of $365.50. The $365.50 shall be increased or decreased by the percentage change reported by the most recent KFF/HRET, available at *http://www.kff.org*. The percentage increase was published at 5 percent. By adding this percentage increase, the calculated average monthly cost of a health insurance policy for 12-month period is $383.78.

The Department will periodically (generally on an annual basis) recalculate the average cost of a health insurance policy by obtaining a new figure from the latest MEPS–IC data and updating this figure using the percentage change(s) reported by the most recent data from KFF/HRET or other authoritative source that may be more accurate or appropriate in the future. The updated calculation will be published as a notice in the **Federal Register** and filed with the Court.

Therefore, the Secretary announces that the revised average cost of a health insurance policy under the VICP is $383.78 per month. In accordance with § 100.2, the revised amount was effective upon its delivery by the Secretary to the United States Court of Federal Claims. Such notice was delivered to the Court on January 4, 2010.

Dated: January 11, 2010.

Mary K. Wakefield,

Administrator.

[FR Doc. 2010–675 Filed 1–14–10; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

NIH Consensus Development Conference: Lactose Intolerance and Health; Notice

Notice is hereby given by the National Institutes of Health (NIH) of the "NIH Consensus Development Conference: Lactose Intolerance and Health" to be held February 22–24, 2010, in the NIH Natcher Conference Center, 45 Center Drive, Bethesda, Maryland 20892. The conference will begin at 8:30 a.m. on February 22 and 23 and at 9 a.m. on February 24, and it will be open to the public.

Lactose intolerance is the inability to digest significant amounts of lactose, a sugar found in milk and other dairy products. Lactose intolerance is caused by a shortage of the enzyme lactase, which is produced by expression of the lactase-phlorizin hydrolase gene by the cells that line the small intestine. Lactase breaks milk sugar down into two simpler forms of sugar called glucose and galactose, which are then absorbed into the bloodstream. Infants of every racial and ethnic group worldwide produce lactase and successfully digest lactose provided by human milk or by infant formulas. However, by the time many of the world's children reach the age of 3–4 years, expression of intestinal lactase ceases. Most affected individuals, referred to as lactase nonpersisters, in the United States belong to minority groups, especially Asians, African Americans, Hispanics, Native Americans, Alaskan Natives, and Pacific Islanders.

Consumption of lactose-containing products by lactase nonpersisters may cause gas production, bloating, abdominal pain, and diarrhea. These symptoms of lactose intolerance are caused by intestinal bacteria's fermentation of undigested lactose and often cause individuals to avoid lactose-containing products. Lactose intolerance can be diagnosed by drinking one to two large glasses of milk after fasting and measuring breath hydrogen levels a few hours later. Other diagnostic tools include analyzing an intestinal biopsy sample or determining the genetic makeup of the chromosomal region coding for lactase. However, many individuals mistakenly ascribe symptoms of a variety of intestinal disorders to lactose intolerance without undergoing testing. This becomes intergenerational when self-diagnosed lactose-intolerant parents place their children on lactose-restricted diets in the belief that the condition is hereditary.

Healthcare providers are concerned that many lactose-intolerant individuals are avoiding dairy products, which constitute a readily accessible source of calcium and are fortified with vitamin D and other nutrients. Therefore, these individuals may not be meeting recommended intakes of these essential nutrients. Insufficient intakes of calcium carry a risk of decreased bone mineral density. This may have effects on bone health and increase the risk of fracture throughout the lifecycle, especially in

postmenopausal women. Very low intake of vitamin D can lead to the development of rickets, especially in those of African descent and other highly pigmented individuals. Although milk alternative products are typically fortified with vitamin D and other nutrients, they are often more expensive and less widely available than conventional products.

The public health burden from deficiencies attributable to lactose intolerance is difficult to quantify. Additionally, it is challenging to identify and manage lactase nonpersisters. Questions remain as to the amount, if any, of lactose that can be tolerated by lactose nonpersisters and how best to assist these individuals in meeting recommended intakes. To examine these important issues, the *Eunice Kennedy Shriver* National Institute of Child Health and Human Development and the Office of Medical Applications of Research of the National Institutes of Health will convene a Consensus Development Conference from February 22 to 24, 2010, to assess the available scientific evidence related to the following questions:

- What is the prevalence of lactose intolerance, and how does this prevalence differ by race, ethnicity, and age?
- What are the health outcomes of dairy exclusion diets?
- What amount of daily lactose intake is tolerable in subjects with diagnosed lactose intolerance?
- What strategies are effective in managing individuals with diagnosed lactose intolerance?
- What are the future research needs for understanding and managing lactose intolerance?

An impartial, independent panel will be charged with reviewing the available published literature in advance of the conference, including a systematic literature review commissioned through the Agency for Healthcare Research and Quality. The first day and a half of the conference will consist of presentations by expert researchers and practitioners and open public discussions. On Wednesday, February 24, the panel will present a statement of its collective assessment of the evidence to answer each of the questions above. The panel will also hold a press telebriefing to address questions from the media. The draft statement will be published online later that day, and the final version will be released approximately six weeks later. The primary sponsors of this meeting are the NIH *Eunice Kennedy Shriver* National Institute of Child Health and Human Development and the NIH Office of Medical Applications of Research.

Advance information about the conference and conference registration materials may be obtained from the NIH Consensus Development Program Information Center by calling 888–644–2667 or by sending e-mail to *consensus@mail.nih.gov*. The Information Center's mailing address is P.O. Box 2577, Kensington, Maryland 20891. Registration information is also available on the NIH Consensus Development Program Web site at *http://consensus.nih.gov.*

Please Note: The NIH has instituted security measures to ensure the safety of NIH employees, guests, and property. All visitors must be prepared to show a photo ID upon request. Visitors may be required to pass through a metal detector and have bags, backpacks, or purses inspected or x-rayed as they enter NIH buildings. For more information about the security measures at NIH, please visit the Web site at *http://www.nih.gov/about/visitorsecurity.htm.*

Dated: January 7, 2010.

Raynard S. Kington,

Deputy Director, National Institutes of Health.

[FR Doc. 2010–672 Filed 1–14–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

NIH State-of-the-Science Conference: Enhancing Use and Quality of Colorectal Cancer Screening

Notice is hereby given by the National Institutes of Health (NIH) of the "NIH State-of-the-Science Conference: Enhancing Use and Quality of Colorectal Cancer Screening" to be held February 2–4, 2010, in the NIH Natcher Conference Center, 45 Center Drive, Bethesda, Maryland 20892. The conference will begin at 8:30 a.m. on February 2 and 3, and at 9 a.m. on February 4, and will be open to the public.

Colorectal cancer is the second-leading cause of cancer-related deaths in the United States. Approximately 50,000 people in the United States are expected to die from colorectal cancer in 2009. Colonic polyps, abnormal growths of tissue on the inner lining of the colon, are relatively common findings in men and women 50 years and older. Most of these growths are not cancerous, but one type of polyp, known as an adenoma, can develop into colorectal cancer. Screening tests for colorectal cancer generally either seek to identify and remove adenomas or examine the stool for signs of early cancer in people who have no symptoms. A range of colorectal cancer screening tests is available in the United States. The U.S. Preventive Services Task Force currently recommends that average-risk adults aged 50 to 75 years undergo screening for colorectal cancer with annual fecal occult blood testing, sigmoidoscopy (internal examination of the lower part of the large intestine) every 5 years, or colonoscopy (internal examination of the entire large intestine) every 10 years. Additional tests that may be used for colorectal cancer screening include computed tomography (CT) colonography and fecal DNA testing.

Although colorectal cancer is an important cause of mortality in the United States, screening for this disease is currently underutilized among eligible individuals. Despite evidence supporting the value of screening, in 2005 only 50 percent of U.S. adults aged 50 and older had been screened according to guidelines. Rates of screening for colorectal cancer are consistently lower than those for other common cancers, particularly breast and cervical cancer. Reasons for this disparity are complex. Unlike most other preventive services, in colorectal cancer screening there are multiple test options from which to choose, and patients and providers may have varying preferences for or access to the tests. Successful completion of colorectal cancer screening requires effort on the part of the patient to obtain stool samples for testing or to clean the colon in preparation for endoscopic examination. Test options may also differ in cost and availability for a given community. Patient, provider, and healthcare system characteristics may each play a unique role in influencing the use and quality of colorectal cancer screening.

Adding to the complexity of this issue, colorectal cancer screening may be overused or misused in certain situations. Despite uncertainty regarding the benefit of removing small polyps, many people undergoing sigmoidoscopy or colonoscopy have all identified growths removed. This may put them at increased risk for possible complications from these procedures, which can include rectal bleeding or colonic perforation (a tear in the wall of the intestine that can cause a serious abdominal infection). In addition, follow-up testing of individuals who have previously had polyps removed may occur more frequently than available evidence supports, which again may put people at risk for complications and have both cost and

capacity implications for the healthcare system.

To provide healthcare providers, patients, policy makers, and the general public with a comprehensive assessment of how colorectal cancer screening and surveillance are most appropriately implemented, monitored, and evaluated for average-risk populations in the United States, the National Cancer Institute and the Office of Medical Applications of Research of the National Institutes of Health will convene a State-of-the-Science Conference February 2–4, 2010, to assess the available scientific evidence related to the following questions:

- What are the recent trends in the use and quality of colorectal cancer screening?
- What factors influence the use of colorectal cancer screening?
- Which strategies are effective in increasing the appropriate use of colorectal cancer screening and follow-up?
- What are the current and projected capacities to deliver colorectal cancer screening and surveillance at the population level?
- What are the effective approaches for monitoring the use and quality of colorectal cancer screening?
- What research is needed to make the most progress and have the greatest public health impact in promoting the appropriate use of colorectal cancer screening?

An impartial, independent panel will be charged with reviewing the available published literature in advance of the conference, including a systematic literature review commissioned through the Agency for Healthcare Research and Quality. The first day and a half of the conference will consist of presentations by expert researchers and practitioners and open public discussions. On Thursday, February 4, the panel will present a statement of its collective assessment of the evidence to answer each of the questions above. The panel will also hold a press telebriefing to address questions from the media. The draft statement will be published online later that day, and the final version will be released approximately six weeks later. The primary sponsors of this meeting are the NIH National Cancer Institute and the NIH Office of Medical Applications of Research.

Advance information about the conference and conference registration materials may be obtained from the NIH Consensus Development Program Information Center by calling 888–644–2667 or by sending e-mail to *consensus@mail.nih.gov.* The Information Center's mailing address is P.O. Box 2577, Kensington, Maryland 20891. Registration information is also available on the NIH Consensus Development Program Web site at *http://consensus.nih.gov.*

Please Note: The NIH has instituted security measures to ensure the safety of employees, guests, and property. All visitors must be prepared to show a photo ID upon request. Visitors may be required to pass through a metal detector and have bags, backpacks, or purses inspected or x-rayed as they enter NIH buildings. For more information about the security measures at NIH, please visit the Web site at *http://www.nih.gov/about/visitorsecurity.htm.*

Dated: January 6, 2010.

Raynard S. Kington,

Deputy Director, National Institutes of Health.

[FR Doc. 2010–666 Filed 1–14–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Moving Into the Future—New Dimensions and Strategies for Women's Health Research for the National Institutes of Health; Notice

Notice is hereby given that the Office of Research on Women's Health (ORWH), Office of the Director, National Institutes of Health, Department of Health and Human Services, in collaboration with the Emory University School of Medicine will convene a public hearing and scientific workshop February 16–17, 2010, at Emory University School of Medicine, James B. Williams Medical Education Building, Atlanta, Georgia.

Purpose of the Meeting

With rapid advances in science and wider global understanding of women's health and sex/gender contributions to well-being and disease, the purpose of the meeting is to ensure that NIH continues to support cutting edge women's health research that is based upon the most advanced techniques and methodologies. The meeting format is designed to promote an interactive discussion involving leading scientists, advocacy groups, public policy experts, health care providers, and the general public. With a focus upon women's cardiovascular health, the meeting at Emory University School of Medicine is convened to assist the ORWH and the NIH to move into the next decade of women's health research.

As science and technology advance and fields such as computational biology demonstrate the power of interdisciplinary research, it remains critical for sex and gender factors to be integrated into broad experimental methodologies and scientific approaches across the lifespan. Biomedical and behavioral research are also necessary to understand how cultural, ethnic, and racial differences influence the causes, diagnosis, progression, treatment, and outcome of disease among different populations, including women of diverse geographic locations and socioeconomic backgrounds. Furthermore, health differences among diverse populations of women remain a critical area in need of continued focus and attention.

The ORWH challenges all meeting attendees to assist the NIH in defining the women's health research agenda of the future by thinking beyond traditional women's health issues. With a special focus upon women's cardiovascular health, ORWH and NIH ask meeting participants to consider creative strategies that need to be employed to identify areas of research that are best poised for advancement, identify innovative ways in which persistent issues of health and disease can be addressed, and explore new horizons of scientific concepts and investigative approaches. Attention also needs to be paid to new areas of science application, new technologies, and continuing basic science investigations. Clinical questions that are not currently the focus of research priorities need to be considered to ensure that women's health research is optimally served and that the ORWH can continue to provide leadership for the benefit of women's health, nationally and internationally.

Meeting Format

The meeting will consist of public testimony, scientific panels and seven concurrent scientific working groups. Specifically, on February 16, individuals representing a full spectrum of organizations interested in biomedical and behavioral research on women's health issues will have an opportunity to provide public testimony from 10:30 a.m.–12 p.m. The seven concurrent scientific working groups meeting on February 16 in afternoon sessions will focus on a range of women's cardiovascular health issues, including the following: pregnancy and cardiovascular disease research and ethical considerations; cardiovascular disease in elderly and frail elderly women—optimal management and research; microvascular disease, biomechanics, and application of new technologies to cardiovascular research; stem cells, progenitor cells, and the vista of cardiovascular regenerative

medicine; unmet needs in diagnostic testing for women with cardiovascular disease; issues of cardiovascular prevention across the lifespan with an emphasis on gender and underserved populations; and women's careers in the biomedical sciences. On February 17, the morning session will be devoted to reports by the working group co-chairs regarding the recommendations emerging from working group deliberations on the previous day. The meeting will adjourn at 12:15 p.m. on February 17.

Public Testimony

ORWH invites individuals with an interest in research related to women's health to provide written and/or oral testimony on these topics and/or on issues related to the sustained advancement of women in various biomedical careers. Due to time constraints, only one representative from an organization or professional specialty group may submit oral testimony. Individuals not representing an organized entity but a personal point of view are similarly invited to present written and/or oral testimony. A letter of intent to present oral testimony is necessary and should be sent electronically to *http://www.orwhmeetings.com/movingintothefuture/Emory* or by mail to Ms. Jory Barone, Educational Services, Inc., 4350 East West Highway, Suite 1100, Bethesda, MD 20814, no later than midnight February 1, 2010. The date of receipt of the communication will establish the order of those selected to give oral testimony at the February meeting.

Those wishing to present oral testimony are also asked to submit a written form of their testimony that is limited to a maximum of 10 pages, double spaced, 12-point font, and should include a brief description of the organization. Electronic submission to the above Web site is preferred; however, for those who do not have access to electronic means, written testimony, bound by the restrictions previously noted and postmarked no later than February 1, 2010, can be mailed to Ms. Jory Barone at the above address. All written presentations must meet the established page limitations. Submissions exceeding this limit will not be accepted and will be returned. Oral testimony of this material at the meeting will be limited to no more than 5–6 minutes in length.

Because of time constraints for oral testimony, testifiers may not be able to present the complete information as it is contained in their written form submitted for inclusion in the public record for the meeting. Therefore, testifiers are requested to summarize the major points of emphasis from the written testimony not to exceed 6 minutes of oral testimony. Those individuals and/or organizations who have indicated that they will present oral testimony at the meeting in Atlanta, will be notified prior to the meeting regarding the approximate time for their oral presentation.

Individuals and organizations wishing to provide written statements *only* should send a copy of their statements, electronically or by mail, to the above Web site or address by February 1, 2010. Written testimony received by that date will be made available at the February 16–17 meeting.

Logistics questions related to the meeting should be addressed to Ms. Jory Barone, *joryb@esi-dc.com* at ESI, while program-specific questions should be addressed to Dr. Nanette K. Wenger at the Emory University School of Medicine, Atlanta, 404–616–4420, *nwenger@emory.edu.*

The resulting report to the ORWH and the NIH will ensure that women's health research in the coming decade continues to support a vigorous research agenda incorporating the latest advances in technology and cutting edge science in support of women's cardiovascular health.

Dated: January 8, 2010.

Francis S. Collins,

Director, National Institutes of Health.

[FR Doc. 2010–665 Filed 1–14–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Advisory Committee on Heritable Disorders in Newborns and Children

AGENCY: Health Resources and Services Administration (HRSA), HHS.

ACTION: Notice of Request for Nominations.

SUMMARY: The Health Resources and Services Administration (HRSA) is requesting nominations to fill three (3) vacancies on the Secretary's Advisory Committee on Heritable Disorders in Newborns and Children.

Authority: Section 1111 of the Public Health Service (PHS) Act, 42 U.S.C. 300b–10, as amended in the Newborn Screening Saves Lives Act of 2008 (Act). The Committee is governed by the provisions of Public Law 92–463, as amended (5 U.S.C. App. 2), and 41 CFR Part 102–3, which sets forth standards for the formation and use of advisory committees.

DATES: The agency must receive nominations on or before May 1, 2010.

ADDRESSES: All nominations are to be submitted to Michele A. Lloyd-Puryear, M.D., PhD, Designated Federal Official and Executive Secretary, Advisory Committee on Heritable Disorders in Newborns and Children, and Chief, Genetic Services Branch, Maternal and Child Health Bureau, Health Resources and Services Administration, Room 18A–19, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857. E-mailed nominations can be sent to *Screening@hrsa.hhs.gov.*

FOR FURTHER INFORMATION CONTACT: Ms. Alaina Harris, Genetic Services Branch, Maternal and Child Health Bureau, HRSA, at *aharris@hrsa.gov* or (301) 443–1080. A copy of the Committee Charter and list of the current membership can be obtained by contacting Ms. Harris or by accessing the Advisory Committee Web site at *http://hrsa.gov/heritabledisorderscommittee.*

SUPPLEMENTARY INFORMATION: The Secretary's ACHDNC is chartered under section 1111 of the Public Health Service (PHS) Act, 42 U.S.C. 300b–10, as amended by the Newborn Screening Saves Lives Act 2008 (Act). The Committee was established in February 2003 to advise the Secretary of the U.S. Department of Health and Human Services. The Committee is governed by the provisions of Public Law 92–463, as amended (5 U.S.C. App. 2), and 41 CFR Part 102–3, which sets forth standards for the formation and use of advisory committees. The ACHDNC is directed to review and report regularly on newborn and childhood screening practices for heritable disorders and to recommend improvements in the national newborn and childhood heritable screening programs.

The Committee is established to advise and guide the Secretary regarding the most appropriate application of universal newborn screening tests, technologies, policies, guidelines and programs for effectively reducing morbidity and mortality in newborns and children having or at risk for heritable disorders. In addition, the Committee provides advice and recommendations to the Secretary concerning the grants and projects authorized under section 1109 and technical information to develop policies and priorities for this Program that will enhance the ability of the State and local health agencies to provide for newborn and child screening, counseling and health care services for

newborns and children having or at risk for heritable disorders.

Specifically, HRSA is requesting nominations for three (3) voting members to serve on the Committee. Members shall be selected from medical, technical, public health or scientific professionals with special expertise in the field of heritable disorders or in providing screening, counseling, testing or specialty services for newborns and children at risk for heritable disorders and from members of the public having special expertise about or concern with heritable disorders.

The individuals selected for appointment to the Committee can be invited to serve for overlapping terms of up to 4 years. However, any member appointed to fill a vacancy of an unexpired term shall be appointed for the remainder of such term. Members may serve after the expiration of their term until their successors have taken office. Terms of more than 2 years are contingent upon the renewal of the Committee by appropriate action prior to its expiration. Members who are not Federal employees will receive a stipend for each day they are engaged in the performance of their duties as members of the Committee. Members shall receive per diem and travel expenses as authorized by section 5 U.S.C. 5703 for persons employed intermittently in Government service. Members who are officers or employees of the United States Government shall not receive compensation for service on the Committee. Nominees will be invited to serve beginning from October 1, 2010.

Nominations should be typewritten. The following information should be included in the package of material submitted for each individual being nominated for consideration: (1) A letter of nomination that clearly states the name and affiliation of the nominee, the basis for the nomination (*i.e.,* specific attributes which qualify the nominee for service in this capacity), and a statement that the nominee is willing to serve as a member of the Committee and appears to have no conflict of interest that would preclude the Committee membership—potential candidates will be asked to provide detailed information concerning consultancies, research grants, or contracts to permit evaluation of possible sources of conflicts of interest; (2) the nominator's name, address, and daytime telephone number, and the home/or work address, telephone number, and e-mail address of the individual being nominated; and (3) a current copy of the nominee's curriculum vitae. Please submit nominations no later than May 1, 2010.

To the extent practicable, members of the Committee should have expertise in dealing with heritable disorders and genetic diseases that affect the racial and ethnic and geographical diversity of newborns served by the State newborn screening programs. The Department of Health and Human Services will ensure that the membership of the Committee reflects an equitable geographical and gender distribution, provided that the effectiveness of the Committee would not be impaired. Appointments shall be made without discrimination on the basis of age, ethnicity, gender, sexual orientation, and cultural, religious, or socioeconomic status.

Dated: January 11, 2010.

Mary K. Wakefield,

Administrator.

[FR Doc. 2010–671 Filed 1–14–10; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2009–0158]

Homeland Security Science and Technology Advisory Committee

AGENCY: Science and Technology Directorate, DHS.

ACTION: Committee management; Notice of closed Federal Advisory Committee meeting.

SUMMARY: The Homeland Security Science and Technology Advisory Committee will meet January 26–28, 2010, at the Department of Homeland Security, 1120 Vermont Ave., NW., Washington, DC. This meeting will be closed to the public.

DATES: The Homeland Security Science and Technology Advisory Committee will meet January 26, 2010, from 9 a.m. to 5 p.m., January 27, 2010, from 9 a.m. to 5 p.m. and on January 28, 2010, from 8 a.m. to 11 a.m.

ADDRESSES: The meeting will be held at the Department of Homeland Security, 1120 Vermont Ave., NW., Washington, DC. Requests to have written material distributed to each member of the committee prior to the meeting should reach the contact person at the address below by Friday, January 8, 2010. Send written material to Ms. Tiwanda Burse, Science and Technology Directorate, Department of Homeland Security, 245 Murray Lane, Bldg. 410, Washington, DC 20528. Comments must be identified by DHS–2009–0158 and may be submitted by *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: HSSTAC@dhs.gov.* Include the docket number in the subject line of the message.
- *Fax:* 202–254–6173.
- *Mail:* Ms. Tiwanda Burse, Science and Technology Directorate, Department of Homeland Security, 245 Murray Lane, Bldg. 410, Washington, DC 20528.

Instructions: All submissions received must include the words "Department of Homeland Security" and the docket number for this action. Comments received will be posted without alteration at *http://www.regulations.gov*, including any personal information provided.

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

FOR FURTHER INFORMATION CONTACT: Ms. Tiwanda Burse, Science and Technology Directorate, Department of Homeland Security, 245 Murray Lane, Bldg. 410, Washington, DC 20528, 202–254–6877.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App. (Pub. L. 92–463).

At this meeting, the Committee will receive sensitive and classified (Top Secret-level) briefings and presentations regarding relationships between Science & Technology and selected Defense related topics concerning matters sensitive to homeland security.

Basis for Closure: In accordance with Section 10(d) of the Federal Advisory Committee Act, it has been determined that the Homeland Security Science and Technology Advisory Committee meeting concerns sensitive Homeland Security information and classified matters within the meaning of 5 U.S.C. 552b(c)(1) and (c)(9)(B) which, if prematurely disclosed, would significantly jeopardize national security and frustrate implementation of proposed agency actions and that, accordingly, the portion of the meeting that concerns these issues will be closed to the public.

Dated: January 7, 2010.

Tara O'Toole,

Under Secretary for Science and Technology.

[FR Doc. 2010–737 Filed 1–14–10; 8:45 am]

BILLING CODE 9910–9F–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Extension of Agency Information Collection Activity Under OMB Review: Transportation Security Officer (TSO) Medical Questionnaire

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 1652–0032, abstracted below to the Office of Management and Budget (OMB) for review and approval of an extension of the currently approved collection under 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 October 26, 2009, 74 FR 55060. The collection involves using a questionnaire to collect medical information from candidates for the job of Transportation Security Officer (TSO) to confirm their qualifications to perform TSO duties pursuant to sec. 111 of the Aviation and Transportation Security Act (ATSA).

DATES: Send your comments by February 16, 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–40, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6040; 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: Transportation Security Officer (TSO) Medical Questionnaire.

Type of Request: Extension of a currently approved collection.

OMB Control Number: 1652–0032.

Forms(s): Transportation Security Officer Medical Questionnaire, Cancer Further Evaluation, Cardiac Surgery Further Evaluation, Cardiac Further Evaluation, Diabetes Further Evaluation, Drug or Alcohol Use Further Evaluation, General Medical Further Evaluation, Hearing Further Evaluation, Hepatitis Further Evaluation, Hernia Further Evaluation, HIV Further Evaluation, Orthopedic Further Evaluation, Pacemaker Further Evaluation, Palmar Sensation Further Evaluation, Respiratory Further Evaluation, Seizure Further Evaluation, Tuberculosis Further Evaluation, Vision Further Evaluation, Vital Signs Further Evaluation, Mental Health Further Evaluation.

Affected Public: Applicants for employment as a Transportation Security Officer with TSA.

Abstract: TSA currently collects relevant medical information from Transportation Security Officer (TSO) candidates for the purpose of assessing whether the candidates meet the medical qualification standards the agency has established pursuant to ATSA. TSA collects this information through a medical questionnaire completed by TSO candidates and, in certain cases, further evaluation forms completed by TSO candidates' health care providers. The medical questionnaire and further evaluation forms evaluate a candidate's physical and medical qualifications to be a TSO, including visual and aural acuity, and physical coordination and motor skills. Only TSO candidates who successfully complete the hiring process up to the medical evaluation are required to complete the medical questionnaire. Candidates who disclose certain medical conditions on the medical questionnaire may be asked to have their health care provider complete one or more further evaluation forms. Historical data indicate that approximately 30 percent of candidates reaching the medical evaluation will be required to complete one or more further evaluation forms.

TSA has a variety of further evaluation forms, each of which pertain to particular body systems and medical conditions, including cardiac, orthopedic, endocrine, vitals, and others. The type of further evaluation form(s) completed by a candidate's health care provider depend(s) on the condition(s) revealed during a candidate's initial medical evaluation and disclosed on the initial medical questionnaire. For example, a candidate who discloses a previous back injury may be required to have his/her health care provider complete a further evaluation form to enable the agency to better evaluate whether the candidate can perform the TSO job safely and efficiently without excessive risk of accident or injury to himself/herself or others. A TSA contractor facilitates receipt and processing of all forms.

Number of Respondents: 26,565 candidates and health care providers. This number includes 14,750 candidates completing the TSO Medical questionnaire and 4,425 candidates and 7,390 health care providers, nationwide, completing the further evaluation form(s).

Estimated Annual Burden Hours: After further evaluation, TSA has decreased the annual burden estimate due to the decrease in hiring over the past three years. The estimated annual burden is 12,912 hours.

Issued in Arlington, Virginia, on January 8, 2010.

Joanna Johnson,

TSA Paperwork Reduction Act Officer, Office of Information Technology.

[FR Doc. 2010–631 Filed 1–14–10; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2009–0701]

Interim Policy for the Sharing of Information Collected by the Coast Guard Nationwide Automatic Identification System

AGENCY: Coast Guard, DHS.

ACTION: Notice of policy and request for comments.

SUMMARY: The Coast Guard has developed an interim policy for the access and sharing of information collected by the Coast Guard Nationwide Automatic Identification System (NAIS). The Coast Guard is also seeking comments on the applicability and levels of sharing of information collected by the NAIS, the definition of historical NAIS information, and any commercial or security sensitivities with respect to sharing NAIS information in order to assist us in the development of the final policy on NAIS information sharing. This policy would serve as guidance for Coast Guard program managers and field units regarding the sharing of information collected by the NAIS with foreign governments, Federal, State, local, and Indian tribal governments, and non-government entities.

DATES: Comments and related material must either be submitted to our online docket via *http://www.regulations.gov* on or before February 16, 2010, or reach the Docket Management Facility by that date.

ADDRESSES: This notice and the interim policy are available in the docket and can be viewed by going to *http://www.regulations.gov*, inserting USCG–2009–0701 in the "Keyword" box, and then clicking "Search." You may submit comments identified by docket number USCG–2009–0701 using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov*.

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. *See* the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or e-mail Irene Hoffman Moffatt, Maritime Domain Awareness and Information Sharing Staff (CG–51M), U.S. Coast Guard; telephone 202–372–2642, e-mail *irene.a.hoffman-moffatt@uscg.mil*. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to submit comments and related material on the sharing of information collected by the NAIS. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided.

Submitting comments: If you submit a comment, please include the docket number for this notice (USCG–2009–0701) and provide a reason for each suggestion or recommendation. You may submit your comments and material online, or by fax, mail or hand delivery, but please use only one of these means. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov*, click on the "submit a comment" box, which will then become highlighted in blue. In the "Document Type" drop-down menu, select "Notices" and insert "USCG–2009–0701" in the "Keyword" box. Click "Search," then click on the balloon shape in the "Actions" column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period.

Viewing the comments: To view the comments, go to *http://www.regulations.gov*, click on the "read comments" box, which will then become highlighted in blue. In the "Keyword" box insert "USCG–2009–0701" and click "Search." Click the "Open Docket Folder" in the "Actions" column. If you do not have access to the internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act: Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act, system of records notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Background and Purpose

The Coast Guard has developed a policy that will serve as guidance for Coast Guard program managers and field units regarding the sharing of information collected by the NAIS with foreign governments, Federal, State, local, and Indian tribal governments, and non-government entities. Sharing information collected by the NAIS would improve navigation safety, enhance the ability to identify and track vessels, heighten our over-all Maritime Domain Awareness (the effective understanding of anything associated with the global maritime environment that could affect the security, safety, economy, or environment of the U.S.), address threats to maritime transportation safety and security, facilitate commerce, and enhance environmental protection efforts.

The Automatic Identification System (AIS) was developed to enhance navigation safety through collision avoidance, waterways management, and surveillance. It is a maritime digital broadcast technology that continually transmits and receives voiceless exchange of vessel data. The AIS technology and communication protocol have been adopted by the International Maritime Organization as a global standard for ship-to-ship, ship-to-shore, and shore-to-ship communication of navigation information. In accordance with section 80.393 of the Rules and Regulations of the Federal Communications Commission (47 CFR 80.393), "Automatic Identification Systems (AIS) are a maritime broadcast service." As a broadcast system (where communications are intended to be

received by the public), there is no expectation of privacy of any transmitted position, binary, or safety related messages, or any information transmitted on AIS. In response to the Maritime Transportation Security Act of 2002, the Coast Guard has developed a two-way maritime data communication system based on AIS technology, which is referred to as the NAIS.

Levels of Information Sharing

The following three levels pertain to information collected by the Coast Guard NAIS.

The First level (Level A) is unfiltered (real-time) information collected by the NAIS that is less than 12 hours from transmission. Level A information may be shared with U.S. or foreign governments for legitimate internal government use (i.e., law enforcement, maritime safety, defense, and security purposes). The final policy would clarify that this information should be handled in accordance with Department of Homeland Security policies concerning sensitive but unclassified information, including by marking this information "For Official Use Only" (FOUO), or any successor controlled unclassified information marking and handling requirements subsequently implemented by the Department. Level A information would be handled as FOUO, or otherwise in accordance with another controlled unclassified information designation approved by the Department, due to the potential commercial sensitivities of the information collected by the NAIS and the unfiltered, embedded addressed and encrypted information, the release of which may pose a security risk.

The Second level (Level B) is filtered (real-time) information collected by the NAIS that is less than 12 hours from transmission. Level B information may be shared with foreign governments or U.S. Federal, State, local, and Indian tribal governments, and with non-government entities that are contractually supporting a Federal government agency's operations or research and development efforts, Coast Guard validated port partners, or non-governmental organizations with which the U.S. has an established or formalized relationship (e.g., port authorities, pilot associations, local law enforcement agencies, etc.). Level B may filter out encrypted and addressed information as appropriate and will be filtered as the NAIS system filtering capabilities become available. As with Level A information, the final policy would clarify that this information should also be handled as FOUO or other appropriate designation due to the potential (but unverified) commercial sensitivities of the information collected by the NAIS and, if applicable, the embedded addressed and encrypted information, the release of which may pose a security risk.

The Third level (Level C) is information collected by the NAIS that is more than 12 hours from transmission. This information should be considered historical and no longer needing to be handled as FOUO. Requests for filtered or unfiltered historical information would be processed in accordance with the Freedom of Information Act, 5 U.S.C. 552.

In an effort to continue to enhance navigation safety and security, and to protect commercial and proprietary interests, this information may not be used for purposes other than those intended for the disclosure as approved. Foreign governments, Federal, State, local and Indian tribal governments, and non-government entities shall not retransmit or redistribute the information stream in any form other than those intended for the disclosure as approved, shall not charge a fee for its usage, and will be required to execute documentation imposing restrictions on the use of information collected by the NAIS. Any provision of information collected by the NAIS to foreign governments will be coordinated with and through the Department of State, as needed.

Implementation of the final policy would be subject to NAIS system capability, especially with respect to evolving capabilities to filter NAIS information.

Request for Comments

We request your general comments on the applicability and levels of the sharing of information collected by the NAIS, the definition of historical NAIS information, and any commercial or security sensitivities with respect to sharing of information collected by the NAIS.

We also seek comments on any or all of following specific questions on the development of the NAIS final policy:

1. How might providing real-time, near real-time, or historical NAIS information to the public impact maritime commerce?

2. What would be the impact of providing this information, if any, on the following?

a. Safety of ships and passengers or crew,

b. Security of ships and their cargo,

c. Economic advantage or disadvantage to commercial stakeholders,

d. Environmental impact on extractable resources or coastal activities.

3. Is information collected by the NAIS considered sensitive?

a. Is real-time or near real-time information collected by the NAIS viewed differently than historical NAIS information, and if so, how?

b. Does the sharing of information collected by the NAIS generate concern about unfair commercial advantage? If so, for which segments of the industry is this a concern?

c. Is there a timeframe within which real-time or historical information collected by the NAIS is considered sensitive or is no longer considered sensitive?

d. Given that ships last for decades and that their capabilities and capacities are relatively stable, is there a concern that historical NAIS information might be analyzed to derive a competitive advantage?

4. What controls on sharing real-time, near real-time, or historical information collected by the NAIS with the public are suitable?

a. Who should receive each type of NAIS information?

b. What are appropriate uses of information collected by the NAIS?

c. Do message types matter?

d. Should addressed messages be handled differently from broadcast messages? Do addressed messages contain information significant to understanding maritime activity? Should addressed messages be shared with the public?

Written comments and responses to the above questions will be added to the docket number for this notice (USCG–2009–0701). The Coast Guard intends to review and analyze all comments received in order to develop the final policy for the sharing of information collected by the NAIS.

This notice is issued under authority of 5 U.S.C. 552 and 46 U.S.C. 70114.

Dated: January 8, 2010.

Dana A. Goward,

Director, Assessment, Integration and Risk Management, U.S. Coast Guard.

[FR Doc. 2010–632 Filed 1–14–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5375–N–02]

Federal Property Suitable as Facilities To Assist the Homeless

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

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

DATES: *Effective Date: January 15, 2010.*

FOR FURTHER INFORMATION CONTACT: Kathy Ezzell, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7262, Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565, (these telephone numbers are not toll-free), or call the toll-free Title V information line at 800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988 court order in *National Coalition for the Homeless* v. *Veterans Administration*, No. 88–2503–OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: January 7, 2009.

Mark R. Johnston,

Deputy Assistant Secretary for Special Needs.

[FR Doc. 2010–346 Filed 1–14–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS-R7-MB-2010-N007] [70151-1231-BS51-L6]

Information Collection Sent to the Office of Management and Budget (OMB) for Approval; OMB Control Number 1018-0124; Alaska Migratory Bird Subsistence Harvest Household Survey

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (Fish and Wildlife Service) have sent an Information Collection Request (ICR) to OMB for review and approval. The ICR, which is summarized below, describes the nature of the collection and the estimated burden and cost. This ICR is scheduled to expire on January 31, 2010. We 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. However, under OMB regulations, we may continue to conduct or sponsor this information collection while it is pending at OMB.

DATES: You must send comments on or before February 16, 2010.

ADDRESSES: Send your comments and suggestions on this information collection to the Desk Officer for the Department of the Interior at OMB-OIRA at (202) 395-5806 (fax) or OIRA_DOCKET@OMB.eop.gov (e-mail). Please provide a copy of your comments to Hope Grey, Information Collection Clearance Officer, Fish and Wildlife Service, MS 222-ARLSQ, 4401 North Fairfax Drive, Arlington, VA 22203 (mail) or hope_grey@fws.gov (e-mail).

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Hope Grey by mail or e-mail (see ADDRESSES) or by telephone at (703) 358–2482.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 1018-0124.

Title: Alaska Migratory Bird Subsistence Harvest Household Survey.

Service Form Number(s): 3-2380, 3-2381-1, 3-2381-2, 3-2381-3, and 3-2381-4.

Type of Request: Revision of a currently approved collection.

Affected Public: Households within subsistence eligible areas of Alaska (Alaska Peninsula, Kodiak Archipelago, the Aleutian Islands, or in areas north and west of the Alaska Range).

Respondent's Obligation: Voluntary.

Frequency of Collection: Annually for Tracking Sheet and Household Consent; three times annually for Harvest Report.

Activity	Number of annual respondents	Number of annual responses	Completion time per response	Annual burden hours
3-2380—Tracking Sheet and Household Consent	2,829	2,829	5 minutes	236
3-2381-1 thru 3-2381-4—Harvest Report (three seasonal sheets).	2,300	6,900	5 minutes	575
Totals	5,129	9,729		811

Abstract: The Migratory Bird Treaty Act of 1918 (16 U.S.C. 703-712) and the Fish and Wildlife Act of 1956 (16 U.S.C. 742d) designate the Department of the Interior as the key agency responsible for managing migratory bird populations that frequent the United States and for setting harvest regulations that allow for the conservation of those populations. These responsibilities include gathering accurate geographical and temporal data on various characteristics of migratory bird harvest. We use harvest data to review regulation proposals and to issue harvest regulations.

The Migratory Bird Treaty Act Protocol Amendment (1995) (Amendment) provides for the customary and traditional use of migratory birds and their eggs for subsistence use by indigenous inhabitants of Alaska. The Amendment states that its intent is not to cause significant increases in the take of species of migratory birds relative to their continental population sizes. A submittal letter from the Department of State to the White House (May 20, 1996) accompanied the Amendment and specified the need for harvest monitoring. The submittal letter stated that the Service, the Alaska Department of Fish and Game (ADFG), and Alaska Native organizations would collect harvest information cooperatively within the subsistence eligible areas. Harvest survey data help to ensure that customary and traditional subsistence uses of migratory birds and their eggs by indigenous inhabitants of Alaska do not significantly increase the take of species of migratory birds relative to their continental population sizes.

Between 1989 and 2004, we monitored subsistence harvest of migratory birds using annual household surveys in the Yukon-Kuskokwim Delta, which is the region of highest subsistence bird harvest in the State of Alaska. In 2004, we began monitoring subsistence harvest of migratory birds in subsistence eligible areas Statewide. The Statewide harvest assessment program helps to track trends and changes in levels of harvest. The harvest assessment program relies on collaboration among the Service, the ADFG, and a number of Alaska Native organizations.

We gather information on the annual subsistence harvest of 60 bird species/species categories (ducks, geese, swans, cranes, upland game birds, seabirds, shorebirds, and grebes and loons) in the subsistence eligible areas of Alaska. The survey covers 10 regions of Alaska, which are further divided in 29 subregions. We survey the regions and villages in a rotation schedule to accommodate budget constraints and to minimize respondent burden. The survey covers spring, summer, and fall harvest in most regions.

In collaboration with Alaska Native organizations, we hire local resident surveyors to collect the harvest information. The surveyors list all households in the villages to be surveyed and provide survey information and harvest report forms to randomly selected households that have agreed to participate in the survey. To ensure anonymity of harvest information, we identify households by a numeric code. The surveyor visits households three times during the survey year. At the first household visit, the surveyor explains the survey purposes and invites household participation. The surveyor returns at the end of the season of most harvest and at the end of the two other seasons combined to help the household complete the harvest report form.

We have revised the survey methods to streamline procedures and reduce respondent burden. We plan to use two forms for household participation:

• FWS Form 3-2380 (Tracking Sheet and Household Consent). The surveyor visits each household selected to participate in the survey to provide information on the objectives and to obtain household consent to participate. The surveyor uses this form to record consent and track subsequent visits for completion of harvest reports

• FWS Forms 3-2381-1, 3-2381-2, 3-2381-3, and 3-2381-4 (Harvest Report). The Harvest Report has drawings of bird species most commonly available for harvest in the different regions of Alaska with fields for writing down the numbers of birds and eggs taken. There are four versions of this form: Interior Alaska, North Slope, Southern Coastal Alaska, and Western Alaska. This form has a page for each season surveyed, and, on each page, there are fields for the household code, community name, harvest year, date of completion, and comments.

Comments: On July 6, 2009, we published in the **Federal Register** (74 FR 31970) a notice of our intent to request that OMB renew this ICR. In that notice, we solicited comments for 60 days, ending on September 4, 2009. We did not receive any comments in response to that notice.

We again invite comments concerning this information collection on:

• Whether or not the collection of information is necessary, including whether or not the information will have practical utility;

• The accuracy of our estimate of the burden for this collection of information;

• Ways to enhance the quality, utility, and clarity of the information to be collected; and

• Ways to minimize the burden of the collection of information on respondents.

Comments that you submit in response to this notice are a matter of public record. 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 OMB in your comment to withhold your personal identifying information from public review, we cannot guarantee that it will be done.

Dated: January 7, 2010.

Hope Grey,

Information Collection Clearance Officer, Fish and Wildlife Service.

[FR Doc. 2010–663 Filed 1–14–10; 8:45 am]

BILLING CODE 4310–55–S

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLAK920000–L14100000–BJ0000]

Notice of Filing of Plats of Survey; Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of filing of plats of survey.

SUMMARY: Notice of filing of plats of survey; Alaska.

DATES: The plat(s) of survey described below is scheduled to be officially filed in the Alaska State Office, Bureau of Land Management, Anchorage, Alaska, thirty (30) days from the date of publication in the **Federal Register**.

ADDRESSES: Bureau of Land Management, Alaska State Office; 222 W. 7th Ave., Stop 13; Anchorage, AK 99513–7599.

FOR FURTHER INFORMATION CONTACT: Michael H. Schoder, Chief Cadastral Surveyor for Alaska, Division of Cadastral Survey, telephone: 907–271–5481; fax: 907–271–4549; e-mail: *mschoder@blm.gov.*

SUPPLEMENTARY INFORMATION: This survey was executed at the request of the National Park Service, Alaska Region, and represents reacquired Federal Lands as part of a land exchange authorized by Public Law 105–317.

The lands surveyed are:

The plat(s) and field notes of U.S. Survey No. 13830, Alaska, a subdivision of a portion 1C and 1D, U.S. Survey No. 1249, the retracement of a portion of U.S. Survey No. 3414, the retracement and dependent resurvey of portions of U.S. Survey No. 13151 and an informational traverse of the apparent centerline of portions of the Chilkoot Trail, situated on the Taiya River approximately 4 miles northwesterly of Skagway, Alaska, within Tps. 25, 26 and 27 S., Rs. 59 and 60 E., Copper River Meridian.

We will place copies of the survey plat and field notes we describe in open files. They will be available to the public as a matter of information. Copies may be obtained from this office for a minimum recovery fee.

If BLM receives a protest against the survey, as shown on the plat, prior to the date of official filing, the filing will be stayed pending consideration of the protest. We will not officially file the plat until the day after we have accepted or dismissed all protests and they have become final, including decisions on appeals.

Authority: 43 U.S.C. chap. 3 sec. 53.

Dated: January 5, 2010.

Michael H. Schoder,

Chief Cadastral Surveyor.

[FR Doc. 2010–216 Filed 1–14–10; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS-R9-IA-2010-N006]
[96300-1671-0000-P5]

Issuance of Permits

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of issuance of permits.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), have issued the following permits to conduct certain activities with endangered species and/or marine mammals.

ADDRESSES: Documents and other information submitted with these applications are available for review, subject to the requirements of the

Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 212, Arlington, Virginia 22203; fax 703-358-2281.

FOR FURTHER INFORMATION CONTACT: Division of Management Authority, telephone 703-358-2104.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on the dates below, as authorized by the provisions of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and/or the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the Fish and Wildlife Service issued the requested permits subject to certain conditions set forth therein. For each permit for an endangered species, the Service found that (1) the application was filed in good faith, (2) the granted permit would not operate to the disadvantage of the endangered species, and (3) the granted permit would be consistent with the purposes and policy set forth in Section 2 of the Endangered Species Act of 1973, as amended.

ENDANGERED SPECIES

Permit number	Applicant	Receipt of application *Federal Register* notice	Permit issuance date
003005	Louisiana State University LSU Museum of Natural Science.	74 FR 47821; September 17, 2009	December 3, 2009
217648	U.S. Fish and Wildlife Service	74 FR 37240, July 28, 2009	December 8, 2009
222610	Atlanta-Fulton County Zoo	74 FR 46222, September 8, 2009	December 17, 2009
225871	Lorenzo J. Ferraro	74 FR 49017; September 25, 2009	November 16, 2009
228690	Jorge L. Medina	74 FR58977; November 16, 2009	January 6, 2010
229221	James C. Faith	74 FR 55062; October 26, 2009	November 27, 2009
230602	Edward D. Pylman	74 FR 58977; November 16, 2009	December 23, 2009
231522	Robert B. Spencer	74 FR 58977; November 16, 2009	December 17, 2009

MARINE MAMMALS

Permit number	Applicant	Receipt of application *Federal Register* notice	Permit issuance date
220876	Alaska Department of Fish and Game	74 FR 46222; September 8, 2009	December 22, 2009
227386	David E. Clapham, M.D., PH.D, Department of Cardiology Children's Hospital.	74 FR 58977; November 16, 2009	December 22, 2009

Dated: January 8, 2010.

Brenda Tapia,

Program Analyst, Branch of Permits, Division of Management Authority.

[FR Doc. 2010–735 Filed 1–14–10; 8:45 am]

BILLING CODE 4310–55–S

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS-R9-IA-2010-N005]
[96300-1671-0000-P5]

Receipt of Applications for Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permit.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications for permits to conduct certain activities with endangered species. The Endangered Species Act requires that we invite public comment on these permit applications.

DATES: Written data, comments or requests must be received by February 16, 2010.

ADDRESSES: Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents within 30 days of the date of publication of this notice to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 212, Arlington, Virginia 22203; fax 703-358-2281.

FOR FURTHER INFORMATION CONTACT: Division of Management Authority, telephone 703-358-2104.

SUPPLEMENTARY INFORMATION:

Endangered Species

The public is invited to comment on the following applications for a permit to conduct certain activities with endangered species. This notice is provided pursuant to Section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). Submit your written data, comments, or requests for copies of the complete applications to the address shown in **ADDRESSES**.

Applicant: Brigham and Woman's Hospital, Boston, MA, PRT-232608

The applicant requests a permit to acquire from Coriell Institute, Camden, NJ, in interstate commerce DNA and cell line samples from various threatened and endangered Primate species for the purpose of scientific research. This notification covers activities to be conducted by the applicant over a 5–year period.

Applicant: The San Diego Zoological Society, San Diego, CA, PRT-236991

The applicant requests a permit to export three male and four female captive-born L'hoest's guenon (*Cercopithecus lhoesti*) to the Royal Zoological Society of Scotland, Edinburgh, UK for the purpose of the enhancement of the survival of the species.

Applicant: Virginia Zoological Park, Norfolk, VA, PRT-237536

The applicant requests a permit to import two captive-born male Siamang (*Symphalangus syndactylus*) from the Port Lympne Wild Animal Park, Lympne, Hythe, Kent, UK for the purpose of enhancement of the survival of the species.

Applicant: George Carden Circus Intl., Inc., Springfield, MO, PRT-080831

The applicant requests the re-issuance of permits to re-export and re-import two female Asian elephants (*Elephas*

maximus) that were born in the wild to worldwide locations for the purpose of enhancement of the species through conservation education. The permit numbers and animals are: 080731, Jazz; 716917, Betty. This notification covers activities to be conducted by the applicant over a three-year period and the import of any potential progeny born while overseas.

Dated: January 8, 2010.

Brenda Tapia,

Senior Permit Biologist, Branch of Permits, Division of Management Authority.

[FR Doc. 2010–720 Filed 1–14– 10; 8:45 am]

BILLING CODE 4310–55–S

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Publication of Model Notices for Health Care Continuation Coverage Provided Pursuant to the Consolidated Omnibus Budget Reconciliation Act (COBRA) and Other Health Care Continuation Coverage, as Required by the American Recovery and Reinvestment Act of 2009 (ARRA), as Amended by the Department of Defense Appropriations Act, 2010, Notice

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Notice of the Availability of the Model Health Care Continuation Coverage Notices Required by ARRA, as amended.

SUMMARY: On December 19, 2009, President Obama signed the Department of Defense Appropriations Act, 2010 (Pub. L. 111–118), which extended the availability of the health care continuation coverage premium reduction provided for COBRA and other health care continuation coverage as required by the American Recovery and Reinvestment Act (ARRA) of 2009 (Pub. L. 111–5). ARRA, as amended, retained the requirement that the Secretary of Labor (the Secretary), in consultation with the Secretaries of the Treasury and Health and Human Services, develop model notices. These models are for use by group health plans and other entities that, pursuant to ARRA, as amended, must provide notices of the availability of premium reductions and additional election periods for health care continuation coverage. This document announces the availability of the model health care continuation coverage notices required by ARRA, as amended.

FOR FURTHER INFORMATION CONTACT: Kevin Horahan or Mark Connor, Office of Health Plan Standards and Compliance Assistance, Employee Benefits Security Administration, (202) 693–8335. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

I. Background

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) created the health care continuation coverage provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), the Internal Revenue Code (Code), and the Public Health Service Act (PHS Act). These provisions are commonly referred to as the "COBRA continuation provisions," and the continuation coverage that they mandate is commonly referred to as "COBRA continuation coverage." Group health plans subject to the Federal COBRA continuation provisions are subject to ARRA's premium reduction provisions and notice requirements. The Federal COBRA continuation coverage provisions do not apply to group health plans sponsored by employers with fewer than 20 employees. Many States require health insurance issuers that provide group health insurance coverage to plans not subject to the COBRA continuation provisions to provide comparable continuation coverage. Such continuation coverage provided pursuant to State law is also subject to ARRA's premium reduction provisions and notice requirements.

II. Description of the Model Notices

a. In General

ARRA mandates the provision of certain notices. Each of these notices must include: a prominent description of the availability of the premium reduction, including any conditions on the entitlement; a model form to request treatment as an "Assistance Eligible Individual";[1] the name, address, and telephone number of the plan administrator (and any other person with information about the premium reduction); a description of the obligation of individuals paying reduced premiums who become eligible for other coverage to notify the plan; and (if applicable) a description of the opportunity to switch coverage options.

The Department of Labor (the Department) created these model notices to cover an array of situations in order to deal with the complexity of the various scenarios facing dislocated workers and their families. In an effort to ensure that the notices include all of the information required under ARRA, as amended, while minimizing the burden imposed on group health plans and issuers, the Department has created several packages. As with those developed by the Department originally under ARRA, each of the new packages is designed for a particular group of qualified beneficiaries, and contains all of the information needed to satisfy the content requirements for ARRA's amended notice provisions. The packages include the following disclosures:

- A summary of ARRA's premium reduction provisions.
- A form to request the premium reduction.
- A form for plans (or issuers) that permit qualified beneficiaries to switch coverage options to use to satisfy ARRA's requirement to give notice of this option.
- A form for an individual to use to satisfy ARRA's requirement to notify the plan (or issuer) that the individual is eligible for other group health plan coverage or Medicare.
- COBRA election forms and information, as appropriate.

b. General Notice

The amended General Notice is required to be sent by plans that are subject to the COBRA continuation provisions under Federal law.[2] It must include the information described above and be provided to ALL qualified beneficiaries, not just covered employees, who experience a qualifying event through February 28, 2010.[3]

The Department has updated the earlier version of this model notice so that it includes all of the information related to the premium reduction and

[1] In general, an "Assistance Eligible Individual" is an individual who has experienced an involuntary termination of employment that is a COBRA "qualifying event" at any time from September 1, 2008 through February 28, 2010 if he or she elects such COBRA coverage.

[2] Under ARRA, as amended, the Secretary generally is responsible for developing all of the model notices with the exception of model notices relating to Temporary Continuation Coverage under 5 U.S.C. 8905a, which is the responsibility of the Office of Personnel Management (OPM). In developing the original ARRA model notices, the Department was required to, and did, consult with the Departments of the Treasury and Health and Human Services, OPM, the National Association of Insurance Commissioners, and plan administrators and other entities responsible for providing COBRA continuation coverage. This set of models is an update of the originals and was created in consultation with staff at the Departments of the Treasury and Health and Human Services.

[3] In the event of a qualifying event that occurs prior to the 2010 DOD Act's December 19, 2009 date of enactment, this notice need not be provided to the extent that proper notice has already been provided. However, in cases where the qualifying event was a termination of employment, the Premium Assistance Extension Notice may be used to satisfy the statutory requirement to notify individuals of their new rights under ARRA, as amended.

other rights and obligations under ARRA, as amended. This model also includes all of the information required in an election notice required pursuant to the Department's final COBRA notice regulations under 29 CFR 2590.606–4(b).[4] Using this model to provide notice to individuals who have experienced any qualifying event from September 1, 2008 through February 28, 2010 will satisfy the Department's existing requirements for the content of the COBRA election notice as well as those imposed by ARRA, as amended.

c. Alternative Notice

The amended Alternative Notice is required to be sent by issuers that offer group health insurance coverage that is subject to comparable continuation coverage requirements imposed by State law. The Alternative Notice must include the information described above and be provided to ALL qualified beneficiaries, not just covered employees, who have experienced a qualifying event through February 28, 2010.[5] The Department updated the earlier version of this model notice. However, because continuation coverage requirements vary among States it should be modified to reflect the requirements of the applicable State law. Issuers of group health insurance coverage subject to this notice requirement should feel free to use the model Alternative Notice or the model General Notice (as appropriate).

d. Premium Assistance Extension Notice

The Premium Assistance Extension Notice is required to be sent by plans and other entities that are subject to continuation of health coverage provisions under either Federal or State law. This notice serves several purposes. It serves as a notice of the extension of the premium assistance from nine to 15 months for individuals who were receiving premium assistance as of October 31, 2009. It also provides this information to individuals who became Assistance Eligible Individuals, or who experienced a qualifying event that was the termination of a covered employee's employment, between October 31, 2009 and December 19, 2009, but who were provided a notice that did not include the information required by ARRA, as amended by the Department of Defense Appropriations Act, 2010.[6] Notices for these individuals must be provided by February 17, 2010, which is 60 days from the December 19, 2009 date of enactment. Additionally, this notice may be used to notify individuals who are in a "transition period" of their new right to make a retroactive, reduced payment. The transition period is the first period of coverage for which the premium assistance would apply due to the extension from nine to 15 months. These individuals have received the full nine months of premium assistance required under ARRA and either did not make any payment for subsequent periods of coverage, made a payment of 35% (or any amount that is less than 100% of the full premium), or made a payment of the full premium otherwise required to maintain coverage absent the subsidy. The notice must be provided to these individuals within the first 60 days of their transition period. The Department has created a single model notice that can be used in any of the above circumstances.

[4] The 60-day period for electing COBRA continuation coverage is measured from when a complete notice is provided. ARRA provides that COBRA election notices provided for qualifying events that are related to a termination occurring during the effective dates of the premium reduction period are not complete if they fail to include information on the availability of the premium reduction.

[5] See note 3 above.

[6] Generally, individuals do not need to receive two notices; if they are one of the two classes of individuals described in this paragraph and receive the Premium Assistance Extension Notice, they do not need to receive the General Notice as well.

III. For Additional Information

For additional information about ARRA's COBRA premium reduction provisions as amended by the Department of Defense Appropriations Act, 2010, contact the Department's Employee Benefits Security Administration's Benefits Advisors at 1–866–444–3272. In addition, the Employee Benefits Security Administration has developed a dedicated COBRA Web page *http://www.dol.gov/COBRA* that will contain information on the program as it is developed. Subscribe to this page to get up-to-date fact sheets, FAQs, model notices, and applications.

IV. Paperwork Reduction Act Statement

According to the Paperwork Reduction Act of 1995 (Pub. L. 104–13) (PRA), no persons are required to respond to a collection of information unless such collection displays a valid Office of Management and Budget (OMB) control number. The Department notes that a Federal agency cannot conduct or sponsor a collection of information unless it is approved by OMB under the PRA, and displays a currently valid OMB control number; further, the public is not required to respond to a collection of information unless it displays a currently valid OMB control number. *See* 44 U.S.C. 3507. Also, notwithstanding any other provisions of law, no person shall be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number. *See* 44 U.S.C. 3512.

This Notice revises the collections of information contained in the ICR titled Notice Requirements of the Health Care Continuation Coverage Provisions approved under OMB Control Number 1210–0123. OMB has approved this revision to the ICR pursuant to the emergency review procedures under 5 CFR 1320.13. The public reporting burden for this collection of information is estimated to average approximately 3 minutes per respondent, including time for gathering and maintaining the data needed to complete the required disclosure. There is also an additional $0.39 average cost per response for mailing costs. Interested parties are encouraged to send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the U.S. Department of Labor, Office of the Chief Information Officer, Attention: Departmental Clearance Officer, 200 Constitution Avenue, NW., Room N–1301, Washington, DC 20210 or e-mail *DOL_PRA_PUBLIC@dol.gov* and reference the OMB Control Number 1210–0123.

V. Models

The Department has decided to make the model notices available in modifiable, electronic form on its Web site: *http://www.dol.gov/COBRA.*

VI. Statutory Authority

Authority: 29 U.S.C. 1027, 1059, 1135, 1161–1169, 1191c; Pub. L. 111–5, 123 Stat. 115, sec. 3001(a)(5), 3001(a)(2)(C), 3001(a)(7); Pub. L. 111–118, 123 Stat. 3409; and Secretary of Labor's Order No. 6–2009, 74 FR 21524 (May 7, 2009).

Signed at Washington, DC, this 12th day of January 2010.

Phyllis C. Borzi,

Assistant Secretary, Employee Benefits Security Administration.

[FR Doc. 2010–752 Filed 1–14–10; 8:45 am]

BILLING CODE 4510–29–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 52–017; NRC–2008–0066]

Virginia Electric and Power Company D/B/A Dominion Virginia Power and Old Dominion Electric Cooperative; Combined License Application for North Anna Unit 3; Exemption

1.0 Background

Virginia Electric and Power Company, doing business as Dominion Virginia Power (Dominion), acting on its own behalf and as agent for Old Dominion Electric Cooperative (ODEC), submitted to the U.S. Nuclear Regulatory Commission (NRC) a combined license (COL) application, under Title 10 of the Code of Federal Regulations (10 CFR), Subpart C of Part 52, for an Economic Simplified Boiling-Water Reactor (ESBWR), to be designated as North Anna Unit 3, at the North Anna Power Station site located in Louisa County, VA. The NRC docketed the application on January 28, 2008, and is currently performing a detailed review of the application. In addition, the NRC is currently performing a detailed review of the GE Hitachi Nuclear Energy application for design certification of the Economic Simplified Boiling Water Reactor (ESBWR).

2.0 Request/Action

10 CFR 50.71(e)(3)(iii) requires that applicants for a combined license under 10 CFR Part 52 shall, during the period from docketing of a COL application until the Commission makes a finding under 10 CFR 52.103(g) pertaining to facility operation, submit an annual update to the application's final safety analysis report (FSAR), which is a part of the application.

Dominion has requested a one-time exemption from the requirements of 10 CFR 50.71(e)(3)(iii) to allow submittal of the FSAR update, scheduled for December 2009, by June 30, 2010, and submittal of the subsequent FSAR update in 2011.

In summary, the requested exemption is a one-time schedule change from the requirements of 10 CFR 50.71(e)(3)(iii). The exemption would allow the applicant to submit the FSAR update scheduled for 2009 by June 30, 2010, and to submit the subsequent FSAR update in 2011. The FSAR update schedule could not be changed absent the exemption. Dominion requested the exemption by letter dated November 17, 2009, (Agencywide Documents Access and Management System (ADAMS) Accession No. ML093240090).

3.0 Discussion

Pursuant to 10 CFR 50.12, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR Part 50, including Section 50.71(e)(3)(iii) when (1) the exemptions are authorized by law, will not present an undue risk to public health or safety, and are consistent with the common defense and security; and (2) special circumstances are present. As relevant to the requested exemption, special circumstances exist if (1) "Compliance would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted, or that are significantly in excess of those incurred by others similarly situated" (10 CFR 50.12(a)(2)(iii)) or (2) "The exemption would provide only temporary relief from the applicable regulation and the licensee or applicant has made good faith efforts to comply with the regulation" (10 CFR 50.12(a)(2)(v)).

The regulations at 10 CFR 50.71(e)(3)(iii), requiring annual FSAR update, did not contemplate a situation in which a design control document (DCD) referenced in a COL application FSAR was revised shortly before the annual FSAR update was due. The ESBWR, referenced in the North Anna Unit 3 COL application, is currently undergoing NRC review, and Revision 6 of the FSAR, which is a comprehensive revision, was submitted to the NRC on August 31, 2009. Consistent with the regulations at 10 CFR 50.71(e), the COL FSAR update shall contain information to reflect all changes since the previous FSAR update. For North Anna, the FSAR update is to include the effects of all changes contained in DCD Revision 6. The overall quantity and nature of changes in ESBWR FSAR Revision 6 was extensive. Some changes in Revision 6 call for detailed analyses and extensive engineering work, including that of vendors, to be performed prior to the COL FSAR update. Completing all prerequisite activities and preparing the North Anna FSAR update by December 2009, would present a considerable and undue burden.

The requested one-time exemption to incorporate ESBWR FSAR Revision 6 into the North Anna FSAR update would provide only temporary relief from the regulations at 10 CFR 50.71(e)(3)(iii). The applicant has made good faith efforts to comply with 10 CFR 50.71(e)(3)(iii) by incorporating ESBWR FSAR Revision 5 into the prior North Anna FSAR update and by providing, on an on-going basis, marked-up COL FSAR pages to incorporate changes associated with responses to NRC requests for additional information.

Authorized by Law

The exemption is a one-time schedule exemption from the requirements of 10 CFR 50.71(e)(3)(iii). The exemption would allow the applicant to submit the North Anna FSAR annual update scheduled for 2009 by June 30, 2010, and to submit the subsequent FSAR annual update in 2011. As stated above, 10 CFR 50.12 allows the NRC to grant exemptions from the requirements of 10 CFR 50.71(e)(3)(iii). The NRC staff has determined that granting of the requested exemption will 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.

No Undue Risk to Public Health and Safety

The underlying purpose of 10 CFR 50.71(e)(3)(iii) is to provide for timely, comprehensive update of the FSAR associated with a COL application in order to support an effective and efficient review by NRC staff and issuance of the staff's safety evaluation report. The requested exemption is solely administrative in nature in that it pertains to the schedule for submittal to the NRC of revisions to an application under 10 CFR Part 52 for which a license has not been granted.

Based on the above, no new accident precursors are created by the exemption; thus, the probability of postulated accidents is not increased. Also, based on the above, the consequences of postulated accidents are not increased. Therefore, there is no undue risk to public health and safety.

Consistent With Common Defense and Security

The requested exemption would allow the applicant to submit the FSAR annual update scheduled for 2009 by June 30, 2010, and to submit the subsequent FSAR annual update in 2011. This schedule change has no relation to security issues. Therefore, the common defense and security is not impacted by this exemption.

Special Circumstances

Special circumstances, in accordance with 10 CFR 50.12(a)(2), are present whenever (1) "Compliance would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted, or that are significantly in excess of those incurred by others similarly situated" (10 CFR

50.12(a)(2)(iii)) or (2) "The exemption would provide only temporary relief from the applicable regulation and the licensee or applicant has made good faith efforts to comply with the regulation" (10 CFR 50.12(a)(2)(v)).

The underlying purpose of 10 CFR 50.71(e)(3)(iii) is to provide for timely, comprehensive update of the FSAR associated with a COL application in order to support an effective and efficient review by NRC staff and issuance of the staff's safety evaluation report. As discussed above, the requested exemption is solely administrative in nature in that it pertains to a one-time schedule change for submittal of revisions to an application under 10 CFR Part 52 for which a license has not been granted. The requested exemption does not affect the underlying purpose of 10 CFR 50.71(e)(3)(iii).

Therefore, since the underlying purpose of 10 CFR 50.71(e)(3)(iii) is achieved, the special circumstances required by 10 CFR 50.12(a)(2) for the granting of an exemption from 10 CFR 50.71(e)(3)(iii) exist.

4.0 Conclusion

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12, the exemption is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security. Also, special circumstances are present. Therefore, the Commission hereby grants Dominion an exemption from the requirements of 10 CFR 50.71(e)(3)(iii) pertaining to the North Anna Unit 3 COL application to allow submital of the FSAR update scheduled for 2009 by June 30, 2010, and submittal of the subsequent FSAR update in 2011.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this exemption will not have a significant effect on the quality of the human environment (74 FR 65161).

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 11th day of January 2010.

For the Nuclear Regulatory Commission.

Jeffrey Cruz,

Chief, ESBWR/ABWR Projects Branch 1, Division of New Reactor Licensing, Office of New Reactors.

[FR Doc. 2010–664 Filed 1–14–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0399; Docket No. 50–263]

Northern States Power Company, LLC; Monticello Nuclear Generating Plant Final Environmental Assessment and Finding of No Significant Impact

The Nuclear Regulatory Commission (NRC) has prepared a final Environmental Assessment (EA) as part of its evaluation of a request by Northern States Power Company (NSPM) for a license amendment to increase the maximum thermal power at the Monticello Nuclear Generating Plant (MNGP) from 1,775 megawatts thermal (MWt) to 2,004 MWt. This represents a power increase of approximately 13 percent over the current licensed thermal power. As stated in the NRC staff's position paper dated February 8, 1996, on the Boiling-Water Reactor Extended Power Uprate (EPU) Program, the NRC staff will prepare an environmental impact statement if it believes a power uprate would have a significant impact on the human environment. The NRC published a draft EA and finding of no significant impact on the proposed action for public comment in the **Federal Register** on September 15, 2009 (74 FR 47281). No comments were received on the draft EA. The NRC staff did not identify any significant impact from the information provided in the licensee's EPU application for MNGP or during the NRC staff's review of other available information; therefore, the NRC staff is documenting its environmental review in this final EA.

Environmental Assessment

Plant Site and Environs

The MNGP site is located in Monticello, Minnesota, along the southern bank of the Mississippi River at River Mile (RM) 900, approximately 30 miles (48 kilometers) northwest of Minneapolis/St. Paul, and east of Interstate Highway 94. The 2,150-acre (870-hectare) site consists of 2 miles (3 kilometers) of frontage on both banks of the Mississippi River, within portions of Wright and Sherburne Counties. The plant and its supporting facilities occupy approximately 50 acres (20 hectares) in Wright County.

MNGP is a single-unit boiling water reactor that has been designed to allow operation using four water circulating modes to cool the system, and draws water from and discharges water to the Mississippi River. These four water circulating modes include an open-cycle (once-through) system, a closed cycle system using two mechanical draft cooling towers, a helper cycle system, and a partial recirculation of the cooling water. The helper cycle cools water using both the open cycle to withdraw water from and discharge the water back to the Mississippi River, and the cooling towers to cool water prior to discharge to the river. The helper cycle is used when the discharge canal temperature approaches permit limits and upstream river temperatures are consistently at or above 68 °F. MNGP operates in open cycle or helper cycle approximately 98 percent of the time. In the partial recirculation mode, 75 percent of the Mississippi River flow is withdrawn and the cooling towers are operating. A portion of the cooled water is recirculated to the intake and the remainder is discharged to the river. The partial recirculation mode is used when river flow is less than 860 cubic-feet-per-second (cfs) but greater than 240 cfs, and the river temperature is elevated.

Identification of the Proposed Action

By application dated November 5, 2008, as supplemented on January 29, 2009 (on environmental issues only) the licensee requested an amendment for an EPU for MNGP to increase the licensed thermal power level from 1,775 MWt to 2,004 MWt, which is an increase of 13 percent over the current licensed thermal power and a 20 percent increase over the original licensed thermal power. The Atomic Energy Commission (predecessor of the NRC) issued the Final Environmental Statement (FES) in November 1972, for the original license for MNGP. The NRC previously approved a 6.3 percent stretch power uprate in September 1998, increasing the power output from 1,670 MWt to 1,775 MWt. The NRC EA for that action resulted in a finding of no significant impact and was published in the **Federal Register** on September 1, 1998 (63 FR 46489). In addition, the NRC issued a Supplemental Environmental Impact Statement, NUREG–1437, Supplement 26 (SEIS–26) in August 2006, associated with renewing the operating license for MNGP for an additional 20 years. This proposed amendment for an EPU would result in an increase in production of electricity and the amount of waste heat delivered to the condenser, requiring an increase to the amount of water withdrawn from the Mississippi River for cooling purposes, and a subsequent increase in the temperature of the water discharged back to the Mississippi River.

The licensee plans to implement the proposed EPU in two phases to coincide with two refueling outages. The first

refueling outage is scheduled for late 2009, with a corresponding increase in power of approximately 50 MWt to a total of 1,825 MWt. The second refueling outage is scheduled for 2011, and the power level will be increased to the maximum of 2,004 MWt.

The Need for the Proposed Action

The need for the additional power generation is based upon NSPM's 15-year Resource Plan that includes a forecast of an average annual increase of peak electrical demand of 1.2 percent through NSPM's 2008–2022 planning period. This forecast for increased energy includes NSPM's resource obligations for summer peak net demand, minimum reserve requirements, its committed resources, and other contracted obligations. This increase in power demand would partially be met by the increased amount of power output proposed for MNGP along with other energy sources.

Environmental Impacts of the Proposed Action

At the time of issuance of the operating license for MNGP in 1972, the NRC staff noted that any activity authorized by the license would be encompassed by the overall action evaluated in the FES for the operation of MNGP. In addition, the NRC published the SEIS–26 in 2006, which evaluated the environmental impacts of operating MNGP for an additional 20 years, and determined that the environmental impacts of license renewal were small. The sections below summarize the non-radiological and radiological impacts in the environment that may result from the proposed action of the proposed EPU.

Non-Radiological Impacts

Land Use and Aesthetic Impacts

Potential land use and aesthetic impacts from the proposed EPU include impacts from plant modifications at MNGP. While some plant components would be modified, most plant changes related to the proposed EPU would occur within existing structures, buildings, and fenced equipment yards housing major components within the developed part of the site. No new construction would occur outside of existing facilities and no expansion of buildings, roads, parking lots, equipment storage areas, or transmission facilities would be required to support the proposed EPU, although some transmission and distribution equipment may be replaced or modified.

Existing parking lots, road access, laydown areas, offices, workshops, warehouses, and restrooms would be used during plant modifications. Therefore, land use conditions would not change at MNGP. Also, there would be no land use changes along transmission lines (no new lines would be required for the proposed EPU), transmission corridors, switch yards, or substations.

Since land use conditions would not change at MNGP, and because any land disturbance would occur within previously disturbed areas, there would be little or no impact to aesthetic resources in the vicinity of MNGP. Therefore, the NRC staff concludes that there would be no significant impact from EPU-related plant modifications on land use and aesthetic resources in the vicinity of MNGP.

Air Quality Impacts

During implementation of the EPU at the MNGP site, some minor and short duration air quality impacts would likely occur. Emissions from the vehicles of workers would be the main sources of these air quality impacts. Wright County, where MNGP is located, is designated as a maintenance area for carbon monoxide. The licensee indicated that an additional 500 temporary employees would be needed for the duration of the project. The majority of the workforce would reside within the county where MNGP is located. The screening analysis performed by the licensee for the proposed Monticello EPU projects that annual average vehicular traffic would increase by approximately 2 percent. The majority of the EPU-associated activities would be performed inside existing buildings and will not cause additional atmospheric emissions. Therefore, the NRC staff concludes that there would be no significant impact on air quality during and following implementation of the proposed EPU.

Water Use Impacts

Groundwater

MNGP uses groundwater for domestic-type water uses and limited industrial use. Groundwater is obtained from six on-site wells, two of which are permitted and regulated by the Minnesota Department of Natural Resources (MDNR) through the State's water appropriation permit program. These two wells produce 100 gallons per minute each and provide domestic water to restrooms, showers, and laundries and industrial use water to the MNGP reverse osmosis system, and to pump seals at the plant intake structure. Four additional small capacity wells that do not require an MDNR permit are used to supply domestic use water to buildings not connected to the permitted system. The proposed EPU will not significantly increase the use of domestic groundwater, and the volume of additional groundwater needed for industrial use is within the limits of the existing appropriations permit. Therefore, the NRC staff concludes that there would be no significant impact on groundwater resources following implementation of the proposed EPU.

Surface Water

MNGP uses surface water for plant condenser cooling, auxiliary water systems, service water cooling, intake screen wash, and fire protection. Under MDNR water appropriation permit number PA 66–1172–S, MNGP may withdraw up to 645 cubic feet per second (cfs) from the Mississippi River. Surface water consumption under EPU conditions is expected to be maintained within permitted limits. The upper limit of the permit is 8,700 ac-ft per year, which would not be reached because the cooling towers are typically operated in combination with the once-through cooling system. As part of its environmental review for license renewal, the NRC staff stated in SEIS–26 that "the consumptive loss due to evaporation from the cooling towers represent 4 percent of the river flow, which is not considered significant." The increased volume of circulation water will continue to have an insignificant effect on the total consumptive use of surface water at MNGP. The issue of discharge temperatures is regulated by the National Pollutant Discharge Elimination System (NPDES) permit discussed in the following section. Therefore, the NRC staff concludes that there would be no significant impact on surface water resources following implementation of the proposed EPU.

Aquatic Resources Impacts

The potential impacts to aquatic biota from the proposed action include impingement, entrainment, and thermal discharge effects.

Since MNGP operates most of the time in open-cycle mode, an increase in river water appropriation for the EPU from the current consumptive rate of 509 cfs to 645 cfs may increase impacts from entrainment and impingement of fish and shellfish in their early life stages. However, in a Section 316(a) Clean Water Act (CWA) Demonstration project in 1975, for MNGP that included an evaluation of plant impacts on aquatic organisms, the evidence

indicated that operations of MNGP had not produced appreciable harm to the aquatic organisms in the Mississippi River in the vicinity of MNGP. In addition, in the SEIS–26, the NRC staff concluded in its assessment of the relicensing activities of MNGP that MNGP was in compliance with its current State of Minnesota NPDES permit, and in compliance with Section 316(b) of the CWA regarding the use of best available technology for the minimization of adverse environmental impacts from entrainment and impingement, and further mitigation measures would not be warranted. Further, river water appropriation under EPU operation will not increase beyond the current maximum MNGP NPDES Permit limit of 645 cfs. Therefore, the NRC staff concludes that there would be no significant adverse impacts from entrainment or impingement for the proposed action.

According to the licensee, at the proposed EPU conditions, the temperature of the water entering the discharge canal is expected to increase by a maximum of 4.5 °F over the current discharge canal temperature, which ranges from 66 °F to 95 °F depending upon the season. This can lead to changes to the length, width, and duration of the thermal plume across the Mississippi River. However, the licensee states in the application that when canal discharge temperatures have approached the limits of the NPDES permit, MNGP will reduce power in order to comply with NPDES thermal discharge requirements. The NRC staff previously noted in its SEIS–26 and review of MNGP's license renewal application that, despite several periods of non-compliance with the NPDES permit, there have been no indications of adverse impacts to the aquatic biota within the vicinity of the discharge plume. Therefore, the NRC staff concludes that there would be no significant adverse impacts to aquatic biota from thermal discharges for the proposed action.

The licensee stated in the application that an increase of up to 4.5 °F for the effluent at the discharge canal over the current temperature would not result in a significant increase in the production of harmful thermophilic organisms in the discharge canal. The maximum temperature at the discharge canal would remain within the limits of the NPDES permit, and this temperature is also well below the temperature for maximum growth rate of thermophilic organisms. The NRC staff determined, in SEIS–26, that thermophilic organisms are not likely to occur as a result of discharges by MNGP into the Mississippi River. No further mitigation was deemed necessary by the NRC staff in SEIS–26. Based upon the information provided in the application for EPU and SEIS–26, the NPDES permit requirements for water temperature, and the Section 316(b) requirements of the CWA, the NRC staff concludes that the impact of thermophilic microbiological organisms from the proposed EPU would not be significant.

Terrestrial Resources Impacts

According to the application and the previous discussion regarding land use, the proposed action will not affect any lands located outside of the inner security fence at MNGP. Therefore, the NRC staff concludes that there would be no significant impacts on terrestrial biota associated with the proposed action.

Threatened and Endangered Species Impacts

Few Federal- or State-listed aquatic species are known to exist in the four counties (Wright, Sherburne, Hennepin, and Anoka counties) in which MNGP and the related transmission lines are located, and no Federal- or State-listed aquatic species have been identified near MNGP. Similarly, no Federal-listed terrestrial species occur within the subject four counties. There are six State-listed species that occur or potentially occur in the vicinity of MNGP. However, because no changes are proposed to terrestrial wildlife habitat on the MNGP site or its vicinity from the proposed EPU, the NRC staff concludes that there would be no significant impacts to any threatened or endangered species for the proposed action.

Historic and Archaeological Resources Impacts

Historic and archaeological resources have been identified in the vicinity of MNGP, but not at MNGP. The licensee has no plans to construct new facilities or modify existing access roads, parking areas, or laydown areas for EPU operation. The licensee stated that onsite transmission and distribution equipment could be replaced or modified to support EPU activities, however, these activities would be limited to previously disturbed areas. Therefore, the NRC staff concludes that there would be no significant impact from the proposed EPU on historic and archaeological resources at MNGP. However, should ground-disturbing activities occur on undisturbed portions of the plant site or in transmission line rights-of-way, an archaeological investigation would be conducted by a qualified archaeologist in consultation with the Minnesota State Historic Preservation Office.

Socioeconomic Impacts

Potential socioeconomic impacts from the proposed EPU include temporary increases in the size of the workforce at MNGP and associated increased demand for public services and housing in the region. The proposed EPU could also increase tax payments due to increased power generation.

Currently, there are approximately 327 full-time workers employed at MNGP, residing primarily in Wright County and Sherburne County, Minnesota. During refueling outages (approximately every 24 months) the number of workers at MNGP increases by as many as 600 workers for 30 to 40 days.

The proposed EPU is expected to temporarily increase the size of the workforce at MNGP during two refueling outages. Approximately 250 additional workers would be needed during the 2009 refueling outage, and up to 500 additional workers would be needed during the 2011 refueling outage to support EPU-related activities at MNGP. Once completed, the proposed EPU would not increase the size of the MNGP workforce during future refueling outages.

Most of the EPU plant modification workers would likely relocate temporarily to Wright and Sherburne counties, resulting in short-term increases in the local population along with increased demands for public services and housing. Because plant modification work would be short-term, most workers could stay in available rental homes, apartments, mobile homes, and camper-trailers. Since MNGP is located in a high population area and the number of available housing units exceeds demand, any temporary changes in plant employment would have little or no noticeable effect on the availability of housing in the region. Due to the short duration of plant outages and the availability of housing, there would be no significant employment-related housing impacts.

NSPM currently pays annual real estate taxes to Public School District 882, Wright County, and the City of Monticello. The proposed EPU could increase property tax payments because the total amount of tax money paid would increase as power generation increases and because the proposed EPU could increase the assessed market value of MNGP. Due to the short duration of EPU-related plant modification activities, there would be little or no noticeable effect on tax

revenue streams from the temporary MNGP workers residing in Wright County and Sherburne County. Therefore, the NRC staff concludes that there would be no significant adverse socioeconomic impacts from EPU-related plant modifications and operations under EPU conditions in the vicinity of MNGP.

Environmental Justice Impacts

The environmental justice impact analysis evaluates the potential for disproportionately high and adverse human health and environmental effects on minority and low-income populations that could result from activities associated with EPU operation at MNGP. Such effects may include ecological, cultural, human health, economic, or social impacts. Some of these potential effects have been identified in resource areas discussed in this EA. For example, increased demand for rental housing during plant modifications for the EPU could disproportionately affect low-income populations. Minority and low-income populations are subsets of the general public residing around MNGP, and all are exposed to the same health and environmental effects generated from activities at MNGP.

Environmental Justice Impact Analysis

The NRC staff considered the demographic composition of the area within a 50-mile radius of MNGP to determine the location of minority and low-income populations and whether they may be affected by the proposed action. According to U.S. Census Bureau data for 2000, the largest minority group was Black or African American (178,000 persons or 6.5 percent), followed by Asian (132,000 or about 4.8 percent). Low-income populations in the vicinity of MNGP were identified as living below the 1999 Federal poverty threshold of $17,029 for a family of four. According to census data, Wright County and Sherburne County had higher median household income averages ($67,391 and $67,634) and lower percentages (both 5.0 percent) of individuals living below the poverty level, respectively.

Potential impacts to minority and low-income populations would mostly consist of environmental and socioeconomic effects (*e.g.*, noise, dust, traffic, employment, and housing impacts).

Noise and dust impacts would be short-term and limited to onsite activities. Minority and low-income populations residing along site access roads could experience increased commuter vehicle traffic during shift changes. Increased demand for inexpensive rental housing during EPU-related plant modifications could disproportionately affect low-income populations, but there are a sufficient number of rental housing units available to accommodate the increase of workers at MNGP during the outages. Due to the short duration of the EPU-related work and the availability of rental properties, impacts to minorities and low-income populations would be short-term and limited.

Based on this information and the analysis of human health and environmental impacts presented in this EA, the NRC staff concludes that the proposed EPU operation would not have disproportionately high and adverse human health and environmental effects on minority and low-income populations residing in the vicinity of MNGP.

Non-Radiological Impacts Summary

As discussed above, the proposed EPU would not result in any significant non-radiological impacts. The NRC staff also anticipates that there would be no significant non-radiological cumulative impacts related to the proposed EPU. Table 1 summarizes the non-radiological environmental impacts of the proposed EPU at MNGP.

TABLE 1—SUMMARY OF NON-RADIOLOGICAL ENVIRONMENTAL IMPACTS

Land Use	No significant impact on land use conditions and aesthetic resources in the vicinity of MNGP.
Air Quality	Temporary short-term air quality impacts from construction activities and vehicle emissions related to travelling of the workforce required to complete EPU modifications; no significant air quality impacts from such temporary increase in workforce.
Water Use	Water use changes resulting from the EPU would be relatively minor. No significant impact on groundwater or surface water resources.
Aquatic Resources	No significant impact to aquatic resources due to impingement and entrainment or thermal discharge.
Terrestrial Resources	No significant impact to terrestrial resources.
Threatened and Endangered Species.	No significant impact to Federal- or State-listed species.
Historic and Archaeological Resources.	No significant impact to historic and archaeological resources on site or in the vicinity of MNGP.
Socioeconomics	No significant socioeconomic impacts from EPU-related temporary increase in workforce or EPU operation.
Environmental Justice	No disproportionately high and adverse human health and environmental effects on minority and low-income populations in the vicinity of MNGP.

Radiological Impacts

Radioactive Gaseous and Liquid Effluents, Direct Radiation Shine, and Solid Waste

Nuclear power plants use waste treatment systems to collect, process, recycle, and dispose of gaseous, liquid, and solid wastes that contain radioactive material in a safe and controlled manner within NRC and EPA radiation safety standards.

Radioactive Gaseous and Liquid Effluents

During normal power plant operation, the gaseous effluent treatment system processes and controls the release of radioactive gaseous effluents into the environment.

Implementation of the proposed EPU would increase the production and activity of gaseous effluents by approximately 13 percent, which is in proportion to the proposed increase in power level. As reported by the licensee for the 2001–2006 period, the average annual calculated maximum total body dose to an offsite member of the general public from gaseous effluents was 1.62E–02 mrem (1.62E–04 mSv). This dose is well below the 5 mrem (0.05 mSv) dose design objective in Appendix I to 10 CFR part 50, Section II.B.2. Using the average annual maximum total body dose (provided by the licensee) to an offsite member of the general public from gaseous effluents, and assuming that the 13-percent EPU will result in a corresponding increase in dose, the NRC staff projects that the average annual

calculated maximum total body dose to an offsite member of the general public from gaseous effluents would be 1.83E–02 mrem (1.83E–04 mSv). Thus, the maximum offsite dose to a member of the public under the conditions of the EPU would remain well within the radiation standards of 10 CFR part 20 and the design objectives of Appendix I to 10 CFR part 50. Therefore, the NRC staff concludes that the potential increase in offsite dose due to gaseous effluent release following implementation of the EPU would not be significant.

MNGP is authorized by the NRC to release a qualified amount of radioactive liquid effluent into the environment; however, by its own policy the licensee operates the plant as a zero radioactive liquid release plant. Therefore, there are no routine periodic releases of liquid radioactive effluents from the plant. MNGP's liquid radioactive waste management system collects and processes the liquid waste, and then either recycles the clean liquid within the plant or solidifies the waste for off-site disposal. The proposed EPU operation will not change the zero radioactive release policy at MNGP. No modifications to the liquid radioactive waste system would be needed to handle the increased liquid waste following implementation of the proposed EPU.

In the EPU application, the licensee estimated that the proposed EPU would slightly increase the volume of radioactive liquid waste generated from 11,000 gals/day to 11,250 gals/day. This is a small increase in volume and can be accommodated by the radioactive liquid waste system capacity. Although the licensee strives to operate the plant as a zero liquid release plant, there were some radioactive liquid discharges in 2001, 2003, and 2004. As reported by the licensee for the 2001–2006 period, the average annual calculated maximum total body dose to an offsite member of the general public from liquid effluents was 2.72E–06 mrem (2.72E–08 mSv). This annual dose is well below the 3 mrem (0.03 mSv) dose design objective in Appendix I to 10 CFR part 50, Section II.A. Based on the licensee's ability to maintain a near zero liquid discharge status for several years, and because the resulting dose from the few releases was well within NRC dose standards, there is reasonable assurance that the proposed EPU will not have a significant impact on future liquid discharges.

In addition to the dose impact from gaseous and liquid radioactive effluents, the licensee evaluated the impact of the proposed EPU on the direct radiation (gamma radiation) from plant systems, liquid storage tanks, the turbine, and components containing radioactive materials.

Based on the licensee's evaluation, the annual offsite dose to members of the public from direct radiation under EPU conditions would be approximately 6 mrem. Thus, the annual cumulative average calculated maximum total body dose to an offsite member of the general public from all sources of radiation from the facility (*i.e.*, gaseous and liquid effluents, and direct radiation) following implementation of the proposed EPU would be less than 7 mrem. This dose is well below the radiation dose limits and standards set forth in 10 CFR part 20, and 40 CFR part 190. Therefore, the NRC staff concludes that the potential increase in offsite radiation dose to members of the public would not be significant.

Radioactive Solid Wastes

The radioactive solid waste system collects, processes, packages, monitors, and temporarily stores radioactive dry and wet solid wastes prior to shipment offsite for disposal. The licensee reported in its environmental assessment that MNGP shipped annually, on average, approximately 706 ft^3 of solid radioactive waste consisting of spent resin, filter sludge, evaporator bottoms, etc., during the 2001–2006 time period. The licensee projects that implementation of the proposed EPU would cause an annual increase of 106 ft^3 in the volume of the resins and result in one additional annual shipment. No modifications to the solid radioactive waste system would be needed to handle the increase in liquid waste following implementation of the proposed EPU. The total long-lived activity contained in the waste is expected to be bounded by the percentage of the EPU, and the increase in the overall volume of waste generated during operation under EPU conditions is expected to be minor. Therefore, the NRC staff concludes that the impact from the increased volume of solid radwaste generated under conditions of the proposed EPU would not be significant.

Spent fuel from MNGP is stored in the spent fuel pool and the newly constructed Independent Spent Fuel Storage Installation (ISFSI). The licensee estimates that the number of discharged assemblies would increase from 150 assemblies per cycle to approximately 170 assemblies per cycle following implementation of the proposed EPU. The storage capacity of the spent fuel pool and the ISFSI is sufficient to accommodate the expected small increase in discharged fuel assemblies. Therefore, the NRC staff concludes that there would be no significant impact resulting from storage of the additional fuel assemblies.

Occupational Doses

Implementation of the proposed EPU would result in the production of more radioactive material and higher radiation dose rates in the restricted areas at MNGP. Occupational exposures from in-plant radiation primarily occur during maintenance and refueling operations. Implementation of the proposed EPU is not expected to significantly change the amount of radiation exposure received by plant personnel, as the licensee has a radiation protection program that monitors radiation levels throughout the plant to establish work controls, shielding, and protective equipment requirements so that worker doses will remain within the dose limits of 10 CFR part 20 and as low as is reasonably achievable. Therefore, the NRC staff concludes that there would be no significant increase in the radiation exposure received by plant personnel due to implementation of the proposed EPU.

Postulated Accident Doses

Implementation of the proposed EPU would increase the core inventory of radionuclides, which is dependent on power level. The concentration of the radionuclides in the reactor coolant may also increase in proportion to power level increase; however, this concentration is limited by the MNGP Technical Specifications. Therefore, the reactor coolant concentration of radionuclides would not be expected to increase significantly. Some of the radioactive waste streams and storage systems evaluated for postulated accidents may contain slightly higher quantities of radionuclides. For those postulated accidents where the source term has increased, the calculated potential radiation dose to individuals at the exclusion area boundary, at the low population zone, and in the main control room, as well as in the technical support center for the loss-of-coolant accident, remain below the requirements of 10 CFR 50.67.

The licensee has submitted analyses of calculated doses under accident conditions for the EPU amendment application. These analyses show that the proposed EPU will not have significant radiological impacts under accident conditions. The NRC staff has reviewed the licensee's analyses to independently verify the licensee's calculated doses under accident

conditions, and has concluded that the radiological consequences of design-basis accidents will meet applicable acceptance criteria. The NRC staff's evaluation results will be presented in the safety evaluation that will be issued concurrently with the proposed EPU amendment, if approved by the NRC staff. However, for the purpose of this EA, the NRC staff concludes that, based on the information provided by the licensee, the proposed EPU would not significantly increase the radiological consequences of postulated accidents.

Radiological Impacts Summary

As discussed above, the proposed EPU would not result in any significant radiological impacts. Because of existing regulatory requirements regarding limits to exposure, the NRC staff also anticipates that there would be no significant radiological cumulative impacts related to the proposed EPU, as the licensee is required to continue to comply with such regulatory requirements. Table 2 summarizes the radiological environmental impacts of the proposed EPU at MNGP.

TABLE 2—SUMMARY OF RADIOLOGICAL ENVIRONMENTAL IMPACTS

Radioactive Gaseous Effluents.	Doses from increased gaseous effluents would remain within NRC limits and dose design objectives.
Offsite Radiation Doses	Radiation doses to members of the public would remain small, well below NRC and EPA Federal radiation protection standards.
Radioactive Liquid Effluents	EPU would not change routine liquid radioactive effluent releases from MNGP; the doses from discharges, if any, would remain within NRC limits and dose design objectives.
Radioactive Solid Wastes	Amount of solid waste generated would increase by approximately 15 percent (*i.e.*, approximately 1 additional truck shipment per year).
Occupational Doses	Occupational doses would continue to be maintained within regulatory limits.
Postulated Accident Doses ..	Calculated doses for postulated design-basis accidents would remain within NRC limits.

Alternatives to the Proposed Action

As an alternative to the proposed action, the NRC staff considered denial of the proposed EPU (*i.e.*, the "no-action" alternative). Denial of the application would result in no change in the current environmental impacts. However, if the EPU were not approved for MNGP, other agencies and electric power organizations may be required to pursue other means, such as fossil fuel power generation, of providing electric generation capacity to offset future demand. Construction and operation of such a fossil-fueled plant may create impacts in air quality, land use, and waste management significantly greater than those identified for the proposed EPU at MNGP. Conservation programs such as demand-side management could possibly replace the proposed EPU's additional power output. However, the regional forecasted future energy demand calculated by the licensee may exceed conservation savings and still require additional generating capacity. Alternative energy sources such as wind energy have been incorporated into NSPM's regional energy forecast.

Furthermore, the proposed EPU does not involve environmental impacts that are significantly different from those originally identified in the MNGP FES.

Alternative Use of Resources

This action does not involve the use of any resources not previously considered in the FES.

Agencies and Persons Consulted

In accordance with its stated policy, on August 7, 2009, the NRC staff consulted with the State of Minnesota official regarding the environmental impact of the proposed action. The Minnesota State official had no comments.

Finding of No Significant Impact

On the basis of the EA, 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 application dated November 5, 2008, and its supplement dated January 29, 2009 (on environmental issues).

Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff at 1–800–397–4209, or 301–415–4737, or send an e-mail to *pdr.Resource@nrc.gov*.

Dated at Rockville, Maryland, this 11th day of January 2010.

For the Nuclear Regulatory Commission.

Peter S. Tam,

Senior Project Manager, Plant Licensing Branch III–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2010–667 Filed 1–14–10; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61318; File No. SR–DTC–2009–18]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Its Settlement Progress Payment and Principal and Income Withdrawal Cutoff Times

January 8, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on December 23, 2009, The Depository Trust Company ("DTC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change described in Items I, II, and III below, which items have been prepared primarily by DTC. DTC filed the proposal pursuant to Section 19(b)(3)(A)(iii) of the Act[2] and Rule 19b–4(f)(4)[3] thereunder so that the proposal was effective upon filing with the Commission. The Commission is publishing this notice to solicit

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78s(b)(3)(A)(iii).

[3] 17 CFR 240.19b–4(f)(4).

comments on the rule change from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change would amend DTC's rules to modify its Settlement Progress Payment ("SPP") and Principal and Income ("P&I") withdrawal cutoff times.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, DTC 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. DTC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[4]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

A SPP is a payment sent intraday by Fedwire to DTC when a DTC participant ("Participant") has insufficient collateral[5] or at DTC or is at its net debit cap. The SPP creates a credit to the Participant's settlement account, thereby reducing its net debit and allowing the Participant to continue to receive deliveries into its Participant account. Currently, Participants are able to request that DTC return an SPP that was submitted to DTC earlier in the day ("Return Request") until 3 p.m. eastern time. When DTC receives a Return Request, DTC returns the full amount or a portion of the SPP as long as the return does not result in a negative collateral monitor[6] or cause the Participant's net settlement debit to exceed its net debit cap.

P&I allocations are credited to a Participant's settlement accounts throughout each processing day as P&I payments are received. The current early P&I withdrawal process allows Participants to withdraw intraday P&I payments for non-Money Market Instrument issues that DTC has allocated to the Participant's settlement account until 3 p.m. eastern time. P&I withdrawals can be made in any dollar amount subject to DTC's Risk Management Controls.[7] The total amount of funds that a Participant may withdraw cannot exceed the sum of all of the Participant's P&I allocations for that day.

In an effort to maximize the early return of available liquidity to Participants, DTC is proposing to extend the cutoff times for when Participants may request the return of SPP and the withdrawal of P&I to 3:20 p.m. eastern time. These changes will necessitate revisions to the existing DTC Settlement Guide.

The proposed rule change is consistent with Section 17A of the Act,[8] as amended, and the rules and regulations thereunder applicable to DTC. The proposed rule change will maximize the early return of available liquidity to Participants and will be implemented consistently with the safe guarding of securities and funds in DTC's custody or control or for which it is responsible because all of DTC's risk management controls will continue to be in effect.

(B) Self-Regulatory Organization's Statement on Burden on Competition

DTC does not believe that the proposed rule change will have any impact or impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments relating to the proposed rule change were not and are not intended to be solicited or received. DTC will notify the Commission of any written comments received by DTC.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has become effective upon filing pursuant to Section 19(b)(3)(A)(iii) of the Act[9] and Rule 19b–4(f)(4)[10] thereunder because the proposed rule change effects a change in an existing service of DTC that: (i) Does not adversely affect the safeguarding of securities or funds in the custody or control of DTC or for which it is responsible and (ii) does not significantly affect the respective rights or obligations of DTC or persons using the service. At any time within sixty 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–DTC–2009–18 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Elizabeth M. Murphy, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–DTC–2009–18. 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

[4] The Commission has modified the text of the summaries prepared by OCC.

[5] The term "collateral" of a Participant on any business day means the sum of (i) The actual participants fund deposit of the Participant, (ii) the actual preferred stock investment of a Participant, (iii) all net additions of the Participant and (iv) any SPPs wired by the Participant to DTC's account at the Federal Reserve Bank of New York in the manner specified in DTC's Procedures.

[6] DTC tracks collateral in a Participant's account through the Collateral Monitor ("CM"). The CM 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 Participant's CM would not become negative when the transaction completes. If the transaction would cause the Participant to have a negative CM, the transaction will recycle until the Participant has sufficient collateral for the transaction to complete.

[7] Withdrawals that are blocked as a result of insufficient collateral or net debit cap will recycle until enough collateral or settlement credits are generated to satisfy the collateral or net debit cap deficiency or until the end of the recycle period when transactions that have not successfully completed are dropped by the system.

[8] 15 U.S.C. 78q–1.

[9] 15 U.S.C. 78s(b)(3)(A)(iii).

[10] 17 CFR 240.19b–4(f)(4).

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 inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filings also will be available for inspection and copying at the principal office of DTC and on DTC's Web site at *http://www.dtcc.com/downloads/legal/rule_filings/2009/dtc/2009-18.pdf*. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–DTC–2009–18 and should be submitted on or before February 5, 2010.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–633 Filed 1–14–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61324; File No. SR–NYSEAmex–2010–01]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Amex, LLC Amending Its Options Fee Schedule

January 11, 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 January 4, 2010, NYSE Amex LLC ("NYSE Amex" 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 Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Schedule of Fees and Charges to implement new royalty fees associated with Nasdaq 100 Index Options ("NDX") and Mini-NDX Options ("MNX"). Moreover, the exchange proposes to remove obsolete language pertaining to expiring pilot programs and products that are no longer traded on the Exchange. The text of the proposed rule change is attached as Exhibit 5 to the 19b–4 form. A copy of this filing is available on the Exchange's Web site at *http://www.nyse.com*, at the Exchange's principal office and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Schedule of Fees and Charges ("Fee Schedule") to implement new royalty fees associated with Nasdaq 100 Index Options ("NDX") and Mini-NDX Options ("MNX"). On January 4, 2010, the current royalty fee of $0.16 for MNX and NDX contracts will increase to $0.22. These fees reflect the pass-through charges associated with the licensing of these products. The Exchange notes that royalty fees do not apply to public customer orders in these products.

Moreover, the Exchange proposes to delete obsolete references in its Fee Schedule pertaining to the Linkage Pilot Program. The Linkage Pilot Program is set to expire on December 31, 2010. Accordingly, the Exchange proposes to remove the "Linkage Fees" portion of its fee schedule as well as endnotes 9, 11, 12, and obsolete and redundant portions of endnote 13. Furthermore, the Exchange proposes to renumber subsequent endnotes accordingly.

Lastly, the Exchange proposes to amend the Royalty Fee section of the Fee Schedule to remove references to ISE FX products because they are not traded on the Exchange.

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act,[3] in general, and Section 6(b)(4),[4] in particular, in that it provides for the equitable allocation of dues, fees and other charges among its members. Under this proposal, all similarly situated Exchange participants will be charged the same reasonable dues, fees and other charges.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[5] of the Act and subparagraph (f)(2) of Rule 19b–4[6] thereunder, because it establishes a due, fee, or other charge imposed by NYSE Amex.

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:

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C.78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 78f(b)(4).

[5] 15 U.S.C. 78s(b)(3)(A).

[6] 17 CFR 240.19b–4(f)(2).

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEAmex–2010–01 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEAmex–2010–01. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/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 inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–NYSEAmex–2010–01 and should be submitted on or before February 5, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–638 Filed 1–14–10; 8:45 am]

BILLING CODE 8011–01–P

[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61308; File No. SR–NYSEAmex-2009–98]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Amex LLC Adopting New Rule 107B—NYSE Amex Equities To Establish a New Class of NYSE Amex Equities Market Participants Referred to as "Supplemental Liquidity Providers" or "SLPs"

January 7, 2010.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the "Act") [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on December 30, 2009, NYSE Amex LLC (the "Exchange" or "NYSE Amex") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the 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 adopt new Rule 107B—NYSE Amex Equities ("Supplemental Liquidity Providers") to establish, as a pilot program, a new class of NYSE Amex Equities market participants referred to as "Supplemental Liquidity Providers" or "SLPs". The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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.

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to adopt new Rule 107B—NYSE Amex Equities ("Supplemental Liquidity Providers") to establish, as a pilot program, a new class of NYSE Amex Equities market participants referred to as "Supplemental Liquidity Providers" or "SLPs".

Background

Proposed Rule 107B—NYSE Amex Equities is based on NYSE Rule 107B. The New York Stock Exchange LLC ("NYSE") adopted NYSE Rule 107B governing SLPs as a six-month pilot program commencing in November 2008, which was subsequently extended to March 30, 2010.[4]

Proposed Rule 107B—NYSE Amex Equities tracks NYSE Rule 107B in its entirety, subject to such changes as are necessary to apply the Rule to the Exchange.[5] In addition, the Exchange proposes to adopt Rule 107B—NYSE Amex Equities as a pilot program commencing on the date the Rule is filed with the Commission and continuing until March 30, 2010, the date NYSE's SLP pilot program expires. The Exchange will extend the duration of its SLP pilot program as needed to track the NYSE's SLP pilot program and will file for permanent approval at the same time as the NYSE.

Proposed Rule 107B—NYSE Amex Equities

With this rule filing, the Exchange is proposing a pilot program to establish a new class of market participants: Supplemental Liquidity Providers ("SLP"). SLPs will supplement the liquidity provided by Designated Market

[4] *See* Securities Exchange Act Release Nos. 58877 (October 29, 2008), 73 FR 65904 (November 5, 2008) (SR–NYSE–2008–108) (adopting SLP pilot program); 59869 (May 6, 2009), 74 FR 22796 (May 14, 2009) (SR–NYSE–2009–46) (extending SLP pilot program until October 1, 2009); 60756 (October 1, 2009), 74 FR 51628 (October 7, 2009) (SR–NYSE–2009–100) (extending SLP pilot program until November 30, 2009) *and* SR–NYSE–2009–119 (extending SLP pilot program until March 30, 2010).

[5] Notably, the Exchange proposes to change the descriptions of the "SLP Liaison Committee" and the "SLP Panel" contained in parts (d)(1) and (j)(2) of the Rule, as well as the procedures for withdrawal in part (e), to match the proper corporate relationship between the various constituents described therein. The Exchange's SLP program would also include both listed and "traded" securities, *i.e.,* securities admitted to trading on the Exchange pursuant to a grant of unlisted trading privileges ("UTP") (*see* part (g)(1) of the Rule).

Makers ("DMMs"). SLPs may only enter orders electronically from off the Floor of the Exchange and may only enter such orders directly into Exchange systems and facilities designated for this purpose. All SLP orders must only be for the proprietary account of the SLP member organization. Thus, an SLP will not handle orders from public customers or otherwise act on an agency basis. They will have a 5% average quoting requirement per assigned security. Additionally, if an SLP posts displayed or non-displayed liquidity in its assigned securities that results in an execution, the Exchange will pay the SLP a financial rebate.

By establishing this new class of market participant, the Exchange is seeking to provide incentives for quoting and to add competition to the existing group of liquidity providers. By requiring SLPs to quote at the NBB or the NBO a percentage of the regular trading day in their assigned securities, and by paying a rebate when the SLP's interest results in an execution, the Exchange is rewarding aggressive liquidity providers in the market. The Exchange believes that this rebate program will encourage the additional utilization of, and interaction with, the Exchange's marketplace and provide customers with the premier venue for price discovery, liquidity, competitive quotes and price improvement.

Responsibilities of the Supplemental Liquidity Provider

SLP's 5% Average Quoting Requirement

An SLP is required to maintain a bid or an offer at the NBB or NBO (*e.g.,* the "inside") averaging at least 5% of the trading day for each assigned security in round lots in order to maintain its status as an SLP. If an SLP fails to meet the quoting requirement for three consecutive months, the Exchange may revoke the SLP status pursuant to Section (i)(1)(C)(iii) of the proposed Rule.

SLP's 3% Average or More Quoting Requirement for Rebate Purposes

If an SLP posts liquidity in its assigned securities that results in an execution, the Exchange will pay the SLP a financial rebate of $0.0020 per share priced at or above $1.00, and $0.0005 per share priced below $1.00, provided the SLP meets its monthly quoting requirement for rebates averaging at least 3% at the NBB or the NBO in its assigned securities in round lots (*see* Section (i) ("Non-Regulatory Penalties") and Section (f) ("Calculation of Quoting Requirements") of the proposed Rule). Meeting the 3% average quoting requirement for rebates does not satisfy the 5% average quoting requirement which SLPs must meet in order to remain in the SLP program. The rebate calculation is described in more detail below.

A member organization that acts as an SLP is not permitted to act as a DMM on the Floor of the Exchange in the same security. Thus, a member organization that acts as a DMM on the Floor may not also act as an SLP in those securities registered to the DMM unit.

Like all other member organizations of the Exchange, an SLP must abide by Exchange and SEC rules and regulations and must deal in a manner consistent with just and equitable principles of trade. SLPs are subject to regulatory oversight by the Exchange and FINRA.

Assigned Securities

During the proposed SLP pilot program, the SLP Liaison Committee, as defined in Section (d)(1) of the proposed Rule, will initially assign a cross section of Exchange-listed and/or traded securities to each SLP. The SLP Liaison Committee will determine which securities will be assigned to an SLP and the number of securities assigned to each SLP. The Exchange's SLP program will include both listed and traded securities, as it is in the process of submitting a separate filing to permit it to trade Nasdaq-listed securities on a UTP basis. *See, e.g.,* NYSE Amex Trader Notice, dated September 8, 2009.

The Exchange believes that the SLP pilot program will provide the Exchange with a unique opportunity to monitor the success of the SLP incentives by starting with a cross section of securities. By doing so, the Exchange will be better equipped to address actual and potential administrative and operational problems without unnecessary risk to the Exchange and to its customers. The SLP pilot program will also provide the Exchange with the opportunity to identify and address any such problems and make beneficial changes to the SLP program.

In addition to its usefulness to the Exchange, the SLP pilot program will provide the SLPs with essential practical experience with the new program and enable the SLPs to become proficient in the SLP role before expanding the assigned securities to include all Exchange-listed or traded securities.

The SLP Liaison Committee, in its discretion, will assign one or more SLPs to each security depending upon the trading activity of the security. The SLP Liaison Committee will likely assign a greater number of SLPs to more actively traded securities.

Qualifications of the Supplemental Liquidity Provider

A member organization of the Exchange must have the following qualifications in order to obtain SLP status:

(1) Adequate technology to support electronic trading through the related systems and facilities of the Exchange and report qualifying trading activity to Exchange systems utilizing unique and separate mnemonics specifically dedicated to SLP trading activity;

(2) Adequate trading infrastructure to support SLP trading activity, which includes support staff to maintain operational efficiencies in the SLP program and adequate administrative staff to manage the member organization's SLP program;

(3) Quoting performance that demonstrates an ability to meet the 5% quoting requirement in each assigned security;

(4) A disciplinary history that is consistent with just and equitable business practices; and

(5) The business unit of the member organization acting as an SLP must have in place adequate information barriers between the SLP unit and the member organization's customer, research and investment banking business.

Adequate Technology for Trading and Reporting: Because the SLP will only be permitted to trade electronically from off the Floor of the Exchange, a member organization's off-Floor technology must be fully automated to accommodate the Exchange's trading and reporting systems that are relevant to operating as an SLP. If a member organization is unable to support the relevant electronic trading and reporting systems of the Exchange for SLP trading activity, it will not qualify as an SLP.

Adequate Trading Infrastructure: Upon applying for status as an SLP, a member organization must have adequate trading infrastructure, which includes support staff to maintain operational efficiencies in the SLP program and adequate administrative staff to manage the member organization's SLP program.

Quoting Performance: Upon applying for SLP status, a member organization's ability to meet the 5% quoting requirement may be demonstrated by past and/or current trading activity. If an applicant has not demonstrated an ability to meet the 5% quoting requirement to the satisfaction of the SLP Liaison Committee, the applicant may not qualify as an SLP.

Disciplinary History: Upon applying for SLP status, a member organization's disciplinary history must reflect conduct that is consistent with just and equitable business practices.

Information Barriers: The business unit of the SLP that submits orders on behalf of the member organization must have in place adequate information barriers between the SLP unit and the member organization's customer, research and investment banking business.

SLP Application Process

To become an SLP, a member organization must submit an SLP application form with all supporting documentation to the SLP Liaison Committee. The SLP Liaison Committee will determine whether an applicant is qualified to become an SLP based on the qualifications described in Section (c) of the proposed Rule ("Qualifications of a Supplemental Liquidity Provider"). The qualifications focus on the adequacy of the applicant's trading and reporting technology and trading infrastructure. The applicant's disciplinary history will be considered as well.

After submission of the SLP application form and supporting documentation, the SLP Liaison Committee will notify the applicant member organization of its decision. If an applicant is approved by the SLP Liaison Committee to receive SLP status, the applicant must establish connectivity with relevant Exchange systems and facilities.

The processing of all applications may be suspended when the SLP Liaison Committee has determined that there is a sufficient number of SLPs assigned to each eligible security in the SLP program (*see* Section (g)(2) of the proposed Rule).

If an applicant is disapproved or "disqualified," pursuant to Section (i)(2) of the proposed Rule, by the SLP Liaison Committee, such applicant may request an appeal of such disapproval or disqualification by the SLP Panel as provided in Section (j) ("Appeal of Non-Regulatory Penalties") of this Rule, and/or reapply for SLP status three (3) months after the month in which the applicant received disapproval or disqualification notice from the Exchange (*see* Section (d)(6) of the proposed Rule).

Voluntary Withdrawal of SLP Status

An SLP may withdraw from the status of an SLP at any time by giving notice to the SLP Liaison Committee, the Market Surveillance Division of NYSE Regulation, Inc. and NYSE Euronext employees of the Operations Division (*see* Section (e) ("Voluntary Withdrawal of Supplemental Liquidity Provider Status" of the proposed Rule). However, withdrawal of SLP status will not become effective until the withdrawing SLP's assigned securities are reassigned to other SLPs. After the notice of withdrawal is received by the SLP Liaison Committee, the Market Surveillance Division and the Operations Division, the SLP Liaison Committee will reassign said securities as soon as practicable but no later than 30 days of the date said notice is received by the SLP Liaison Committee, the Market Surveillance Division and the Operations Division. In the event the reassignment of securities takes longer than the 30-day period, the withdrawing SLP will have no obligations under this Rule 107B–NYSE Amex Equities and will not be held responsible for any matters concerning its previously assigned SLP securities upon termination of this 30-day period.

Quoting Requirements of the Supplemental Liquidity Provider

In order to maintain SLP status, an SLP is required to maintain a bid or an offer at the NBB or NBO on the Exchange averaging at least 5% of the trading day in round lots for each assigned security.[6] While the SLP may provide displayed and non-displayed liquidity (*e.g.,* reserve and dark orders), the 5% average quoting requirement can only be satisfied when an SLP posts displayed liquidity in its assigned securities in round lots at the NBB or the NBO. Thus, non-displayed liquidity will not be counted as credit towards the 5% quoting requirement. Additionally, tick sensitive orders (*i.e.,* "Sell Plus," "Buy Minus" (*see* Rule 13) and "Buy Minus Zero Plus") will not be counted as credit towards the 5% quoting requirement.

In order for an SLP to be entitled to a rebate, an SLP must post liquidity on the Exchange that executes against incoming orders and meet the monthly minimum quoting requirement averaging at least 3% at the NBB or the NBO in round lots in its assigned securities (*see* Section (b) ("Financial Rebates for Executed Transactions") in the proposed Rule). If the SLP does not meet a minimum monthly quoting requirement averaging at least 3%, an SLP will not be entitled to a rebate on executed volume in that given month in that particular affected security (*see* Section (i) ("non-Regulatory Penalties") of the proposed Rule).

The SLP is not subject to any minimum or maximum quoting size requirement apart from the requirement that an order be for at least one round lot (*see* Section (f)(2) of the proposed Rule).

An SLP must use its SLP mnemonic when trading as an SLP in its assigned securities in order to obtain credit for their SLP trading activity (*see* Section (f)(2) of the proposed Rule). Quoting and rebate credit will be measured only by using the SLP's unique mnemonics specifically designated for SLP trading activity.

Calculation of the Quoting Requirements

The SLP's quoting requirements will not be in effect in the first month the SLP operates as an SLP. The Exchange will provide the SLP with a one-month grace period to allow preparation time for the SLP. Therefore, this quoting requirement will not take effect until the second month of an SLP's operation as an SLP.

Beginning with the second month an SLP is operating as an SLP, an SLP must satisfy the 5% quoting requirement for each assigned security.[7] The SLP Liaison Committee will determine whether an SLP has met its quoting requirement for the trading days[8] in a calendar month by calculating the following:

(1) The "Daily NBB Quoting Percentage" by determining the percentage of time an SLP has at least one round lot of displayed interest in an Exchange bid at the NBB during each trading day for a calendar month;

(2) The "Daily NBO Quoting Percentage" by determining the percentage of time an SLP has at least one round lot of displayed interest in an Exchange offer at the NBO during each trading day for a calendar month;

(3) The "Average Daily NBBO Quoting Percentage" for each trading day by summing the "Daily NBB Quoting Percentage" and the "Daily NBO Quoting Percentage" in each assigned security then dividing such sum by two; and

(4) The "Monthly Average NBBO Quoting Percentage" for each assigned security by summing the security's "Average Daily NBBO Quoting

[6] *See* Exhibit 5, Section (a) of the proposed Rule.

[7] NYSE Euronext's Strategic Analysis Department will be responsible for generating SLP performance data and providing such data to the SLP Liaison Committee in order to determine which SLPs are meeting their quoting requirements and are eligible for financial rebates.

[8] For purposes of Section (f)(1) of the proposed rule text (Exhibit 5), "trading day" shall mean any day on which the Exchange is scheduled to be open for business. Days on which the Exchange closes prior to 4 p.m. (Eastern Time) for any reason, which may include any regulatory halt or trading halt, shall be considered a trading day.

Percentages" for each trading day in a calendar month then dividing the resulting sum by the total number of trading days in such calendar month.

Example of Quoting Requirement Calculation

Below is an example of a quoting requirement calculation. For purposes of this example, it is assumed that SLP No. 1 has two assigned securities, A and B, and that there were 5 trading days in the selected calendar month.

The "Average Daily NBBO Quoting Percentage" for SLP No. 1 is calculated for each security by summing the daily NBB and NBO of each security for that day and dividing that number by two:

Trading days	NBB	NBO	Calculation of "Average Daily NBBO Quoting Percentage" for SLP No. 1	"Average Daily NBBO Quoting Percentage"
			Security A	
T1	4%	6%	4% + 6% = 10% divided by 2 = 5%	5%
T2	3%	5%	3% + 5% = 8% divided by 2 = 4%	4%
T3	4%	4%	4% + 4% = 8% divided by 2 = 4%	4%
T4	6%	8%	6% + 8% = 14% divided by 2 = 7%	7%
T5	5%	5%	5% + 5% = 10% divided by 2 = 5%	5%
			Security B	
T1	5%	7%	5% + 7% = 12% divided by 2 = 6%	6%
T2	4%	6%	4% + 6% = 10% divided by 2 = 5%	5%
T3	6%	8%	6% + 8% = 14% divided by 2 = 7%	7%
T4	7%	9%	7% + 9% = 16% divided by 2 = 8%	8%
T5	9%	9%	9% + 9% = 18% divided by 2 = 9%	9%

The "Monthly Average NBBO Quoting Percentage" for each security is then calculated by summing the security's "Average Daily NBBO Quoting Percentages" for all five trading days of the calendar month and then dividing the resulting total by the number of trading days in the calendar month (in this instance 5).

"Average Daily NBBO Quoting Percentage"					Calculation of "Monthly Average NBBO Quoting Percentage" for SLP No. 1	"Monthly Average NBBO Quoting Percentage"
T1	T2	T3	T4	T5		
					Security A	
5%	4%	4%	7%	5%	5% + 4% + 4% + 7% + 5% = 25% divided by 5 = 5%	5%
					Security B	
6%	5%	7%	8%	9%	6% + 5% + 7% + 8% + 9% = 35% divided by 5 = 7%	7%

Financial Rebates for Executed Transactions

When an SLP posts liquidity, displayed or non-displayed, on the Exchange in its SLP assigned securities and such liquidity is executed against an incoming order, the SLP will receive a financial rebate for that executed transaction provided the SLP has met it rebate quoting requirement averaging at least 3% at the NBB or the NBO in each assigned security pursuant to Section (i)(1)(A) and (B) ("Non-Regulatory Penalties"). An SLP will only receive a rebate when it has met the monthly 3% or better quoting requirement in its assigned securities and the SLP's posted displayed or non-displayed liquidity results in an execution.

SLP Rebate Calculation

The SLP rebate will be $0.0020 per share priced at or above $1.00, and $0.0005 per share priced below $1.00, for executions when the SLP provides liquidity.[9] The rebate will be paid for displayed and non-displayed orders provided that the SLP meets the quoting requirement averaging 3% or more at the NBB or NBO in its assigned securities for a given month. If an SLP does not meet the average quoting requirement described above, such SLP will not be entitled to a rebate. As discussed previously, if an SLP does not meet its quoting requirement averaging 5% at the NBB or the NBO for each assigned security for 3 consecutive months, such SLP may be disqualified from SLP status. The Exchange will track the volume and quoting requirement of SLPs by their designated SLP mnemonics.

Except for the rebate, all other SLP fees are the same as existing customer fees on the Exchange (*see* the NYSE Amex Equities Price List on the Exchange Web site).

SLP Parity With Other Market Participants Pursuant to Rule 72—NYSE Amex Equities

Exchange systems are responsible for share allocation and create interest files for each market participant. Individual Floor brokers and the DMM registered in a security each constitute single participants. All off-Floor orders entered in Exchange systems at the Exchange BBO together constitute a single participant ("Book Participant") for the purpose of share allocation. SLP orders will be in the "Book Participant"

[9] The Exchange will file a separate fee filing with the SEC pursuant to the provisions of Section 19b–4 that will outline the SLP rebate program described above. The calculation and amount of the SLP rebate will be published in the NYSE Amex Equities Price List, available on the Exchange's Web site.

category pursuant to Rule 72—NYSE Amex Equities.

Market Data and Trading Information Available to the SLP

The universe of trading information and market data available to the SLP will include market data published by the Exchange and all other automated trading centers (as defined in Rule 600 of Regulation NMS), trading information published on the Consolidated Tape and on the NYSE Amex OpenBook®.[10] Thus, the SLP will have the same published trading information and market data that all other Exchange customers have available to them.

Non-Regulatory Penalties

If an SLP fails to meet the 5% quoting requirement for any assigned security, the SLP may be subject to non-regulatory penalties imposed by the SLP Liaison Committee (*see* Section (i) of the proposed Rule). Such non-regulatory penalties include: (1) Denial of the financial rebate; (2) removal of one or more assigned securities from the SLP; and (3) disqualification. These non-regulatory penalties and the conditions under which such penalties are imposed may be appealed by an SLP as provided in Section (j) ("Appeal of a Non-Regulatory Penalty") of the proposed Rule and described in more detail below.

Penalties for Quoting Less Than 5% in a Given Calendar Month

In a given calendar month, if an SLP maintains a quote at the NBB or NBO averaging 3% of the trading day, but less than the average of 5% of the trading day in any assigned security, the SLP will receive a financial rebate for that calendar month for executed transactions in that particular security as described in Section (b) ("Rebates for Executed Transactions") of the proposed Rule. Failure to meet the 5% quoting requirement for each assigned security in that month will be counted towards the three-month disqualification period provided in paragraph (i)(C) of the proposed Rule.

In a given calendar month, if an SLP maintains a quote at the NBB or the NBO averaging less than 3% of the regular trading day in an assigned security, the SLP will not receive the financial rebate for that month for transactions executed in that particular assigned security. The failure to meet the 5% quoting requirement for any assigned security in that month will also be counted towards the three-month disqualification period.

If an SLP fails to meet the 5% quoting requirement for three consecutive calendar months in any assigned security, the SLP Liaison Committee may, in its discretion, take the following non-regulatory action:

(1) Revoke the assignment of the affected security(ies);

(2) Revoke the assignment of an additional, unaffected security from an SLP; or

(3) Disqualify a member organization's status as an SLP.

Disqualification Determinations

In the second calendar month that an SLP fails to meet the 5% quoting requirement, the SLP Liaison Committee will notify the SLP in writing that the SLP may be disqualified if it fails to meet the quoting requirement the third consecutive month.[11] If the SLP fails to meet the 5% quoting requirement for a third consecutive month, the SLP may be disqualified from SLP status.

When disqualification determinations are made, the SLP Liaison Committee will provide a disqualification notice to the member organization informing the member organization of its disqualification as an SLP.

If a member organization is disqualified from its status as an SLP pursuant to Section (i)(1)(C)(iii) of the proposed Rule, the member organization may appeal the disqualification pursuant to Section (j) ("Appeal of a Non-Regulatory Penalties") of the proposed Rule, or re-apply for SLP status in accordance with Section (d)(6) ("Re-application for SLP Status") of the proposed Rule. However, the re-application process may not begin until three calendar months after the month in which the member organization received its disqualification notice.

Appeal of Non-Regulatory Penalties

An SLP may request an appeal of the decision to impose a non-regulatory penalty as provided in Section (j) of the proposed Rule. Upon receiving a request for an appeal, a panel of NYSE Euronext employees referred to as the "SLP Panel" will review the decision to impose non-regulatory penalties. The SLP Panel shall consist of the Exchange's Chief Regulatory Officer ("CRO"), or a designee of the CRO, and two (2) officers of the Exchange designated by the NYSE Euronext Head of the U.S. Markets Division.

The SLP Panel will review the facts of the subject non-regulatory penalty and render a decision as to the correctness of the decision to impose the penalty. The SLP Panel may overturn or modify an action taken by the SLP Liaison Committee, and all determinations by the SLP Panel will constitute final action by the Exchange on the disputed matter.

Regulatory Oversight of SLPs

Member organizations that act as SLPs will be subject to regulatory oversight by the Exchange and FINRA.

Proposed amendments to Rule 2A—NYSE Amex Equities

In conjunction with the adoption of Rule 107B—NYSE Amex Equities, the Exchange also proposes to amend Rule 2A(c)—NYSE Amex Equities to accommodate the Exchange's authority to approve or disapprove the designation of a member or member organization as an SLP.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with, and furthers the objectives of, Section 6(b)(5) of the Act,[12] 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 also supports the principles of Section 11A(a)(1)[13] of the Act in that it seeks to ensure the economically efficient execution of securities transactions and fair competition among brokers and dealers and among exchange markets.

The Exchange believes that the proposed Rule is consistent with these principles in that it seeks to establish a new class of market participant that will provide additional liquidity to the market and add competition to the existing group of liquidity providers. The Exchange believes that by requiring an SLP to quote at the NBB or the NBO a percentage of the regular trading day in their assigned securities, and by paying an SLP a rebate when its posted interest results in an execution, the Exchange is rewarding aggressive liquidity providers in the market, and

[10] The NYSE Amex OpenBook® is provided by the Exchange to vendors and customers in two modes. The first displays the depth of the market refreshed every five seconds. The second displays the depth of the market in real time. NYSE Amex OpenBook® discloses limit order interest at the price at the best bid and offer and at prices below the best bid and above the best offer.

[11] The SLP Liaison Committee will be responsible for issuing the letter to an SLP that fails to meet its quoting requirement for three consecutive months. It will also be responsible for advising an SLP of its eligibility or ineligibility to become an SLP.

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78k–1(a)(1).

by doing so, the Exchange will encourage the additional utilization of, and interaction with, the NYSE Amex Equities market and provide customers with the premier venue for price discovery, liquidity, competitive quotes and price improvement.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [14] and Rule 19b–4(f)(6) thereunder.[15] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.[16]

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–NYSEAmex–2009–98 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEAmex–2009–98. 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,[17] 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 inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–NYSEAmex–2009–98 and should be submitted on or before February 5, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–637 Filed 1–14–10; 8:45 am]

BILLING CODE 8011–01–P

[14] 15 U.S.C. 78s(b)(3)(A)(iii).

[15] 17 CFR 240.19b–4(f)(6).

[16] 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.

[17] The text of the proposed rule change is available on the Commission's Web site at *http://www.sec.gov.*

[18] 17 CFR 200.30–3(a)(12).

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

2010 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment and Announcement of Public Hearing

AGENCY: Office of the United States Trade Representative.

ACTION: Request for written submissions from the public and announcement of public hearing.

SUMMARY: Section 182 of the Trade Act of 1974 (Trade Act) (19 U.S.C. 2242) requires the United States Trade Representative (USTR) to identify countries that deny adequate and effective protection of intellectual property rights (IPR) or deny fair and equitable market access to U.S. persons who rely on intellectual property protection. (The provisions of Section 182 are commonly referred to as the "Special 301" provisions of the Trade Act.). The USTR is required to determine which, if any, of these countries should be identified as Priority Foreign Countries. Acts, policies, or practices that are the basis of a country's identification as a Priority Foreign Country can be subject to the procedures set out in sections 301–305 of the Trade Act.

In addition, USTR has created a "Priority Watch List" and "Watch List" to assist the Administration in pursuing the goals of the Special 301 provisions. Placement of a trading partner on the Priority Watch List or Watch List indicates that particular problems exist in that country with respect to IPR protection, enforcement, or market access for persons relying on intellectual property. Trading partners placed on the Priority Watch List are the focus of increased bilateral attention concerning the problem areas.

USTR chairs an interagency team that reviews information from many sources, and that consults with and makes recommendations to the USTR on issues arising under Special 301. Written submissions from interested persons are a key source of information for the Special 301 review process. In 2010, USTR through the Special 301

Committee will conduct a public hearing as part of the review process.

USTR is hereby requesting written submissions from the public concerning foreign countries' acts, policies, or practices that are relevant to the decision on whether a particular trading partner should be identified as a priority foreign country under Section 182 of the Trade Act or placed on the Priority Watch List or Watch List. Interested parties, including foreign governments, who want to testify at the public hearing must submit a request to testify at the hearing and a short hearing statement. The deadlines for these procedures are set out below.

DATES: The schedule for the 2010 Special 301 review is set forth below.

Tuesday, February 16, 2010 (by 5 p.m.)—For interested parties, except for foreign governments: Submit written comments, requests to testify at the Special 301 Public Hearing, and hearing statements.

Tuesday, February 23, 2010 (by 5 p.m.)—For foreign governments: Submit written comments, requests to testify at the Special 301 Public Hearing, and hearing statements.

Wednesday, March 3, 2010, and additional days from March 4–8, 2010 as necessary—Special 301 Committee Public Hearing for interested parties, including representatives of foreign governments, will be held at the United States International Trade Commission, 500 E St. SW., Washington, DC 20436.

On or about April 30, 2010—In accordance with statutory requirements, USTR will publish the 2010 Special 301 Report on or about April 30, 2010.

ADDRESSES: All written comments, requests to testify, and hearing statements should be sent electronically via *http://www.regulations.gov*, docket number USTR–2010–0003. Submissions should contain the term "2010 Special 301 Review" in the "Type comment & Upload file" field on *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Jennifer Choe Groves, Senior Director for Intellectual Property and Innovation and Chair of the Special 301 Committee, Office of the United States Trade Representative, at (202) 395–4510. Further information about Special 301 can be located at *http://www.ustr.gov*.

SUPPLEMENTARY INFORMATION:

1. Background

USTR requests that interested persons identify those countries that deny adequate and effective protection for intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection. USTR requests that, where relevant, submissions mention particular regions, provinces, states, or other subdivisions of a country in which an act, policy, or practice is believed to warrant special attention. Submissions may report positive or negative developments with respect to these sub-national entities.

Section 182 contains a special rule regarding actions of Canada affecting United States cultural industries. The USTR must identify any act, policy or practice of Canada that affects cultural industries, is adopted or expanded after December 17, 1992, and is actionable under Article 2106 of the North American Free Trade Agreement (NAFTA). USTR must make the above-referenced identifications within 30 days after publication of the National Trade Estimate (NTE) report, *i.e.*, approximately April 30, 2010.

2. Public Comments

a. Written Comments

The Special 301 Committee invites written submissions from the public concerning foreign countries' acts, policies, or practices that are relevant to the decision whether a particular trading partner should be identified under Section 182 of the Trade Act. As noted above, interested parties, except for foreign governments, must submit written comments by February 16, 2010 at 5 p.m. Interested foreign governments must submit written comments by February 23, 2010 at 5 p.m.

b. Requirements for Comments

Written comments should include a description of the problems experienced by the submitter and the effect of the acts, policies, and practices on U.S. industry. Comments should be as detailed as possible and should provide all necessary information for assessing the effect of the acts, policies, and practices. Any comments that include quantitative loss claims should be accompanied by the methodology used in calculating such estimated losses. Comments must be in English. All comments should be sent electronically via *http://www.regulations.gov*, docket number USTR–2010–0003.

To submit comments to *http://www.regulations.gov*, find the docket by entering the number USTR–2010–0003 in the "Enter Keyword or ID" window at the *http://www.regulations.gov* home page and click "Search." The site will provide a search-results page listing all documents associated with this docket. Find a reference to this notice by selecting "Notice" under "Document Type" on the left side of the search-results page, and click on the link entitled "Submit a comment." (For further information on using the *http://www.regulations.gov* Web site, please consult the resources provided on the Web site by clicking on "How to Use This Site" on the left side of the home page).

The *http://www.regulations.gov* site provides the option of providing comments by filling in a "Type comment & Upload file" field, or by attaching a document. It is USTR's preference that comments be provided in an attached document. If a document is attached, please type "2010 Special 301 Review" in the "Type comment & Upload file" field. USTR prefers submissions in Microsoft Word (.doc) or Adobe Acrobat (.pdf). If the submission is in an application other than those two, please indicate the name of the application in the "Comments" field.

3. Public Hearing

a. Notice of Public Hearing

The Special 301 Committee will hold a public hearing at the United States International Trade Commission, 500 E St. SW., Washington, DC 20436 for interested parties, including representatives of foreign governments, beginning on March 3 and continuing through March 4–8 (as necessary). The hearing will be open to the public, and a transcript of the hearing will be made available on *http://www.ustr.gov*.

b. Submission of Requests To Testify at the Public Hearing and Hearing Statements

All interested parties, except foreign governments, wishing to testify at the hearing must submit, by 5 p.m. on February 16, 2010, a "Notice of Intent to Testify" and "Hearing Statement" to *http://www.regulations.gov* (following the procedures set forth in "Requirements for Comments" above), the name of the witness, name of the organization (if applicable), address, telephone number, fax number, and e-mail address. Oral testimony before the Special 301 Committee will be limited to one five-minute presentation in English. A five-minute period will be allowed for questions from the Special 301 Committee. If those testifying wish to submit a longer "Hearing Statement" for the record, it must accompany the "Notice of Intent to Testify" to be submitted on February 16, 2010.

All interested foreign governments who wish to testify at the hearing must submit, by 5 p.m. on February 23, 2010, a "Notice of Intent to Testify" to *http://www.regulations.gov* (following the procedures set forth in "Requirements

for Comments" above), the name of the witness, name of the organization (if applicable), address, telephone number, fax number, and e-mail address. Oral testimony before the Special 301 Committee will be limited to one five-minute presentation in English. A five-minute period will be allowed for questions from the Special 301 Committee. If foreign governments testifying wish to submit a "Hearing Statement" for the record, it must be submitted by February 23, 2010.

4. Business Confidential Information

A person requesting that information contained in a comment submitted by that person be treated as confidential business information must certify that such information is business confidential and would not customarily be released to the public by the submitter. Confidential business information must be clearly designated as such, the submission must be marked "BUSINESS CONFIDENTIAL" at the top and bottom of the cover page and each succeeding page, and the submission should indicate, via brackets, the specific information that is confidential. Additionally, "Business Confidential" should be included in the "Type comment & Upload file" field. Anyone submitting a comment containing business confidential information must also submit as a separate submission a non-confidential version of the confidential submission, indicating where confidential information has been redacted. The non-confidential summary will be placed in the docket and open to public inspection.

5. Inspection of Comments, Notices, and Hearing Statements

USTR will maintain a docket on the 2010 Special 301 Review, accessible to the public. The public file will include non-confidential comments, notices of intent to testify, and hearing statements received by USTR from the public, including foreign governments, with respect to the 2010 Special 301 Review. Comments will be placed in the docket and open to public inspection pursuant to 15 CFR 2006.13, except confidential business information exempt from public inspection in accordance with 15 CFR 2006.15. Comments may be viewed on the *http://www.regulations.gov* Web site by entering docket number USTR–2010–0003 in the search field on the home page.

Stanford K. McCoy,

Assistant U.S. Trade Representative for Intellectual Property and Innovation.

[FR Doc. 2010–620 Filed 1–14–10; 8:45 am]

BILLING CODE 3190–WO–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 35339]

Carolina Coastal Railway, Inc.—Acquisition and Operation Exemption—North Carolina State Ports Authority

Carolina Coastal Railway, Inc. (CLNA), a Class III rail carrier, has filed a verified notice of exemption [1] under 49 CFR 1150.41 to acquire, by assignment, Morehead & South Fork Railroad Co.'s (MHSF) lease with the North Carolina State Ports Authority (SPA) and to operate approximately 0.87 miles of SPA's rail lines as follows: (1) From milepost 0.0 to milepost 0.87 at Gallants Channel on Radio Island, in Morehead City; [2] (2) from milepost 0.0, in Morehead City, through and including the classification yard parallel to Highway 70 onto the Morehead City Port; [3] and (3) all of the railroad tracks owned or leased by SPA (or previously owned or leased by North Carolina Ports Railway Commission), in Carteret County that might have been omitted from the lines' description. The lines also include 4 additional miles of intra-terminal trackage.

CLNA certifies that its projected annual revenues as a result of this transaction will not exceed those that would qualify it as a Class III carrier and further certifies that its projected revenues will not exceed $5 million.

CLNA states that its services will replace those provided by MHSF on or about February 1, 2010 (after the January 29, 2010 effective date of the exemption, 30 days after the exemption was filed).

If the verified notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Stay petitions must be filed no later than January 22, 2010 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 35339, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on John D. Heffner, John D. Heffner, PLLC, 1750 K Street, NW., Suite 200, Washington, DC 20006.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov*.

Decided: January 12, 2010.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Andrea Pope-Matheson,

Clearance Clerk.

[FR Doc. 2010–679 Filed 1–14–10; 8:45 am]

BILLING CODE 4915–01–P

[1] CLNA supplemented its notice with a letter filed January 8, 2010, confirming that the agreement between the parties does not contain any provisions prohibiting petitioner from interchanging traffic with any third party.

[2] The line extends from the connection with the Norfolk Southern Railway Company/North Carolina Railroad Company, and includes the spur track and consolidation tracks leading from the line, generally along Inlet Drive, to the industrial tracks on the property leased from SPA to the PCS Phosphate Company, Inc., rail car dump and the "Fishmeal" spur on the area commonly known as Marsh Island, in Carteret County, NC.

[3] The line extends from the connection with the Norfolk Southern Railway Company/North Carolina Railroad Company, and includes all of the railroad tracks on the Morehead City Port's property, whether denominated as spurs, side tracks, industrial tracks, or otherwise, in Carteret County.

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–1056X; STB Docket No. AB–1066 (Sub-No. 1X)]

Pioneer Industrial Railway Co.—Discontinuance of Service Exemption—Line in Peoria County, IL; Central Illinois Railroad Company—Discontinuance of Service Exemption—Line in Peoria County, IL

On December 29, 2009, Pioneer Industrial Railway Co. (PIRY) and Central Illinois Railroad Company (CIRY), jointly filed with the Surface Transportation Board a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903.[1] PIRY seeks to discontinue service over 8.29 miles of rail line known as the Kellar Branch, between mileposts 1.71 and 10.0, owned by and located in the City of Peoria and the Village of Peoria Heights, IL. CIRY seeks to discontinue service over a 5.72-mile portion of the Kellar Branch, between mileposts 2.78 and 8.50.[2] The line traverses United

[1] Applicants also seek exemptions from 49 U.S.C. 10904 (offer of financial assistance procedures) and 49 U.S.C. 10905 (public use conditions). These requests will be addressed in the final decision. We note, however, that because this is a discontinuance proceeding and not an abandonment, trail use/rail banking and public use conditions are not appropriate. Similarly, no environmental or historic documentation is required under 49 CFR 1105.6(c)(2) and 1105.8(e).

[2] PIRY was authorized to lease and operate the line in *Pioneer Industrial Railway Co.—Lease and Operation Exemption—Peoria, Peoria Heights & Western Railroad,* STB Finance Docket No. 33549

States Postal Service Zip Codes 61603, 61604, 61614, 61615 and 61616, and includes the stations of Peoria P&PU Switch, Averyville, Peoria Heights, Keller, and Pioneer Park.

This transaction is related to a concurrently filed verified notice of exemption for PIRY to acquire from CIRY non-exclusive local trackage rights to operate over approximately 4.81 miles of rail line (the northern and southern sections of the Kellar Branch and the western connection). *See* STB Finance Docket No. 35341, *Pioneer Industrial Railway Co.—Trackage Rights Exemption—Central Illinois Railway Company.*

The line does not contain Federally granted rights-of-way. Any documentation in PIRY's or CIRY's possession will be made available promptly to those requesting it.

The interest of railroad employees will be protected by the conditions set forth in *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979).

By issuance of this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision is scheduled to be issued by April 16, 2010.

Any offer of financial assistance (OFA) to subsidize continued rail service under 49 CFR 1152.27(b)(2) will be due no later than 10 days after service of a decision granting the petition for exemption. Each offer must be accompanied by a $1,500 filing fee. *See* 49 CFR 1002.2(f)(25).

All filings in response to this notice must refer to STB Docket No. AB–1056X and STB Docket No. AB–1066 (Sub-No. 1X) and must be sent to: (1) Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001; and (2) William A. Mullins, 2401 Pennsylvania Avenue, NW., Suite 300, Washington, DC 20037, and Michael R. Ascher, 2500 S. Highland Ave., Suite 360, Lombard, IL 60148. Replies to the petition are due on or before February 4, 2010.

Persons seeking further information concerning discontinuance procedures may contact the Board's Office of Public Assistance, Governmental Affairs and Compliance at (202) 245–0230 or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Section of Environmental Analysis (SEA) at (202) 245–0305. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: January 12, 2010.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Kulunie L. Cannon,

Clearance Clerk.

[FR Doc. 2010–694 Filed 1–14–10; 8:45 am]

BILLING CODE 4915–01–P

(STB served Feb. 20, 1998); CIRY was authorized to operate the line in *Central Illinois Railroad Company—Operation Exemption—Rail Line of The City of Peoria and The Village of Peoria Heights in Peoria and Peoria Heights, Peoria County, IL,* STB Finance Docket No. 34518 (STB served July 28, 2004).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Eighty-First Meeting: RTCA Special Committee 159: Global Positioning System (GPS)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of RTCA Special Committee 159 meeting: Global Positioning System (GPS).

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of RTCA Special Committee 159: Global Positioning System (GPS).

DATES: The meeting will be held February 2–5, 2010, from 9 a.m. to 4:30 p.m. (unless stated otherwise).

ADDRESS: The meeting will be held at RTCA, Inc., 1828 L Street, NW., Suite 805, Washington, DC, 20036.

FOR FURTHER INFORMATION CONTACT: RTCA Secretariat, 1828 L Street, NW., Suite 805, Washington, DC, 20036; telephone (202) 833–9339; fax (202) 833–9434; Web site *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a) (2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for a Special Committee 159: Global Positioning System (GPS) meeting. The agenda will include:

Specific Working Group Sessions

Tuesday, February 2nd

- All Day, Working Group 2C, GPS/Inertial, Colson Board Room.

Wednesday, February 3rd

- All Day, Working Group 2, GPS/WAAS, Colson Board Room.
- All Day, Working Group 4, Precision Landing Guidance (GPS/LAAS), MacIntosh-NBAA Room & Hilton-ATA Room.

Thursday, February 4th

- Morning (9 a.m.–12 p.m.), Working Group 4, Precision Landing Guidance (GPS/LAAS), MacIntosh-NBAA Room & Hilton-ATA Room.
- Afternoon (1 p.m.–5 p.m.), Working Groups 2, 4, 6 & 7, Joint Session, MacIntosh-NBAA Room & Hilton-ATA Room.

Friday, February 5th

Plenary Session—*See* Agenda Below

Agenda—Plenary Session—Agenda: February 5th, 2010—starting at 9 a.m.; MacIntosh-NBAA & Hilton-ATA Rooms.

- Chairman's Introductory Remarks.
- Approval of Summary of the Eightieth Meeting held October 2, 2009, RTCA Paper No. 002–09/SC159–982.
- Review Working Group (WG) Progress and Identify Issues for Resolution:
- GPS/3rd Civil Frequency (WG–1).
- GPS/WAAS (WG–2).
- GPS/GLONASS (WG–2A).
- GPS/Inertial (WG–2C).
- GPS/Precision Landing Guidance (WG- 4).
- GPS/Airport Surface Surveillance (WG–5).
- GPS/Interference (WG–6).
- GPS/Antennas (WG–7).
- Review of EUROCAE Activities.
- GEAS Update Briefing.
- Assignment/Review of Future Work.
- Other Business.
- Date and Place of Next Meeting

Attendance is open to the interested public but limited to space availability. With the approval of the chairmen, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on January 7, 2010.

Francisco Estrada C.,

RTCA Advisory Committee.

[FR Doc. 2010–659 Filed 1–14–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Twelfth Meeting: RTCA Special Committee 216/Aeronautical Systems Security

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of RTCA Special Committee 216 meeting; Aeronautical Systems Security.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of RTCA Special Committee 216: Aeronautical Systems Security.

DATES: The meeting will be held February 9–11, 2010 from 9 a.m. to 5 p.m.

ADDRESSES: The meeting will be held at RTCA, Inc., 1828 L Street, NW., Suite 805, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: RTCA Secretariat, 1828 L Street, NW., Suite 805, Washington, DC, 20036; telephone (202) 833–9339; fax (202) 833–9434; Web site *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a) (2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for a Special Committee 216/Aeronautical Systems Security meeting. The agenda will include:

- Welcome/Introductions/Administrative Remarks.
- Agenda Overview and Approval of the Summary of the 11th meeting held November 18–20, 2009, (RTCA Paper No. 257–09/SC216–023).
- EUROCAE WG–72 Report.
- Subgroup and Action Item Reports:
  - SOW reviews;
  - Schedule.
- Subgroup Meetings/Break-outs.
- Subgroup Reports on Break-outs.
- Establish Dates, Location, and Agenda for Next Meeting(s).
- Any Other Business.

Attendance is open to the interested public but limited to space availability. With the approval of the chairmen, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on January 7, 2010.

Francisco Estrada C.,

RTCA Advisory Committee.

[FR Doc. 2010–660 Filed 1–14–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Proposed Modification of the Atlanta, GA, Class B Airspace Area; Public Meetings

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of meetings; correction.

SUMMARY: This action corrects an error in the notice of meetings published in the **Federal Register** on Friday, December 4, 2009, concerning a proposal to revise Class B airspace at Atlanta, GA, (74 FR 63818). In that notice, the address and phone number for the meeting scheduled for Thursday, February 25, 2010 in Covington, GA, was incorrect. The meeting information for the other three meetings is correct as originally published.

FOR FURTHER INFORMATION CONTACT: Mike Richardson, Support Manager, Atlanta TRACON, 784 South Highway 74, Peachtree City, GA; *telephone:* 678–364–6306.

SUPPLEMENTARY INFORMATION:

History

On Friday, December 4, 2009, a notice of meetings was published in the **Federal Register** concerning a proposal to revise Class B airspace at Atlanta, GA, (74 FR 63818). The address and phone number for the meeting scheduled for Thursday, February 25, 2010, in Covington, GA was incorrect. This action corrects that error.

For information regarding submittal of comments, meeting procedures, and agenda, please reference the notice of meetings published on Friday, December 4, 2009.

Correction to Notice

Accordingly, the address and phone number for the informal airspace meeting scheduled for February 25, 2010, in Covington, GA, as published in the **Federal Register** on Friday, December 4, 2009 (74 FR 63818), FR Doc. E9–28900 on page 63818, second column, is corrected as follows:

* * * * *

The meeting on Thursday, February 25, 2010, will be held at the City of Covington City Hall, 2194 Emory Street NW., Covington, GA 30014 [Call 770–385–2010 for directions].

* * * * *

Issued in Washington, DC, on January 8, 2010.

Edith V. Parish,

Manager, Airspace and Rules Group.

[FR Doc. 2010–724 Filed 1–14–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 35336]

YCR Corporation—Modified Rail Certificate—in Yakima County, WA

On December 16, 2009, YCR Corporation (YCR),[1] a noncarrier, filed a notice for a modified certificate of public convenience and necessity under 49 CFR 1150, Subpart C, *Modified Certificate of Public Convenience and Necessity,* to lease and operate a line of railroad between Wesley Junction at milepost 0.0 [2] at Toppenish and milepost 20.56 near White Swan, and an additional 1.63 miles of industrial spur near White Swan,[3] for a total distance of 22.19 miles, in Yakima County, WA.

The line was authorized for abandonment by the Board's predecessor agency, the Interstate Commerce Commission (ICC), in *Washington Central Railroad Company, Inc.—Abandonment Exemption—in Yakima County, WA,* Docket No. AB–326X (ICC served Aug. 24, 1992). Although authorized for abandonment, the line was subsequently acquired by the State of Washington pursuant to an offer of financial assistance in *Washington Central Railroad Company, Inc.—Abandonment Exemption—in Yakima County, WA, In the Matter of an Offer of Financial Assistance,* Docket No. AB–326X (ICC served March 18, 1993) and, according to YRC, transferred to the County of Yakima (the County). Previously, the line was operated by two other carriers under modified rail certificates.[4]

Pursuant to a lease agreement, YCR, as lessee, and the County, as owner,

[1] YCR is a profit corporation formed under the laws of the State of Washington.

[2] There is an interline connection with BNSF Railway Company (BNSF) at BNSF milepost 73.6 at Toppenish.

[3] On December 17, 2009, YCR filed an amendment to its application to correct the description of the line to include 1.63-mile spur in the description in this notice.

[4] The Yakima Valley Rail and Steam Museum Association d/b/a Toppenish, Simcoe & Western Railroad (YVR) was issued a modified rail certificate to operate the line in *Yakima Valley Rail and Steam Museum Association, d/b/a Toppenish, Simcoe & Western Railroad—Modified Rail Certificate,* Finance Docket No. 32487 (ICC served Apr. 28, 1994). YCR states that YVR's lease with the County was terminated on December, 31, 2005. Shortly thereafter, the Central Washington Railroad Company and Columbia Basin Railroad Company, Inc. (CWA/CBRC), was issued a modified certificate to operate the line in *Central Washington Railroad Company and Columbia Basin Railroad Company, Inc.—Modified Rail Certificate,* STB Finance Docket No. 34804 (STB served Jan. 4, 2006). YCR states that CWA/CBRC's lease with the County was terminated on December 20, 2009. On December 21, 2009, YCR became the operator of the line.

have agreed that YCR will commence freight rail operation on or after December 21, 2009, for a term of 10 years, which may be extended, upon the occurrence of certain conditions, for an additional 5 years. Under the agreement, the parties may terminate the lease earlier upon the occurrence of certain events (*i.e.,* a final and non-appealable order by the Board, court, or other administrative agency that terminates YCR's authority or ability to provide rail freight services on the line). As operator of the line, YCR will provide rail freight service over the line's only interline connection with BNSF at BNSF milepost 73.6, at Toppenish.[5]

This transaction is related to the verified notice of exemption filed in STB Finance Docket No. 35337, *Paul Didelius—Continuance in Control Exemption—YCR Corporation* (STB served Dec. 31, 2009), wherein Paul Didelius seeks to continue in control of YCR, upon YCR becoming a Class III rail carrier.

The rail segment qualifies for a modified certificate of public convenience and necessity. *See Common Carrier Status of States, State Agencies and Instrumentalities and Political Subdivisions,* Finance Docket No. 28990F (ICC served July 16, 1981).

YCR states that no subsidy is involved and that there are no preconditions for shippers to meet in order to receive rail service. YCR also states that the agreement requires it to obtain liability insurance coverage.

This notice will be served on the Association of American Railroads (Car Service Division) as agent for all railroads subscribing to the car-service and car-hire agreement at 50 F Street, NW., Washington, DC 20001; and on the American Short Line and Regional Railroad Association at 50 F Street, NW., Suite 7020, Washington, DC 20001.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: January 12, 2010.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Kulunie L. Cannon,

Clearance Clerk.

[FR Doc. 2010–651 Filed 1–14–10; 8:45 am]

BILLING CODE 4915–01–P

[5] In its December 17, 2009 amendment to its application, YCR also advises the Board that it intends to enter into an interchange agreement with BNSF, imposing no interchange commitment. YCR states that it will advise the Board in the event that the final interchange agreement differs from what is represented here.

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Over-the-Road Bus Accessibility Program Grants

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of Availability of Fiscal Year 2009 Funds: Solicitation of Grant Applications.

SUMMARY: The U.S. Department of Transportation (DOT) Federal Transit Administration (FTA) announces the availability of funds in Fiscal Year (FY) 2009 for the Over-the-Road Bus (OTRB) Accessibility Program, authorized by Section 3038 of the Transportation Equity Act for the 21st Century (TEA–21). The OTRB Accessibility Program makes funds available to private operators of over-the-road buses to finance the incremental capital and training costs of complying with DOT's over-the-road bus accessibility regulation. The authorizing legislation calls for national solicitation of applications with grantees to be selected on a competitive basis. Federal transit funds are available to intercity fixed-route providers and other OTRB providers at up to 90 percent of the project cost.

A total of $8,800,000 has been appropriated for the program in FY 2009. FY 2006 funds have lapsed in the amount of $1,867,900. The total amount available for allocation is $10,710,435 which includes FY 2009 appropriations and lapsed funds. This announcement is available on the Internet on the FTA Web site at: *http://www.fta.dot.gov*. FTA will announce final selections on the Web site and in the **Federal Register**. A synopsis of this announcement will be posted in the FIND module of the government-wide electronic grants Web site at *http://www.grants.gov*. Applications may be submitted to the appropriate FTA Regional Office (see Appendix B) in hard copy or electronically through the Grants.Gov APPLY function.

DATES: Complete applications for OTRB Program grants must be submitted to the appropriate FTA regional office (see Appendix B) by April 15, 2010, or submitted electronically through the Grants.Gov Web site by the same date. Anyone intending to apply electronically should initiate the process of registering on the Grants.Gov site immediately to ensure completion of registration before the deadline for submission. FTA will announce grant selections in the **Federal Register** when the competitive selection process is complete.

FOR FURTHER INFORMATION CONTACT: Contact the appropriate FTA Regional Administrator (Appendix B) for application-specific information and issues. For general program information, contact Blenda Younger, Office of Program Management, (202) 366–2053, e-mail: *blenda.younger@dot.gov*. A TDD is available at 1–800–877–8339 (TDD/FIRS).

Overview Information

Federal Agency Name: Department of Transportation. Federal Transit Administration (FTA).

Funding Opportunity Title: Capital And Training Assistance Program For Over-The-Road Bus Accessibility.

Announcement Type: Initial Announcement: Notice of Availability of Fiscal Year 2009.

Funds: Solicitation of Grant Applications.

Catalog of Federal Domestic Assistance (CFDA) Number: 20.518 Capital and Training Assistance Program For Over-The-Road Bus Accessibility.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Funding Opportunity Description

A. Authority

The program is authorized under Section 3038 of the Transportation Equity Act for the 21st Century (TEA–21), Public Law 105–85 as amended by the Safe, Accountable, Flexible, Efficient, Transportation Equity Act: A Legacy for Users (SAFETEA–LU), Public Law 109–059, August 10, 2005.

B. Background

Buses purchased under the OTRB program are used in intercity fixed-route service as well as other services, such as commuter, charter, and tour bus services. These services are an important element of the U.S. transportation system. TEA–21 authorized FTA's OTRB Accessibility Program to assist OTRB operators in complying with the Department's OTRB Accessibility regulation, "Transportation for Individuals with

Disabilities" (49 CFR part 37, Subpart H).

Summary of DOT's OTRB Accessibility Rule Deadlines for Acquiring Accessible Vehicles

Under the OTRB Accessibility regulation, all new buses obtained by large (Class I carriers, *i.e.*, those with gross annual transportation revenues of $8.6 million or more), fixed-route carriers must be accessible, with wheelchair lifts and securement locations that allow passengers to ride in their own wheelchairs. Specifications describing the design features of an accessible over-the-road bus are listed in 49 CFR part 38, subpart G.

The rule required 50 percent of a fixed-route operator's fleet to be accessible by October 30, 2006, and 100 percent of the vehicles in their fleet to be accessible by October 29, 2012. New buses acquired by small (gross annual transportation revenues of less than $8.6 million) fixed-route operators after October 29, 2001, also are required to be lift-equipped, unless the operator can provide equivalent service to passengers with disabilities on a 48-hour advance notice basis. Unlike large operators, small fixed-route operators do not have a deadline for total fleet accessibility. Small demand responsive OTRB operators such as charter and tour companies are required to provide service in an accessible bus on 48 hours advance notice. Small mixed service operators must also provide this kind of service on an interim basis until their fleets are completely accessible.

OTRB operators must submit three types of reports annually by the last Monday of every October, with each annual report covering the time period from October 1 of the prior calendar year through September 30 of the current calendar year: (1) OTRB operators must submit a summary of all individual requests they receive for accessible and/or equivalent service in each 12-month reporting period; (2) Large and small fixed route OTRB companies must submit an annual report that summarizes the number of passengers with disabilities who used the lift to board accessible buses in a given 12-month reporting period; and (3) OTRB companies must submit acquisition and lease data to the DOT annually. Additional information on the filing requirements can be found on the following Federal Motor Carrier Safety Administration Web page: *http://www.fmcsa.dot.gov/rules-regulations/bus/company/ada-guidelines.htm*.

Deadlines for Delivering Accessible Service

The rules for delivering accessible motorcoach service went into effect October 29, 2001, for large fixed-route, charter, tour and other demand-responsive motorcoach operators, and for small operators on October 28, 2002. Operators should consult 49 CFR part 37, Subpart H, regarding the acquisition of accessible vehicles and the provision of accessible service to determine the applicable section that best describes their operating characteristics. Specifications describing the design features of an accessible over-the-road bus are listed in 49 CFR part 38, subpart G.

C. Purpose

Improving mobility and shaping America's future by ensuring that the transportation system is accessible, integrated, and efficient, and offers flexibility of choices is a key strategic goal of the DOT. OTRB Accessibility projects will improve mobility for individuals with disabilities by providing financial assistance to help make vehicles accessible and training to ensure that drivers and others are properly trained to use accessibility features as well as how to treat patrons with disabilities.

D. Vehicle and Service Definitions

An "over-the-road bus" is defined in 49 CFR 37.3 as a bus characterized by an elevated passenger deck located over a baggage compartment.

Intercity, fixed-route over-the-road bus service is regularly scheduled bus service for the general public, using an OTRB that operates with limited stops over fixed routes connecting two or more urban areas not in close proximity or connecting one or more rural communities with an urban area not in close proximity; has the capacity for transporting baggage carried by passengers; and makes meaningful connections with scheduled intercity bus service to more distant points. The application includes five criteria factors that will be reviewed to determine eligibility for a portion of the funding available to operators that qualify under this definition.

"Other" OTRB service means any other transportation using OTRBs, including local fixed–route service, commuter service, and charter or tour service (including tour or excursion service that includes features in addition to bus transportation such as meals, lodging, admission to points of interest or special attractions). While some commuter service may also serve the needs of some intercity fixed-route passengers, the statute includes commuter service in the definition of "other" service. Commuter service providers may apply for these funds, even though the services designed to meet the needs of commuters may also provide service to intercity fixed-route passengers on an incidental basis. If a commuter service provider can document that more than 50 percent of its passengers are using the service as intercity fixed-route service, the provider may apply for the funds designated for intercity fixed-route operators.

II. Award Information

Federal transit funds are available to intercity fixed-route providers and other OTRB providers at up to 90 percent of the project cost. A total of $8,800,000 was appropriated for the program in FY 2009 which together with $1,910,435 in prior year unobligated funds make a total of $10,710,435 available for allocation. Successful applicants will be awarded grants. Typical grants under this program range from $25,000 to $180,000, with most grants being less than $40,000, for lift equipment for a single vehicle.

III. Eligibility Information

1. Eligible Applicants

Grants will be made directly to operators of OTRBs. Intercity, fixed-route OTRB service providers may apply for the funds that are anticipated to be appropriated for intercity fixed-route providers in FY 2009. Applicants must establish eligibility as intercity fixed-route providers by meeting established criteria on six factors identified in Part 2B of the application. Other OTRB service providers, including operators of local fixed-route service, commuter service, and charter or tour service may apply for the funds appropriated in FY 2009 for these providers. OTRB operators who provide both intercity, fixed-route service and another type of service, such as commuter, charter or tour, may apply for both categories of funds with a single application. Private for-profit operators of over-the-road buses are eligible to be direct applicants for this program. This is a departure from most other FTA programs for which the direct applicant must be a State or local public body. FTA does not award grants to public entities under this program.

2. Eligible Projects

Projects to finance the incremental capital and training costs of complying with DOT's OTRB accessibility rule (49

CFR part 37) are eligible for funding. Incremental capital costs eligible for funding include adding lifts, tie-downs, moveable seats, doors and training costs associated with using the accessibility features and serving persons with disabilities. Retrofitting vehicles with such accessibility components is also an eligible expense. Please see Buy America section for further conditions of eligibility.

FTA may award funds for costs already incurred by the applicants. Any new wheelchair accessible vehicles delivered after June 8, 1998, the date that the TEA–21 became effective, are eligible for funding under the program. Vehicles of any age that have been retrofitted with lifts and other accessibility components after June 8, 1998, are also eligible for funding.

Eligible training costs are those required by the final accessibility rule as described in 49 CFR 37.209. These activities include training in proper operation and maintenance of accessibility features and equipment, boarding assistance, securement of mobility aids, sensitive and appropriate interaction with passengers with disabilities, and handling and storage of mobility devices. The costs associated with developing training materials or providing training for local providers of OTRB services for these purposes are also eligible expenses.

FTA will not fund the incremental costs of acquiring used accessible OTRBs that were previously owned, as it may be impossible to verify whether or not FTA funds were already used to make the vehicles accessible. Also, it would be difficult to place a value on the accessibility features based upon the depreciated value of the vehicle. The legislative intent of this grant program is to increase the number of wheelchair accessible OTRBs available to persons with disabilities throughout the country. The purchase of previously-owned accessible vehicles, whether or not they were funded by FTA, does not further this objective of increasing the number of wheelchair accessible OTRBs.

FTA has sponsored the development of accessibility training materials for public transit operators. Project ACTION is an FTA funded national technical assistance program to promote cooperation between the disability community and the transportation industry. Project ACTION provides training, resources and technical assistance to thousands of disability organizations, consumers with disabilities, and transportation operators. It maintains a resource center with up-to-date information on transportation accessibility. Project ACTION may be contacted at: Project ACTION, 1425 K Street, NW., Suite 200, Washington, DC 20005, Phone: 1–800–659–6428 (TDD: (202) 374–7385), *Internet address: http://www.projectaction.org/*.

3. Cost Sharing or Matching

Federal transit funds are available to intercity fixed-route providers and other OTRB providers at up to 90 percent of the project cost. A 10 percent match is required.

IV. Application and Submission Information

1. Address to Request Application Package

This announcement includes all of the application materials. It is also available on the Internet on the FTA Web site at *http://www.fta.dot.gov*. FTA will announce final selections on its Web site and in the **Federal Register**. A synopsis of this announcement will be posted in the FIND module of the government-wide electronic grants Web site at *http://www.grants.gov*.

2. Content and Form of Application Submission

Guidelines for Preparing Grant Application

The application should provide information on all items for which you are requesting funding in FY 2009. If you use another company's previous application as a guide, remember to modify all elements as appropriate to reflect your company's situation. The application must include a project narrative in the format provided in Appendix A, in addition to Standard Form 424, "Application for Federal Assistance."

Application Content

I. Applicant Information

This addresses basic identifying information, including:

a. Company name.

b. Dun and Bradstreet (D&B) Data Universal Numbering System (DUNS) number.

c. Contact information for notification of project selection: contact name, address, email address, fax and phone number.

d. Description of services provided by company, including areas served.

e. For fixed-route carriers, whether you are a large (Class I, with gross annual operating revenues of $8.1 million or more) or small (gross operating revenues of less than $8.1 million annually) carrier.

f. Existing fleet and employee information, including number of over-the-road buses used for (1) intercity fixed-route service, and (2) other service, and number of employees.

g. If you provide both intercity fixed-route service and another type of service, such as commuter, charter or tour service, please provide an estimate of the proportion of your service that is intercity.

h. Description of your technical, legal, and financial capacity to implement the proposed project. Include evidence that you currently possess appropriate operating authority (*e.g.,* DOT number if you operate interstate or identifier assigned by State if you do not operate interstate service).

II. Project Information

Every application must:

a. Provide the Federal amount requested for each purpose for which funds are sought in the format in Appendix A.

b. Document matching funds, including amount and source.

c. Describe project, including components to be funded (*e.g.,* lifts, tie-downs, moveable seats, or training).

d. Provide project timeline, including significant milestones such as date or contract for purchase of vehicle(s), and actual or expected delivery date of vehicles.

e. Address each of the five statutory evaluation criteria described in V.

f. If requesting funding for intercity service, provide evidence that:

1. The applicant provides scheduled, intercity, fixed route, over-the-road bus service that interlines with one or more scheduled, intercity bus operators. (Such evidence includes applicant's membership in the National Bus Traffic Association or participation in separate interline agreements, and participation in interline tariffs or price lists issued by, or on behalf of, scheduled, intercity bus operators with whom the applicant interlines); and

2. The applicant has obtained authority from the Federal Motor Carrier Safety Administration or the Interstate Commerce Commission to operate scheduled, intercity, fixed route service; and as many of the following as are applicable;

3. The applicant is included in Russell's Official National Motor Coach Guide showing that it provides regularly scheduled, fixed route OTRB service with meaningful connections with scheduled intercity bus service to more distant points.

4. The applicant maintains a Web site showing routes and schedules of its regularly scheduled, fixed route OTRB service and its meaningful connections to other scheduled, intercity bus service.

5. The applicant maintains published schedules showing its regularly scheduled, fixed route OTRB service and its meaningful connections to other scheduled, intercity bus service.

6. The applicant participates in the International Registration Plan (IRP) apportionment program.

III. Labor Information

a. Identify any labor organizations that may represent your employees and employees of any transit providers in the service area of the project. For each local union of a nationally affiliated union, the applicant must provide the name of the national organization and the number or other designation of the local union (*e.g.,* Amalgamated Transit Union local 1258). Since the Department of Labor (DOL) makes its referral to the national union's headquarters, there is no need to provide a means of contacting the local organization.

b. For each independent labor organization (*i.e.,* a union that is not affiliated with a national or international organization) the local information will be necessary (name of organization, address, contact person, phone, fax numbers).

c. Where a labor organization represents transit employees in the service area of the project, DOL must refer the proposed protective arrangements to each union and to each recipient. For this reason, please provide DOL with a contact person, address, telephone number and fax number for your company and associated union information.

3. Submission Dates and Times

Complete applications for OTRB Accessibility Program grants must be submitted to the appropriate FTA regional office (Appendix B) April 15, 2010 or submitted electronically through *http://www.grants.gov* by the same date. Applicants planning to apply electronically are encouraged to begin the process of registration on the Grants.Gov site well in advance of the submission deadline. Registration is a multi-step process, which may take several weeks to complete before an application can be submitted. FTA will announce grant selections when the competitive selection process is complete.

4. Intergovernmental Review

This program is not generally subject to Executive Order (EO) 12372, "Intergovernmental Review of Federal Programs." For more information, contact the State's Single Point of Contact (SPOC) to find out about and comply with the State's process under EO 12372. The names and addresses of the SPOCs are listed in the Office of Management and Budget's homepage at *http://www.whitehouse.gov/omb/grants/spoc.html.*

5. Funding Restrictions

Only applications from eligible recipients for eligible activities will be considered for funding (see Section III). Due to funding limitations, applicants that are selected for funding may receive less than the amount requested.

6. Other Submission Requirements

Applicants should submit three copies of their project proposal application, consistent with the application format provided at Appendix A, to the appropriate regional office or apply electronically through the government wide electronic grant application portal at *http://www.grants.gov.*

V. Application Review Information

1. Project Evaluation Criteria—Projects will be evaluated according to the following criteria:

A. The identified need for OTRB accessibility for persons with disabilities in the areas served by the applicant (20 points).

B. The extent to which the applicant demonstrated innovative strategies and financial commitment to providing access to OTRBs to persons with disabilities (20 points).

C. The extent to which the OTRB operator acquired equipment required by DOT's over-the-road bus accessibility rule prior to the required timeframe in the rule (20 points).

D. The extent to which financing the costs of complying with DOT's rule presents a financial hardship for the applicant (20 points).

E. The impact of accessibility requirements on the continuation of OTRB service with particular consideration of the impact of the requirements on service to rural areas and for low-income individuals (20 points).

Note: These are the statutory criteria upon which funding decisions will be made. In addition to these criteria, FTA may also consider other factors, such as the size of the applicant's fleet and the level of FTA funding previously awarded to applicants in prior years. Applicants will not be considered for funding as intercity fixed-route operators unless they satisfy, at a minimum, the first two criteria and at least one of criteria three through five listed in the Project Information section of the application; these criteria are applicable to intercity fixed-route applicants.

VI. Selection Process and Award Administration Information

1. Review and Selection Process

Each application is screened by a panel of members consisting of FTA headquarters and regional staff. Incomplete or non-responsive applications will be disqualified. Intercity fixed-route service providers must provide evidence that they meet at a minimum the first two criteria and at least one of the next three criteria set forth in Project Information, if funds are requested under this category (see Appendix A, 2, B). Applicants that do not qualify as intercity-fixed route operators may be considered for funding in the "other" category using the same application. FTA will make an effort to award every qualified applicant at least one lift.

2. Award Notices

FTA will screen all applications to determine whether all required eligibility elements, as described in Part III "Eligibility Information," are present. The FTA evaluation team will evaluate each application according to the criteria described in this announcement. FTA will notify all applicants, both those selected for funding and those not selected when the competitive selection process is complete. Projects selected for funding will be published in a **Federal Register** notice. Applicants selected for funding must then apply to the FTA regional office for the actual grant award, sign Certifications and Assurances, and execute a grant contract before funds can be drawn down.

3. Administrative and National Policy Requirements

A. Grant Requirements

Applicants selected for funding must include documentation necessary to meet the requirements of FTA's Nonurbanized Area Formula program (Title 49, United States Code, Section 5311). Technical assistance regarding these requirements is available from each FTA regional office. The regional offices will contact those applicants selected for funding regarding procedures for making the required certifications and assurances to FTA before grants are made.

The authority for these requirements is provided by TEA–21, Public Law 105–178, June 9, 1998, as amended by the TEA–21 Restoration Act 105–206, 112 Stat. 685, July 22, 1998; 49 U.S.C. Section 5310, note; and DOT and FTA regulations and FTA Circulars.

B. Buy America

Under the OTRB Accessibility Grant Program, FTA's Buy America regulations, 49 CFR part 661, apply to the incremental capital costs of making vehicles accessible.

Generally, Buy America applies to all accessibility equipment acquired with FTA funds, *i.e.,* all of the manufacturing processes for the product take place in the United States. The lift, the moveable seats, and the securement devices will each be considered components for purposes of this program; accordingly, as components, each must be manufactured in the United States regardless of the origin of its respective subcomponents.

It should also be noted that FTA has issued a general public interest waiver for all purchases under the Federal "small purchase" threshold, which is currently $100,000. (See 49 CFR 661.7, Appendix A(e)). Because Section 3038(b) of TEA–21, limited FTA financing to the incremental capital costs of compliance with DOT's OTRB accessibility rule, the small purchase waiver applies only to the incremental cost of the accessibility features. Where more than one bus is being made accessible, the grantee must calculate the incremental cost increase of the entire procurement when determining if the small purchase waiver applies. For example, if $30,000 is the incremental cost for the accessibility features eligible under this program per bus (regardless of the Federal share contribution), then a procurement of three buses with a total such cost of $90,000, would qualify for the small purchase waiver. No special application to FTA would be required.

The grantee must obtain a certification from the bus or component manufacturer that all items included in the incremental cost for which the applicant is applying for funds meet Buy America requirements. The Buy America regulations can be found at *http://www.fta.dot.gov/library/legal/buyamer/.*

C. Labor Protection

Before FTA may award a grant for capital assistance, 49 U.S.C. 5333(b) requires that fair and equitable arrangements must be made to protect the interests of transit employees affected by FTA assistance. Those arrangements must be certified by the Secretary of Labor as meeting the requirements of the statute. When a labor organization represents a group of affected employees in the service area of an FTA project, the employee protective arrangement is usually the product of negotiations or discussions with the union. The grant applicant can facilitate DOL certification by identifying in the application any previously certified protective arrangements that have been applied to similar projects undertaken by the grant applicant, if any. Receiving funds under the OTRB Accessibility program, however, will not require the grantee's employees to be represented by organized labor. Nothing in the labor protection provisions in 49 U.S.C 5333(b) requires a motorcoach operator to become a union carrier or encourages union organizing in any manner. Upon receipt of a grant application requiring employee protective arrangements, FTA will transmit the application to DOL and request certification of the employee protective arrangements. In accordance with DOL guidelines, DOL notifies the relevant unions in the area of the project that a grant for assistance is pending and affords the grant applicant and union the opportunity to agree to an arrangement establishing the terms and conditions of the employee protections. If necessary, DOL furnishes technical and mediation assistance to the parties during their negotiations. The Secretary of Labor may determine the protections to be certified if the parties do not reach an agreement after good faith bargaining and mediation efforts have been exhausted. DOL will also set the protective conditions when affected employees in the service area are not represented by a union. When DOL determines that employee protective arrangements comply with labor protection requirements, DOL will provide a certification to FTA. The grant agreement between FTA and the grant applicant incorporates by reference the employee protective arrangements certified by DOL.

Applicants must identify any labor organizations that may represent their employees and all labor organizations that represent the employees of any other transit providers in the service area of the project.

For each local of a nationally affiliated union, the applicant must provide the name of the national organization and the number or other designation of the local union (*e.g.,* Amalgamated Transit Union local 1258). Since DOL makes its referral to the national union's headquarters, there is no need to provide a means of contacting the local organization.

However, for each independent labor organization (*i.e.,* a union that is not affiliated with a national or international organization) the local information will be necessary, such as the name of organization, address, contact person, phone, and fax numbers.

Where a labor organization represents transit employees in the service area of the project, DOL must refer the proposed protective arrangements to each union and to each recipient. For this reason, please provide DOL with a contact person, address, telephone number and fax number for your company, and associated union information.

DOL issued a **Federal Register** notice addressing the new TEA–21 programs, including the OTRB Accessibility Program, "Amendment to Section 5333(b) Guidelines to Carry Out New Programs Authorized by the Transportation Equity Act for the 21st Century (TEA–21);" Final Rule, dated July 28, 1999. FTA issued a "Dear Colleague" letter, dated December 5, 2000, addressing DOL processing of grant applications. Attached to the letter is an application checklist, which provides information that DOL must have in order to review and certify FTA grant applications. This letter and attachment can be found at: *http://www.fta.dot.gov/office/public/c0019.html.* Questions concerning protective arrangements and related matters pertaining to transit employees should be addressed to the Division of Statutory Programs, Department of Labor, 200 Constitution Avenue, NW., Room N–5411, Washington, DC 20210; telephone (202) 693–0126, fax (202) 219–5338.

D. Planning

Applicants are encouraged to notify the appropriate State Departments of Transportation and Metropolitan Planning Organizations (MPO) in areas likely to be served by equipment made accessible through funds made available in this program. Those organizations, in turn, should take appropriate steps to inform the public, and individuals requiring fully accessible services in particular, of operators' intentions to expand the accessibility of their services. Incorporation of funded projects in the plans and transportation improvement programs of states and metropolitan areas by States and MPOs also is encouraged, but is not required.

E. Standard Assurances

The applicant assures that it will comply with all applicable Federal statutes, regulations, executive orders, FTA circulars, and other Federal administrative requirements in carrying out any project supported by the FTA grant. The applicant acknowledges that it is under a continuing obligation to comply with the terms and conditions of the grant agreement issued for its project with FTA. The applicant

understands that Federal laws, regulations, policies, and administrative practices might be modified from time to time and affects the implementation of the project. The applicant agrees that the most recent Federal requirements will apply to the project, unless FTA issues a written determination otherwise. Certifications and Assurances for grants to be awarded under this program in FY 2009 will be included in the FTA Certifications and Assurances for FY 2009, which will be published in the **Federal Register** at a later date, and made available for electronic signature in FTA's grants system. Every applicant must submit Certification 01, "For Each Applicant." Each applicant for more than $100,000 must provide both Certification 01, and, 02, the "Lobbying Certification."

4. Reporting

Post-award reporting requirements include submission of final Financial Status Report and milestone report, or annual reports for grants remaining open at the end of each Federal fiscal year (September 30). Documentation is required for payment.

VII. Agency Contact(s)

Contact the appropriate FTA Regional Administrator (Appendix B) for application-specific information and issues. For general program information, contact Blenda Younger, Office of Program Management, (202) 366–2053, e-mail: *blenda.younger@dot.gov.* A TDD is available at 1–800–877–8339 (TDD/FIRS).

Issued in Washington, DC, this 12th day of January, 2010.

Peter Rogoff,

Administrator.

Appendix A Over-the-Road Bus Accessibility Program Project Proposal Application (Paper or electronic project narrative)

(See Section IV.2 of **Federal Register** announcement for detailed explanation of application content).

In addition to OMB Standard Form 424, Application For Federal Assistance, provide the following information:

1. Applicant Information

A. Company Name:
B. DUNS Number:
C. For Notification of Project Selection Contact:
Name of Individual:
Address:
FAX:
Telephone number:
E-mail:
D. Describe Services Provided by Company, including Areas Served:
E. Intercity Fixed-Route Carriers:
___Large/Class I (gross annual operating revenues of $8.1 Million or more).
___Small (gross annual revenues of less than $8.1 Million).
F. Existing Fleet and Employee Information:
___Total number of over-the-road buses in fleet.
___Number of over-the-road buses in fleet used for intercity fixed-route service.
___Number of over-the-road buses intercity-fixed-route service that currently have lifts.
___Number of over-the-road buses in fleet used for Other Service, *e.g.,* Charter, Tour, & Commuter.
___Number of over-the-road buses used in "other" service that currently have lifts.
___Number of Employees.
G. Estimate of the proportion of service, if any, that is intercity fixed-route
___% of services is intercity fixed-route.
H. Describe your technical, legal, and financial capacity to implement the proposed project. Include evidence of operating authority.

2. Project Information

A. Federal Amount Requested (Up to 90% Federal Share):
Intercity Fixed Route Service:
$____for____ #New Over-the-road Buses
$____for____ #Retrofits
$____for____ #Employees—Training
Other Service (Commuter, Charter, or Tour)
$____for____ #New Over-the-road Buses
$____for____ #Retrofits
$____for____ #Employees—Training

B. If requesting funding for intercity service, provide evidence of any of the following that are applicable:

1. The applicant provides scheduled, intercity, fixed route, over-the-road bus service that interlines with one or more scheduled, intercity bus operators. Such evidence includes applicant's membership in the National Bus Traffic Association or participation in separate interline agreements, and participation in interline tariffs or price lists issued by, or on behalf of, scheduled, intercity bus operators with whom the applicant interlines.

2. The applicant has obtained authority from the Federal Motor Carrier Safety Administration or the Interstate Commerce Commission to operate scheduled, intercity, fixed route service.

3. The applicant is included in Russell's Official National Motor Coach Guide showing that it provides regularly scheduled, fixed route OTRB service with meaningful connections with scheduled intercity bus service to more distant points.

4. The applicant maintains a website showing routes and schedules of its regularly scheduled, fixed route OTRB service and its meaningful connections to other scheduled, intercity bus service.

5. The applicant maintains published schedules showing its regularly scheduled, fixed route OTRB service and its meaningful connections to other scheduled, intercity bus service.

6. The applicant participates in the International Registration Plan (IRP) apportionment program.

C. Document Matching Funds, including Amount and Source

D. Describe Project, including Components to be funded (*i.e.,* lifts, tie-downs, moveable seats or training).

E. Provide Project Time Line, including significant milestones such as date of contract for purchase of vehicle(s), and actual or expected delivery date of vehicles.

F. Project Evaluation Criteria

Provide information addressing the following criteria:

- The identified need for OTRB accessibility for persons with disabilities in the areas served by the applicant (20 points).
- The extent to which the applicant demonstrated innovative strategies and financial commitment to providing access to OTRBs to persons with disabilities (20 points).
- The extent to which the over-the-road bus operator acquired equipment required by DOT's OTRB accessibility rule prior to the required time frame in the rule (20 points).
- The extent to which financing the costs of complying with DOT's rule presents a financial hardship for the applicant (20 points).
- The impact of accessibility requirements on the continuation of OTRB service with particular consideration of the impact of the requirements on service to rural areas and for low income individuals (20 points).

G. Labor Information

- List labor organizations that may represent your employees and all labor organizations that represent the employees of any transit providers in the service area of the project.
- For each local of a nationally affiliated union, provide the name of the national organization and the number or other designation of the local union.
- For each independent labor organization, provide the local information, including: name of organization, address, contact person, phone and fax numbers.
- For transit employee unions in service area of project, provide information including: contact person, address, telephone number and fax number for your company and associated union information.

Appendix B

FTA Regional Offices

Richard H. Doyle, Regional Administrator, Region 1—Boston, Kendall Square, 55 Broadway, Suite 920, Cambridge, MA 02142–1093, Tel. 617–494–2055.

Robert C. Patrick, Regional Administrator, Region 6–Ft. Worth, 819 Taylor Street, Room 8A36, Ft. Worth, TX 76102, Tel. 817–978–0550.

FTA REGIONAL OFFICES—Continued

States served: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.	States served: Arkansas, Louisiana, Oklahoma, New Mexico and Texas.
Brigid Hynes-Cherin, Regional Administrator, Region 2—New York, One Bowling Green, Room 429, New York, NY 10004–1415, Tel. 212–668–2170.	Mokhtee Ahmad, Regional Administrator, Region 7—Kansas City, MO, 901 Locust Street, Room 404, Kansas City, MO 64106, Tel. 816–329–3920.
States served: New Jersey, New York.	States served: Iowa, Kansas, Missouri, and Nebraska.
New York Metropolitan Office, Region 2—New York, One Bowling Green, Room 428, New York, NY 10004–1415, Tel. 212–668–2202.	
Letitia Thompson, Regional Administrator, Region 3—Philadelphia, 1760 Market Street, Suite 500, Philadelphia, PA 19103–4124, Tel. 215–656–7100.	Terry Rosapep, Regional Administrator, Region 8—Denver, 12300 West Dakota Ave., Suite 310, Lakewood, CO 80228–2583, Tel. 720–963–3300.
States served: Delaware, Maryland, Pennsylvania, Virginia, West Virginia, and District of Columbia.	States served: Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming.
Philadelphia Metropolitan Office, Region 3—Philadelphia, 1760 Market Street, Suite 500, Philadelphia, PA 19103–4124, Tel. 215–656–7070.	
Washington, DC Metropolitan Office, 1990 K Street, NW., Room 510, Washington, DC 20006, Tel. 202–219–3562.	
Yvette Taylor, Regional Administrator, Region 4—Atlanta, 230 Peachtreet Street, NW., Suite 800, Atlanta, GA 30303, Tel. 404–865–5600.	Leslie T. Rogers, Regional Administrator, Region 9—San Francisco, 201 Mission Street, Room 1650, San Francisco, CA 94105–1926, Tel. 415–744–3133.
States served: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, Puerto Rico, South Carolina, Tennessee, and Virgin Islands.	States served: American Samoa, Arizona, California, Guam, Hawaii, Nevada, and the Northern Mariana Islands.
	Los Angeles Metropolitan Office, Region 9—Los Angeles, 888 S. Figueroa Street, Suite 1850, Los Angeles, CA 90017–1850, Tel. 213–202–3952.
Marisol Simon, Regional Administrator, Region 5—Chicago, 200 West Adams Street, Suite 320, Chicago, IL 60606, Tel. 312–353–2789.	Rick Krochalis, Regional Administrator, Region 10—Seattle, Jackson Federal Building, 915 Second Avenue, Suite 3142, Seattle, WA 98174–1002, Tel. 206–220–7954.
States served: Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.	States served: Alaska, Idaho, Oregon, and Washington.
Chicago Metropolitan Office, Region 5—Chicago, 200 West Adams Street, Suite 320, Chicago, IL 60606, Tel. 312–353–2789.	

[FR Doc. 2010–703 Filed 1–14–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Petition for Exemption From the Federal Motor Vehicle Theft Prevention Standard; Chrysler

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

ACTION: Grant of petition for exemption.

SUMMARY: This document grants in full the Chrysler LLC, (Chrysler) petition for exemption of the Jeep Patriot vehicle line in accordance with 49 CFR Part 543, *Exemption from Vehicle Theft Prevention Standard.* This petition is granted because the agency has determined that the antitheft device to be placed on the line as standard equipment is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of 49 CFR Part 541, *Federal Motor Vehicle Theft Prevention Standard.*

DATES: The exemption granted by this notice is effective beginning with the 2011 Model Year (MY).

FOR FURTHER INFORMATION CONTACT: Ms. Carlita Ballard, International Policy, Fuel Economy and Consumer Programs, NHTSA, W43–439, 1200 New Jersey Avenue, SE., Washington, DC 20590. Ms. Ballard's phone number is (202) 366–0846. Her fax number is (202) 493–2990.

SUPPLEMENTARY INFORMATION: In a petition dated September 30, 2009, Chrysler requested an exemption from the parts-marking requirements of the Theft Prevention Standard (49 CFR Part 541) for the Jeep Patriot vehicle line, beginning with MY 2011. The petition requested an exemption from parts-marking requirements pursuant to 49 CFR 543, *Exemption from Vehicle Theft Prevention Standard,* based on the installation of an antitheft device as standard equipment for the entire vehicle line.

Under Section § 543.5(a), a manufacturer may petition NHTSA to grant exemptions for one of its vehicle lines per year. Chrysler petitioned the agency to grant an exemption for its Jeep Patriot vehicle line beginning with MY 2011. In its petition, Chrysler provided a detailed description and diagram of the identity, design, and location of the components of the antitheft device for the new vehicle line. Chrysler will install the Sentry Key Immobilizer System (SKIS) antitheft device as standard equipment on the vehicle line. The major components of the SKIS device consist of: a Powertrain Control Module, an Integrated Power Module, a Sentry Key REmote Entry Module (SKREEM), a fob with integrated key (FOBIK) and an Electromechanical Instrument Cluster which controls the telltale function only. According to Chrysler, all of these components work collectively to perform the immobilizer function, and the SKIS device does not provide a visible or audible indication of unauthorized vehicle entry (*i.e.,* flashing lights or horn alarm).

Chrysler stated that the SKIS provides passive vehicle protection by preventing the engine from operating unless a valid electronically encoded key is detected in the ignition lock cylinder. According to Chrysler, the immobilizer feature is activated when the key is removed from the ignition lock cylinder. Only a valid key inserted into the ignition lock cylinder will allow the vehicle to start and continue to run.

Chrysler stated that the SKREEM/Wireless Ignition Node (WIN), an integral component of the SKIS antitheft device, contains a radio frequency

transceiver and microprocessor that receives signals from the Sentry key transponder and communicates to the FOBIK. According to Chrysler, the SKREEM/WIN determines whether a valid key is present in the ignition switch based on the signal received from the transponder, and also serves as the receiver for the Tire Pressure Monitoring System if the vehicle is equipped with one. To avoid any perceived delay when starting the vehicle with a valid key and to prevent unburned fuel from entering the exhaust, Chrysler stated that the engine is permitted to run for no more than 2 seconds if an invalid key is used. If the response identifies the key as invalid, or if no response is received from the key transponder, Chrysler stated that the SKREEM sends an invalid key message to the Powertrain Control Module (PCM), and the PCM will disable engine operation (after the initial 2-second run) based upon the status of the SKREEM messages. Chrysler stated that only six consecutive invalid vehicle start attempts would be permitted and all other attempts would be locked out by preventing the fuel injectors from firing and disabling the starter.

Chrysler stated that it has incorporated an unauthorized vehicle start telltale light into the device. Chrysler stated that the telltale feature operates as a security indicator in the Electro Mechanical Instrument Cluster (EMIC). According to Chrysler, the telltale alerts the owner that an unauthorized vehicle start attempt has been made. Chrysler stated that upon an unauthorized start attempt, the telltale will flash on and off when the ignition switch is turned to the "ON" position. Chrysler stated that besides acting as a security indicator, the telltale acts as a diagnostic indicator. Chrysler stated that if the SKREEM detects a system malfunction and/or the SKIS has become inoperative, the security indicator will stay on. If the SKREEM detects an invalid key or if a key transponder-related fault exists, the security indicator will flash.

Chrysler stated that each ignition key used in the SKIS has an integral transponder chip included on the circuit board beneath the cover of the integral Remote Keyless Entry (RKE) transmitter. Chrysler stated that in addition to having to be cut to match the mechanical coding of the ignition lock cylinder and programmed for operation of the RKE system, each new Sentry Key has a unique transponder identification code that is permanently programmed into it by the manufacturer, and which must be programmed into the SKREEM to be recognized by the SKIS as a valid key. Chrysler stated that once a Sentry Key has been programmed to a particular vehicle, it cannot be used on any other vehicle.

In addressing the specific content requirements of 543.6, Chrysler provided information on the reliability and durability of the device. Chrysler conducted tests based on its own specified standards and stated its belief that the device meets the stringent performance standards prescribed. Specifically, Chrysler stated that its device must demonstrate a minimum of 95 percent reliability with 90 percent confidence. In addition to the design and production validation test criteria, Chrysler stated that the SKIS also undergoes a daily short term durability test. Chrysler also stated that 100 percent of its systems undergo a series of three functional tests for durability prior to being shipped from the supplier to the vehicle assembly plant for installation in its vehicles.

Chrysler stated that while there is no theft data available for the Jeep Patriot because it's a new vehicle line introduction, experience with the Jeep Liberty, a similar 5-door, All Wheel Drive, crossover/Sport Utility Vehicle as the Jeep Patriot indicates that this vehicle is projected to have a theft rate lower than the median theft rate. Chrysler offered the Jeep Grand Cherokee as an example vehicle with a SKIS immobilizer system as standard equipment since the 1999 model year. The average theft rate for the Jeep Grand Cherokee vehicles for the four model years prior to 1999 (1995–1998), when a vehicle immobilizer system was not offered as standard equipment, was 5.3574 per one thousand vehicles produced, which is significantly higher than the 1990/1991 median theft rate of 3.5826. However, the average theft rate for the six model years (1999–2005) after installation of the standard immobilizer device was 2.5492, which is significantly lower than the median. The Jeep Grand Cherokee vehicle line was granted an exemption from the parts-marking requirements beginning with MY 2004. Chrysler further stated that NHTSA's theft data for the Jeep Grand Cherokee indicates that the inclusion of a standard immobilizer system has resulted in a 52.3 percent net average reduction in vehicle thefts.

Based on the supporting evidence submitted by Chrysler on the Jeep Grand Cherokee, the agency believes that the antitheft device for the Jeep Patriot vehicle line is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the Theft Prevention Standard (49 CFR 541). The agency concludes that the device will provide four of the five types of performance listed in § 543.6(a)(3): Promoting activation; preventing defeat or circumvention of the device by unauthorized persons; preventing operation of the vehicle by unauthorized entrants; and ensuring the reliability and durability of the device.

Pursuant to 49 U.S.C. 33106 and 49 CFR 543.7(b), the agency grants a petition for exemption from the parts-marking requirements of Part 541, either in whole or in part, if it determines that, based upon supporting evidence, the standard equipment antitheft device is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of Part 541. The agency finds that Chrysler has provided adequate reasons for its belief that the antitheft device for the Chrysler Jeep Patriot vehicle line is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the Theft Prevention Standard (49 CFR Part 541). This conclusion is based on the information Chrysler provided about its device.

For the foregoing reasons, the agency hereby grants in full Chrysler's petition for an exemption for the MY 2011 Jeep Patriot vehicle line from the parts-marking requirements of 49 CFR Part 541. The agency notes that 49 CFR Part 541, Appendix A–1, identifies those lines that are exempted from the Theft Prevention Standard for a given model year. 49 CFR Part 543.7(f) contains publication requirements with respect to the disposition of all Part 543 petitions. Advanced listing, including the release of future product nameplates, the beginning model year for which the petition is granted and a general description of the antitheft device is necessary in order to notify law enforcement agencies of new vehicle lines exempted from the parts-marking requirements of the Theft Prevention Standard.

If Chrysler decides not to use the exemption for this vehicle line, it must formally notify the agency. If such a decision is made, the vehicle line must be fully marked as required by 49 CFR Parts 541.5 and 541.6 (marking of major component parts and replacement parts).

NHTSA notes that if Chrysler wishes in the future to modify the device on which this exemption is based, the company may have to submit a petition to modify the exemption. Part 543.7(d) states that a Part 543 exemption applies only to vehicles that belong to a line exempted under this part and equipped

with the anti-theft device on which the line's exemption is based. Further, § 543.9(c)(2) provides for the submission of petitions to modify an exemption to permit the use of an antitheft device similar to but differing from the one specified in that exemption.

The agency wishes to minimize the administrative burden that Part 543.9(c)(2) could place on exempted vehicle manufacturers and itself. The agency did not intend Part 543 to require the submission of a modification petition for every change to the components or design of an antitheft device. The significance of many such changes could be *de minimis*. Therefore, NHTSA suggests that if the manufacturer contemplates making any changes the effects of which might be characterized as *de minimis*, it should consult the agency before preparing and submitting a petition to modify.

Authority: 49 U.S.C. 33106; delegation of authority at 49 CFR 1.50.

Issued on: January 11, 2010.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

[FR Doc. 2010–732 Filed 1–14–10; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Petition for Waiver of Compliance

In accordance with part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) received a request for a waiver of compliance with certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief from the requirements of 49 CFR Part 236 as detailed below.

CSX Transportation, Inc.

[Docket Number FRA–2009–0120]

The CSX Transportation, Inc. (CSXT) seeks relief from the requirements of the Rules, Standards and Instructions, Title 49 CFR Part 236, Section 236.377 Approach Locking; 236.378 Time Locking; 236.379 Route Locking; 236.380 Indication Locking; and 236.381 Traffic Locking on vital microprocessor-based systems. CSXT proposes to verify and test signal locking systems controlled by microprocessor-based equipment by use of alternative procedures every 4 years after initial baseline testing or program change as follows:

- Verifying the Cyclic Redundancy Check (CRC)/Check Sum/Universal Control Number (UNC) of the existing location's specific application logic to the previously tested version.
- Testing the appropriate interconnection to the associated signaling hardware equipment outside of the processor (switch indication, track indication, searchlight signal indication, approach locking (if external)) to verify correct and intended inputs to and outputs from the processor are maintained.
- Analyze and compare the results of the 4-year alternative testing with the results of the baseline testing performed at the location and submit the results to FRA.

Applicant's justification for relief: Many of CSXT's interlockings, control points, and other locations are controlled by solid-state vital microprocessor-based systems. These systems utilize programmed logic equations in lieu of relays or other mechanical components for control of both vital and non-vital functions. The logic does not change once a microprocessor-based system has been tested and locking tests are documented on installation.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number FRA–2009–0120) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, 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 (65 FR 19477) or at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC on January 11, 2010.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. 2010–682 Filed 1–14–10; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2009–0002]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel BOO PACIFIC.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2009–0002 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse

effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

DATES: Submit comments on or before February 16, 2010.

ADDRESSES: Comments should refer to docket number MARAD–2009–0002. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel BOO PACIFIC is:

Intended Commercial Use of Vessel: "Sailing lessons in coastal waters."

Geographic Region: "California."

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Dated: January 11, 2010.

By Order of the Maritime Administrator.

Christine Gurland,

Secretary, Maritime Administration.

[FR Doc. 2010–707 Filed 1–14–10; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2009–0001]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel BELLISSIMO.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2009–0001 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

DATES: Submit comments on or before February 16, 2010.

ADDRESSES: Comments should refer to docket number MARAD–2009–0001. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel BELLISSIMO is:

Intended Commercial Use Of Vessel: "Carrying passengers (maximum 6 guest) for pleasure trips of one day to one week."

Geographic Region: "Florida, Georgia, South Carolina, North Carolina, Virginia, Maine, Maryland, Delaware, New Jersey, New York, Rhode Island, Massachusetts, Louisiana, Alabama, Mississippi."

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Dated: January 11, 2010.

By Order of the Maritime Administrator.

Christine Gurland,

Secretary, Maritime Administration.

[FR Doc. 2010–708 Filed 1–14–10; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 35341]

Pioneer Industrial Railway Co.—Trackage Rights Exemption—Central Illinois Railroad Company

Pursuant to a written trackage rights agreement, Central Illinois Railroad Company (CIRY) has agreed to grant non-exclusive local trackage rights to Pioneer Industrial Railway Co. (PIRY) over approximately 4.81 miles of rail line in the City of Peoria, Peoria County, IL, as follows: (1) The southern segment of the Kellar Branch, between mileposts 1.71 and 2.78, (2) the northern segment of the Kellar Branch, between mileposts 8.50 and 10.0, and (3) the western connection, between milepost 71.5 to the end of track (a short distance west

of University Avenue), and including 1,800 feet of connecting track linking the end of the western connection with the northern segment.

This transaction is related to a concurrently filed petition for exemption wherein PIRY seeks to discontinue service over 8.29 miles of rail line on the Kellar Branch and CIRY seeks to discontinue service over 5.72 miles of rail line on the Kellar Branch. *See* STB Docket No. AB–1056X, *Pioneer Industrial Railway Co.—Discontinuance of Service Exemption—Line in Peoria County, IL,* and STB Docket No. AB–1066 (Sub-No. 1X), *Central Illinois Railroad Company—Discontinuance of Service Exemption—Line in Peoria County, IL.*

The transaction may be consummated on or after January 28, 2010, the effective date of the exemption (30 days after the exemption was filed).

The purpose of the transaction is to: (1) Facilitate the possible conversion of the middle segment of the Kellar Branch to a recreational trail, (2) restructure the relationships among PIRY, CIRY, and the City of Peoria (City), so that PIRY and the City will no longer have a direct landlord-tenant relationship pursuant to a lease agreement, and (3) permit PIRY to continue to provide common carrier service, via local trackage rights, to shippers located on, or that may in the future locate on, the southern and northern segments of the Kellar Branch and on the western connection.

As a condition to this exemption, any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk and Western Ry. Co.—Trackage Rights—BN,* 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate,* 360 I.C.C. 653 (1980).

This notice is filed under 49 CFR 1180.2(d)(7). If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Stay petitions must be filed by January 21, 2010 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 35341, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on William A. Mullins, 2401 Pennsylvania Avenue NW., Suite 300, Washington, DC 20037.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: January 12, 2010.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2010–693 Filed 1–14–10; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Unblocking of Specially Designated National Pursuant to Executive Order 13224

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control ("OFAC") is removing the name of one individual from the list of Specially Designated Nationals and Blocked Persons whose property and interests in property have been blocked pursuant to Executive Order 13224 of September 23, 2001, *Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism.* The individual, HUBER, Albert Friedrich Armand, was designated pursuant to Executive Order 13224 on November 7, 2001.

DATES: The removal of the individual from the list of Specially Designated Nationals and Blocked Persons whose property and interests in property have been blocked pursuant to Executive Order 13224 is effective as of January 8, 2010.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, *tel.:* 202/622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's web site (*http://www.treas.gov/ofac*) or via facsimile through a 24-hour fax-on-demand service, *tel.:* 202/622–0077.

Background

On September 23, 2001, the President issued Executive Order 13224 (the "Order") pursuant to the International Emergency Economic Powers Act, 50 U.S.C. 1701–1706, and the United Nations Participation Act of 1945, 22 U.S.C. 287c, imposing economic sanctions on persons who commit, threaten to commit, or support acts of terrorism. The President identified in the Annex to the Order various individuals and entities as subject to the economic sanctions. The Order authorizes the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and (pursuant to Executive Order 13284) the Secretary of the Department of Homeland Security, to designate additional persons or entities determined to meet certain criteria set forth in Executive Order 13224.

One such additional person was designated by the Secretary of the Treasury on November 7, 2001. The Department of the Treasury's Office of Foreign Assets Control has determined that this individual no longer continues to meet the criteria for designation under the Order and is appropriate for removal from the list of Specially Designated Nationals and Blocked Persons.

The following designation is removed from the list of Specially Designated Nationals and Blocked Persons:

HUBER, Albert Friedrich Armand (a.k.a. HUBER, Ahmed), Mettmenstetten, Switzerland; DOB 1927 (individual) [SDGT]

The removal of the individual's name from the list of Specially Designated Nationals and Blocked Persons is effective as of January 8, 2010. All property and interests in property of the individual that are in or hereafter come within the United States or the possession or control of United States persons are now unblocked.

Dated: January 8, 2010.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2010–630 Filed 1–14–10; 8:45 am]

BILLING CODE 4811–45–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0700]

Proposed Information Collection (Service-Disabled Veterans Insurance—Waiver of Premiums); 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 this notice. This notice solicits comments for information needed to determine a claimant's eligibility for disability insurance benefits.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before March 16, 2010.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *http://www.Regulations.gov;* or to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail *nancy.kessinger@va.gov.* Please refer to "OMB Control No. 2900–0700 in any correspondence. During the comment period, comments may be viewed online through FDMS at *http://www.Regulations.gov.*

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: Service-Disabled Veterans Insurance—Waiver of Premiums, VA Form 29–0812.

OMB Control Number: 2900–0700.

Type of Review: Extension of a currently approved collection.

Abstract: Claimants who become totally disabled complete VA Form 29–0812 to apply for a waiver of their Service-Disabled Veterans Insurance policy premiums.

Affected Public: Individuals or households.

Estimated Annual Burden: 1,167 hours.

Estimated Average Burden per Respondent: 20 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 3,500.

Dated: January 12, 2010.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2010–655 Filed 1–14–10; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–New (CPEP)]

Proposed Information Collection (Compensation and Pension Examination Program (CPEP) Veterans Satisfaction Survey) Activity: Comment Request

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Health Administration (VHA), 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 new collection and allow 60 days for public comment in response to the notice. This notice solicits comments on the Veteran experience in taking the Compensation and Pension examination at individual CPEP sites.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before March 16, 2010.

ADDRESSES: Submit written comments on the collection of information through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov;* or to Mary Stout, Veterans Health Administration (193E1), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail: *mary.stout@va.gov.* Please refer to "OMB Control No. 2900–New (CPEP)" in any correspondence. During the comment period, comments may be viewed online through the FDMS.

FOR FURTHER INFORMATION CONTACT: Mary Stout at (202) 461–5867 or Fax (202) 273–9381.

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, VHA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VHA's functions, including whether the information will have practical utility; (2) the accuracy of VHA'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: Compensation and Pension Examination Program (CPEP) Veterans Satisfaction Survey, VA Form 10–0480.

OMB Control Number: 2900–New (CPEP).

Type of Review: New collection.

Abstract: The survey will be used to gather feedback from Veterans regarding their experience at individual CPEP examination sites. VA will use the data collected to determine where and to what extent services are satisfactory or where improvement is needed.

Affected Public: Individuals or households.

Estimated Annual Burden: 153.

Estimated Average Burden per Respondent: 5.7 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 1,614.

Dated: January 12, 2010.

By direction of the Secretary.

Denise McLamb,

Enterprise Records Service.

[FR Doc. 2010–656 Filed 1–14–10; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–New (CCHT)]

Proposed Information Collection (Care Coordination Home Telehealth (CCHT) Activity: Comment Request

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Health Administration (VHA) 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 new collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to obtain a patient perspective on their satisfaction with the CCHT program and messaging devices.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before March 16, 2010.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *http://www.Regulations.gov;* or to Mary Stout, Veterans Health Administration (193E1), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail: *mary.stout@va.gov.* Please refer to "OMB Control No. 2900–New (CCHT)" in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Mary Stout (202) 461–5867 or FAX (202) 273–9381.

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, VHA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VHA's functions, including whether the information will have practical utility; (2) the accuracy of VHA'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: Care Coordination Home Telehealth (CCHT) Patient Satisfaction Survey, VA Form 10–0481.

OMB Control Number: 2900–New (CCHT).

Type of Review: New collection.

Abstract: Patients enrolled in the CCHT program will receive survey questions through a messaging device located in their home. Patients can select an answer by the use of buttons, a touch screen application or electronically spoken to them through an Interactive Voice Response if they are visually impaired.

Affected Public: Individuals or households.

Estimated Total Annual Burden: 1,640 hours.

Estimated Average Burden per Respondent—1.5 minutes.

Frequency of Response: Quarterly.

Estimated Number of Respondents: 65,600.

Dated: January 12, 2010.

By direction of the Secretary.

Denise McLamb,

Program Analyst. Enterprise Records Service.

[FR Doc. 2010–657 Filed 1–14–10; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0616]

Proposed Information Collection (Application for Furnishing Long-Term Care Services to Beneficiaries of Veterans Affairs, and Residential Care Home Program) Activity: Comment Request

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Health Administration (VHA), 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 new collection and allow 60 days for public comment in response to the notice. This notice solicits comments for information needed to determine non-Federal nursing home or residential care home qualification to provide care to veteran patients.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before March 16, 2010.

ADDRESSES: Submit written comments on the collection of information through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov;* or to Mary Stout, Veterans Health Administration (193E1), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail: mary.stout@va.gov. Please refer to "OMB Control No. 2900–0616" in any correspondence. During the comment period, comments may be viewed online through the FDMS.

FOR FURTHER INFORMATION CONTACT: Mary Stout at (202) 461–5867 or Fax (202) 273–9381.

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, VHA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VHA's functions, including whether the information will have practical utility; (2) the accuracy of VHA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Titles:

a. Application for Furnishing Long-Term Care Services to Beneficiaries of Veterans Affairs, VA Form 10–1170.

b. Residential Care Home Program—Sponsor Application, VA Form 10–2407.

OMB Control Number: 2900–0616.

Type of Review: Extension of a currently approved collection.

Abstracts:

a. VA Form 10–1170 is completed by community agencies wishing to

provide long term care to veterans receiving VA benefits.

b. VA Form 10–2407 is an application used by a residential care facility or home that wishes to provide residential home care to veterans. It serves as the agreement between VA and the residential care home that the home will submit to an initial inspection and comply with VA requirements for residential care.

Affected Public: Business or other for-profit.

Estimated Annual Burden:

a. VA Form 10–1170—83 hours.

b. VA Form 10–2407—42 hours.

Estimated Average Burden per Respondent

a. VA Form 10–1170—10 minutes.

b. VA Form 10–2407—5 minutes.

Frequency of Response: One time.

Estimated Number of Respondents

a. VA Form 10–1170—500.

b. VA Form 10–2407—500.

Dated: January 12, 2010.

By direction of the Secretary:

Denise McLamb,

Enterprise Records Service.

[FR Doc. 2010–658 Filed 1–14–10; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Friday,
January 15, 2010

Part II

Department of Transportation

Federal Railroad Administration

49 CFR Part 229, 234, 235, et al.
Positive Train Control Systems; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Parts 229, 234, 235, and 236

[Docket No. FRA–2008–0132, Notice No. 3]

RIN 2130–AC03

Positive Train Control Systems

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule; request for comment on specific issues.

SUMMARY: FRA is issuing regulations implementing a requirement of the Rail Safety Improvement Act of 2008 that defines criteria for certain passenger and freight rail lines requiring the implementation of positive train control (PTC) systems. This final rule includes required functionalities of PTC system technology and the means by which PTC systems will be certified. This final rule also describes the contents of the PTC implementation plans required by the statute and contains the process for submission of those plans for review and approval by FRA. These regulations could also be voluntarily complied with by entities not mandated to install PTC systems. This is a final rule; however, FRA has identified specific provisions for which we are considering making changes to the final rule, if warranted by the public comments received. We expect to publish our response to those comments, including any possible changes to the rule made as a result of them, as soon as possible following the end of the comment period. However, the limited areas of this rule open for additional comment do not affect the requirement for railroads to prepare and submit plans in accordance with the deadlines established in this final rule.

DATES: This final rule is effective March 16, 2010. Petitions for reconsideration must be received on or before March 16, 2010. Comments must be received on or before February 16, 2010.

ADDRESSES: *Petitions for reconsideration and comments:* Any petitions for reconsideration or comments related to Docket No. FRA–2008–0132, may be submitted by any of the following methods:

- *Web site:* The Federal eRulemaking Portal, *http://www.regulations.gov.* Follow the Web site's online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* Room W12–140 on the Ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. Note that all petitions received will be posted without change to *http://www.regulations.gov* including any personal information. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted petitions, comments, or materials.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or to Room W12–140 on the Ground level of the West Building, 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: Thomas McFarlin, Office of Safety Assurance and Compliance, Staff Director, Signal & Train Control Division, Federal Railroad Administration, Mail Stop 25, West Building 3rd Floor, Room W35–332, 1200 New Jersey Avenue, SE., Washington, DC 20590 (*telephone:* 202–493–6203); or Jason Schlosberg, Trial Attorney, Office of Chief Counsel, RCC–10, Mail Stop 10, West Building 3rd Floor, Room W31–217, 1200 New Jersey Avenue, SE., Washington, DC 20590 (*telephone:* 202–493–6032).

SUPPLEMENTARY INFORMATION: FRA is issuing this final rule to provide regulatory guidance and performance standards for the development, testing, implementation, and use of Positive Train Control (PTC) systems for railroads mandated by the Rail Safety Improvement Act of 2008 § 104, Public Law 110–432, 122 Stat. 4854 (Oct. 16, 2008) (codified at 9 U.S.C. 20157) (hereinafter "RSIA08"), to implement PTC systems. These regulations may also be voluntarily complied with by entities not mandated to install PTC in lieu of the requirements contained in subpart H of part 236. The final rule establishes requirements for PTC system standard design and functionality, the associated submissions for FRA PTC system approval and certification, requirements for training, and required risk-based criteria. The RSIA08 mandates that widespread implementation of PTC across a major portion of the U.S. rail industry be accomplished by December 31, 2015. This final rule intends to provide the necessary Federal oversight, guidance, and assistance toward successful completion of that congressional requirement. This final rule also necessitates or results in some minimal revision or amendment to parts 229, 234, and 235, as well as previously existing subparts A through H of part 236.

Table of Contents for Supplementary Information

I. Introduction

This final rule provides new performance standards for the implementation and operation of PTC systems as mandated by the RSIA08 and as otherwise voluntarily adopted. This final rule also details the process and identifies the documents that railroads and operators of passenger trains are to utilize and incorporate in their PTC implementation plans required by the RSIA08. The final rule also details the process and procedure for obtaining FRA approval of such plans.

While developing this final rule, FRA applied the performance-based principles embodied in existing subpart H of part 236 to identify and remedy any weaknesses discovered in the subpart H regulatory approach, while exploiting lessons learned from products developed under subpart H. FRA has continued to make performance-based safety decisions while supporting railroads in their development and implementation of PTC system technologies. Development of this final rule was enhanced with the participation of the Railroad Safety

Advisory Committee (RSAC), which tasked a PTC Working Group to provide advice regarding development of implementing regulations for PTC systems and their deployment that are required under the RSIA08. The PTC Working Group made a number of consensus recommendations, which were identified and included in the proposed rule, and has contributed further refinements in the form of recommendations for resolution of the public comments. The preamble discusses the statutory background, the regulatory background, the RSAC proceedings, the alternatives considered and the rationale for the options selected, the proceedings to date, as well as the comments and conclusions on general issues. Other comments and resolutions are discussed within the corresponding section-by-section analysis.

II. Background

A. The Need for Positive Train Control Technology

Since the early 1920s, systems have been in use that can intervene in train operations by warning crews or causing trains to stop if they are not being operated safely because of inattention, misinterpretation of wayside signal indications, or incapacitation of the crew. Pursuant to orders of the Interstate Commerce Commission (ICC)—whose safety regulatory activities were later transferred to FRA when it was established in 1967—cab signal systems, automatic train control, and automatic train stop systems were deployed on a significant portion of the national rail system to supplement and enforce the indications of wayside signals and operating speed limitations. However, these systems were expensive to install and maintain, and with the decline of intercity passenger service following the Second World War, the ICC and the industry allowed many of these systems to be discontinued. During this period, railroads were heavily regulated with respect to rates and service responsibilities. The development of the Interstate Highway System and other factors led to reductions in the railroads' revenues without regulatory relief, leading to bankruptcies, railroad mergers, and eventual abandonment of many rail lines. Consequently, railroads focused on fiscal survival, and investments in expensive relay-based train control technology were economically out of reach. The removal of these train control systems, which had never been pervasively installed, permitted train collisions to continue, notwithstanding enforcement of railroad operating rules designed to prevent them.

As early as 1970, following its investigation of the August 20, 1969, head-on collision of two Penn Central Commuter trains near Darien, Connecticut, in which 4 people were killed and 45 people were injured, the National Transportation Safety Board (NTSB) asked FRA to study the feasibility of requiring a form of automatic train control system to protect against train operator error and prevent train collisions. Following the Darien accident, the NTSB continued to investigate one railroad accident after another caused by human error. During the next two decades, the NTSB issued a number of safety recommendations asking for train control measures. Following its investigation of the May 7, 1986, rear-end collision involving a Boston and Maine Corporation commuter train and a Consolidated Rail Corporation (Conrail) freight train in which 153 people were injured, the NTSB recommended that FRA promulgate standards to require the installation and operation of a train control system that would provide for positive train separation. NTSB Recommendation R–87–16 (May 19, 1987), *available at http://www.ntsb.gov/Recs/letters/1987/R87_16.pdf.* When the NTSB first established its Most Wanted List of Transportation Safety Improvements in 1990, the issue of Positive Train Separation was among the improvements listed, and it remained on the list until just after enactment of the RSIA08. Original "Most Wanted" list of Transportation Safety Improvements, as adopted September 1990, *available at http://www.ntsb.gov/Recs/mostwanted/original_list.htm.* The NTSB continues to follow the progress of the technology's implementation closely and participated through staff in the most recent PTC Working Group deliberations.

Meanwhile, enactment of the Staggers Rail Act of 1980 signaled a shift in public policy that permitted the railroads to shed unprofitable lines, largely replace published "tariffs" with appropriately priced contract rates, and generally respond to marketplace realities, which increasingly demanded flexible service options responsive to customer needs. The advent of microprocessor-based electronic control systems and digital data radio technology during the mid-1980s led the freight railroad industry, through the Association of American Railroads (AAR) and the Railway Association of Canada, to explore the development of Advanced Train Control Systems (ATCS). With broad participation by suppliers, railroads, and FRA, detailed specifications were developed for a multi-level "open" architecture that would permit participation by many suppliers while ensuring that systems deployed on various railroads would work in harmony as trains crossed corporate boundaries. ATCS was intended to serve a variety of business purposes, in addition to enhancing the safety of train operations. Pilot versions of ATCS and a similar system known as Advanced Railroad Electronic Systems (ARES) were tested relatively successfully, but the systems were never deployed on a wide scale primarily due to cost. However, sub-elements of these systems were employed for various purposes, particularly for replacement of pole lines associated with signal systems.

Collisions, derailments, and incursions into work zones used by roadway workers continued as a result of the absence of effective enforcement systems designed to compensate for the effects of fatigue and other human factors. Renewed emphasis on rules compliance and federal regulatory initiatives, including rules for the control of alcohol and drug use in railroad operations, operational testing and inspection programs designed to verify railroad rules compliance, requirements for qualification and certification of locomotive engineers, and negotiated rules for roadway worker protection, led to substantial reductions in risk. However, the lack of an effective collision avoidance system allowed the continued occurrence of accidents, some involving tragic losses of life, serious injury, and significant property damage.

B. Earlier Efforts To Encourage Voluntary PTC Implementation

As the NTSB continued to highlight the opportunities for accident prevention associated with emerging train control technology through its investigations and findings, Congress showed increasing interest, mandating three separate reports over the period of a decade. In 1994, FRA reported to Congress on this problem, calling for implementation of an action plan to deploy PTC systems (Report to Congress on Railroad Communications and Train Control (July 1994) (hereinafter "1994 Report")). The 1994 Report forecasted substantial benefits of advanced train control technology in supporting a variety of business and safety purposes, but noted that an immediate regulatory mandate for PTC could not be justified based upon normal cost-benefit principles relying on direct safety

benefits. The report outlined an aggressive Action Plan implementing a public-private sector partnership to explore technology potential, deploy systems for demonstration, and structure a regulatory framework to support emerging PTC initiatives.

Following through on the 1994 Report, FRA committed approximately $40 million through the Next Generation High-Speed Rail Program and the Research and Development Program to support development, testing, and deployment of PTC prototype systems in the Pacific Northwest, Michigan, Illinois, Alaska, and on some Eastern railroads. FRA also initiated a comprehensive effort to structure an appropriate regulatory framework for facilitating voluntary implementation of PTC and for evaluating future safety needs and opportunities.

In September of 1997, FRA asked the RSAC to address the issue of PTC. The RSAC accepted three tasks: Standards for New Train Control Systems (Task 1997–06), Positive Train Control Systems-Implementation Issues (Task 1997–05), and Positive Train Control Systems-Technologies, Definitions, and Capabilities (Task 1997–04). The PTC Working Group was established, comprised of representatives of labor organizations, suppliers, passenger and freight railroads, other federal agencies, and interested state departments of transportation. The PTC Working Group was supported by FRA counsel and staff, analysts from the Volpe National Transportation Systems Center (Volpe Center), and advisors from the NTSB staff.

In 1999, the PTC Working Group provided to the Federal Railroad Administrator a consensus report (Report of the Railroad Safety Advisory Committee to the Federal Railroad Administrator, Implementation of Positive Train Control Systems (August 1999) (hereinafter "1999 Report")) with an indication that it would be continuing its efforts. The 1999 Report defined the PTC core functions to include: prevention of train-to-train collisions (positive train separation); enforcement of speed restrictions, including civil engineering restrictions (curves, bridges, etc.) and temporary slow orders; and protection for roadway workers and their equipment operating within their limits of authority. The PTC Working Group identified additional safety functions that might be included in some PTC architectures: provide warning of on-track equipment operating outside their limits of authority; receive and act upon hazard information, when available, in a more timely or more secure manner (*e.g.,* compromised bridge integrity, wayside detector data); and provide for future capability by generating data for transfer to highway users to enhance warning at highway-rail grade crossings. The PTC Working Group stressed that efforts to enhance highway-rail grade crossing safety must recognize the train's necessary right of way at grade crossings and that it is important that warning systems employed at highway-rail grade crossings be highly reliable and "fail-safe" in their design.

As the PTC Working Group's work continued, other collaborative efforts, including development of Passenger Equipment Safety Standards (including private standards through the American Public Transit Association), Passenger Train Emergency Preparedness rules, and proposals for improving locomotive crashworthiness (including improved fuel tank standards) have targeted reduction in collision and derailment consequences.

In 2003, in light of technological advances and potential increased cost and system savings related to prioritized deployment of PTC systems, the Appropriations Committees of Congress requested that FRA update the costs and benefits for the deployment of PTC and related systems. As requested, FRA carried out a detailed analysis that was filed in August of 2004, *Benefits and Costs of Positive Train Control* (Report in Response to Committees on Appropriations, August 2004) ("2004 Report"), which indicated that under one set of highly controversial assumptions, substantial public benefits would likely flow from the installation of PTC systems on the railroad system. Further, the total amount of these benefits was subject to considerable controversy. While many of the other findings of the 2004 Report were disputed, there were no data submitted to challenge the 2004 Report finding that reaffirmed earlier conclusions that the safety benefits of PTC systems were relatively small in comparison to the large capital and maintenance costs. Accordingly, FRA continued to believe that an immediate regulatory mandate for widespread PTC implementation could not be justified based upon traditional cost-benefit principles relying on direct railroad safety benefits.

Despite the economic infeasibility of PTC based on safety benefits alone, as outlined in the 1994, 1999, and 2004 Reports, FRA continued with regulatory and other efforts to facilitate and encourage the voluntary installation of PTC systems. As part of the High-Speed Rail Initiative, and in conjunction with the National Railroad Passenger Corporation (Amtrak), the AAR, the State of Illinois, and the Union Pacific Railroad Company (UP), FRA created the North American Joint Positive Train Control (NAJPTC) Program, which set out to describe a single standardized open source PTC architecture and system. UP's line between Springfield and Mazonia, Illinois was selected for initial installation of a train control system to support Amtrak operations up to 110 miles per hour, and the system was installed and tested on portions of that line. Although the system did not prove viable as then conceived, the project hastened the development of PTC technology that was subsequently employed in other projects. Promised standards for interoperability of PTC systems also proved elusive.

In addition to financially supporting the NAJPTC Program, FRA continued to work with the rail carriers, rail labor, and suppliers on regulatory reforms to facilitate voluntary PTC implementation. The regulatory reform effort culminated when FRA issued a final rule on March 7, 2005, establishing a technology neutral safety-based performance standard for processor-based signal and train control systems. This new regulation, codified as subpart H to part 236, was carefully crafted to encourage the voluntary implementation and operation of processor-based signal and train control systems without impairing technological development. 70 FR 11,052 (Mar. 7, 2005).

FRA intended that final rule—developed through the RSAC process in close cooperation with rail management, rail labor, and suppliers—to further facilitate individual railroad efforts to voluntarily develop and deploy cost effective PTC technologies that would make system-wide deployment more economically viable. It also appeared very possible that major railroads would elect to make voluntary investments in PTC to enhance safety, improve service quality, and foster efficiency (e.g., better asset utilization, reduced fuel use through train pacing).

C. Technology Advances Under Subpart H

While FRA and RSAC worked to develop consensus on the regulations that would become subpart H, the railroads continued with PTC prototype development. The technology neutral, performance-based regulatory process established by subpart H proved to be very successful in facilitating the development of other PTC implementation approaches. Although the railroads prototype development efforts were generally technically

successful and offered significant improvements in safety, costs of nationwide deployment continued to be untenable in the judgment of those determining allocation of railroad capital. Information gained from prototype efforts did little to reduce the estimated costs for widespread implementation of the core PTC safety functions on the nation's railroads.

Working under subpart H, the BNSF Railway Company (BNSF), CSX Transportation, Inc. (CSXT), the Norfolk Southern Corporation (NS), and UP undertook more aggressive design and implementation work. The new subpart H regulatory approach also made it feasible for smaller railroads, such as the Alaska Railroad and the Ohio Central Railroad, to begin voluntary design and implementation work on PTC systems that best suited their needs. FRA provided, and continues to provide, technical assistance and guidance regarding regulatory compliance to enable the railroads to more effectively design, install, and test their respective systems.

In December 2006, FRA approved the initial version of the Electronic Train Management System (ETMS®) product for deployment on 35 of BNSF's subdivisions ("ETMS I Configuration") comprising single track territory that was either non-signaled or equipped with traffic control systems. ETMS is a registered trademark of Wabtec Railway Electronics. BNSF Railway has also referred to its application of this technology as "ETMS."

In a separate proceeding, FRA agreed that ETMS could be installed in lieu of restoring a block signal system on a line for which discontinuance had been authorized followed by a significant increase in traffic. During the same period, BNSF successfully demonstrated a Switch Point Monitoring System (SPMS)—a system that contains devices attached to switches that electronically report the position of the switches to the railroad's central dispatching office and to the crew of an approaching train—and a Track Integrity Warning System (TIWS)—a system that also electronically reports to the railroad's central dispatching office and to the crew of an approaching train if there are any breaks in the rail that might lead to derailments or the condition of track occupancy. FRA believes both of these technologies help to reduce risk in non-signaled territory and are forward-compatible for use with existing and new PTC systems. To be forward-compatible, not to be confused with the similar concept of extensibility, a system must be able to gracefully provide input intended for use in later system versions. The introduction of a forward-compatible technology implies that older devices can partly understand and provide data generated or used by new devices or systems. The concept can be applied to electrical interfaces, telecommunication signals, data communication protocols, file formats, and computer programming languages. A standard supports forward-compatibility if older product versions can receive, read, view, play, execute, or transmit data to the new standard. In the case of wayside devices, they are said to be forward-compatible if they can appropriately communicate and interact with a PTC system when later installed. A wayside device might serve the function of providing only information or providing information and accepting commands from a new system.

In addition to scheduling the installation of the ETMS I configuration as capital funding became available, BNSF voluntarily undertook the design and testing of complementary versions of ETMS that would support BNSF operations on more complex track configurations, at higher allowable train speeds, and with additional types of rail traffic. Meanwhile, CSXT was in the process of redesigning and relocating the test bed for its Communications Based Train Management (CBTM) system, which it has tested for several years, and UP and NS were working on similar systems using vital onboard processing.

As congressional consideration of legislation that resulted in the RSIA08 commenced, all four major railroads had settled on the core technology developed for them by Wabtec Railway Electronics ("Wabtec"). As the legislation progressed, the railroads and Wabtec worked toward greater commonality in the basic functioning of the onboard system with a view toward interoperability. PTC applications of ETMS include the non-vital PTC systems of BNSF's ETMS I and ETMS II, CSXT's CBTM, UP's Vital Train Management System (VTMS), and NS's Optimized Train Control (OTC). Further work is being undertaken by BNSF to advance the capability of ETMS by integrating Amtrak operations (ETMS III). For a description of system enhancements planned by BNSF as per the Product Safety Plan filed in accordance with subpart H, see FRA Docket No. 2006–23687, Document 0017, at pp. 40–43.

While the freight railroads' efforts for developing and installing PTC systems progressed over a relatively long period of time, starting with demonstrations of ATCS and ARES in the late 1980s and culminating in the initial ETMS Product Safety Plan approval in December of 2006, Amtrak demonstrated its ability to turn on revenue-quality PTC systems on its own railroad in support of high-speed rail. Beginning in the early 1990s, Amtrak developed plans for enhanced high-speed service on the Northeast Corridor (NEC), which included electrification and other improvements between New Haven and Boston and introduction of the Acela trainsets as the premium service from Washington to New York and New York to Boston. In connection with these improvements, which support train speeds up to 150 miles per hour, Amtrak undertook to install the Advanced Civil Speed Enforcement System (ACSES) as a supplement to existing cab signals and automatic train control (speed control). Together, these systems deliver PTC core functionalities. In support of this effort, FRA issued an order for the installation of the system, which required all passenger and freight operators in the New Haven-Boston segment to equip their locomotives with ACSES. *See* 63 FR 39,343 (July 22, 1998). ACSES was installed between 2000 and 2002, and has functioned successfully between New Haven and Boston, and on selected high-speed segments between Washington and New York, for a number of years.

Amtrak voluntarily began development of an architecturally different PTC system, the Incremental Train Control System (ITCS), for installation on its Michigan Line. Amtrak developed and installed ITCS under waivers from specific sections of 49 CFR part 236, subparts A through G, granted by FRA. ITCS was applied to tenant NS locomotives as well as Amtrak locomotives traversing the route. Highway-rail grade crossings on the route were fitted with ITCS units to pre-start the warning systems for high-speed trains and to monitor crossing warning system health in real time. The ITCS was tested extensively in the field for safety and reliability, and it was placed in revenue service in 2001. As experience was gained, FRA authorized increases in speed to 95 miles per hour; and FRA is presently awaiting final results of an independent assessment of verification and validation for the system with a view toward authorizing operations at the design speed of 110 miles per hour.

Despite these successes, the widespread deployment of these various train control systems, particularly on the general freight system, remained very much constrained by prohibitive capital costs. While the railroads were committed to installing these new systems to enhance the safety afforded

to the public and their employees, the railroads' actual widespread implementation remained forestalled due to an inability to generate sufficient funding for these new projects in excess of the capital expenditures necessary to cover the ongoing operating and maintenance costs. Accordingly, the railroads continued to plan very slow deployments of PTC system technologies.

III. The Rail Safety Improvement Act of 2008

On May 1, 2007, H.R. 2095 was introduced in the House of Representatives, which would, among other things, mandate the implementation and use of PTC systems. The bill passed the House, as amended, on October 17, 2007. The bill was then amended and passed by the Senate on August 1, 2008. While the bill was awaiting final passage, the FRA Administrator testified before Congress that "FRA is a strong supporter of PTC technology and is an active advocate for its continued development and deployment." Senate Commerce Committee Briefing on Metrolink Accident, 110th Cong. (Sept. 23, 2008) (written statement of Federal Railroad Administrator Joseph H. Boardman), *available at http://www.fra.dot.gov/downloads/PubAffairs/09–23–08FinalStatementFRAAdministratorPTC_Sen_Boxer_Meeting.pdf.*

On September 24, 2008, the House concurred with the Senate amendment and added another amendment pursuant to H. Res. 1492. When considering the House's amendment, various Senators made statements referencing certain train accidents that were believed to be PTC-preventable. For instance, Senator Lautenberg (NJ) took notice of the collision at Graniteville, South Carolina, in 2005, and Senators Lautenberg, Hutchinson (TX), Boxer (CA), Levin (MI), and Carper (DE) took notice of an accident at Chatsworth, California, on September 12, 2008. According to Senator Levin, federal investigators have said that a collision warning system could have prevented that crash and the subject legislation would require that new technology to prevent crashes be installed in high risk tracks. Senators Carper and Boxer made similar statements, indicating that PTC systems are designed to prevent train derailments and collisions, like the one in Chatsworth. 154 Cong. Rec. S10283–S10290 (2008). Ultimately, on October 1, 2008, the Senate concurred with the House amendment.

The Graniteville accident referenced by Senator Lautenberg occurred in the early morning hours of January 6, 2005, when a northbound NS freight train, operating within non-signaled (dark) territory, encountered an improperly lined switch that diverted the train from the main line onto an industry track, where it struck the locomotive of an unoccupied, parked train. The collision derailed both locomotives and 16 of the 42 freight cars of the moving train, as well as the locomotive and 1 of the 2 cars of the parked train. Among the derailed cars from the moving train were three tank cars containing chlorine, one of which was breached, releasing about 60 tons of chlorine gas. The train engineer and eight other people died as a result of chlorine gas inhalation. About 554 people complaining of respiratory difficulties were taken to local hospitals. Of these, 75 were admitted for treatment. Because of the chlorine release, about 5,400 people within a 1-mile radius of the derailment site were evacuated for almost 2 weeks.

The Chatsworth train collision occurred on the afternoon of September 12, 2008, when a UP freight train and a Metrolink commuter train collided head-on on a single main track equipped with a Traffic Control System (TCS) in the Chatsworth district of Los Angeles, California. Although NTSB has not yet released its final report, evidence summarized at the NTSB's public hearing suggested that the Metrolink passenger train was being operated on the main track past an absolute signal at a control point displaying a stop indication, when it trailed through a power-operated switch lined against its movement, and entered a section of single track where the opposing UP freight train was operating on a permissive signal indication. The UP train was lined to enter the siding at the control point, after which the switch would have been lined for the Metrolink train to proceed. As a consequence of the accident, 25 people died and over 130 more were seriously injured.

Prior to the accidents in Graniteville and Chatsworth, the railroads' slow incremental deployment of PTC technologies—while not uniformly agreed upon by the railroads, FRA, and NTSB—was generally deemed acceptable by them in view of the tremendous costs involved. Partially as a consequence and severity of these very public accidents, coupled with a series of other less publicized accidents, Congress passed the RSIA08 and it was signed into law by the president on October 16, 2008, marking a public policy decision that, despite the implementation costs, railroad employee and general public safety warranted mandatory and accelerated installation and operation of PTC systems.

As immediately relevant to this rulemaking, the RSIA08 requires the installation and operation of PTC systems on all rail main lines, meaning all intercity and commuter lines—with limited exceptions entrusted to FRA—and on freight-only rail lines when they are part of a Class I railroad system, carrying at least 5 million gross tons of freight annually, and carrying any amount of poison- or toxic-by-inhalation (PIH or TIH) materials. While the statute vests certain responsibilities with the Secretary of the U.S. Department of Transportation, the Secretary has since delegated those responsibilities to the FRA Administrator. *See* 49 CFR 1.49(oo); 74 FR 26,981 (June 5, 2009); *see also* 49 U.S.C. 103(g).

In the RSIA08, Congress established very aggressive dates for PTC system build-out completion. Each subject railroad is required to submit to FRA by April 16, 2010, a PTC Implementation Plan (PTCIP) indicating where and how it intends to install PTC systems by December 31, 2015.

In light of the timetable instituted by Congress, and to better support railroads with their installation while maintaining safety, FRA decided that it is appropriate for mandatory PTC systems to be reviewed by FRA differently than the regulatory approval process provided under subpart H. FRA believes that it is important to develop a process more suited specifically for PTC systems that would better facilitate railroad reuse of safety documentation and simplify the process of showing that the installation of the intended PTC system did not degrade safety. FRA also believes that subpart H does not clearly address the statutory mandates and that such lack of clarity would complicate railroad efforts to comply with the new statutory requirements. Accordingly, FRA hereby amends part 236 by modifying existing subpart H and adding a new subpart I.

IV. Public Participation

A. RSAC Process

In March 1996, FRA established the RSAC, which provides a forum for collaborative rulemaking and program development. The RSAC includes representatives from all of the agency's major stakeholder groups, including railroads, labor organizations, suppliers and manufacturers, other government agencies, and other interested parties. When appropriate, FRA assigns a task to the RSAC, and after consideration and debate, the RSAC may accept or reject

the task. If accepted, the RSAC establishes a working group comprised of persons that possess the appropriate expertise and representation of interests to develop recommendations to FRA for action on the task. These recommendations are developed by consensus. The working group may establish one or more task forces or other subgroups to develop facts and options on a particular aspect of a given task. The task force, or other subgroup, reports to the working group. If the working group comes to consensus on recommendations for action, the package is presented to the RSAC for a vote. If the proposal is accepted by a simple majority of the RSAC, the proposal is formally recommended to FRA. FRA then determines what action to take on the recommendation. Because FRA staff has played an active role at the working group and subgroup levels in discussing the issues and options and in drafting the language of the consensus proposal, and because the RSAC recommendation constitutes the consensus of some of the industry's leading experts on a given subject, FRA is generally favorably inclined toward the RSAC recommendation. However, FRA is in no way bound to follow the recommendation and the agency exercises its independent judgment on whether the recommended rule achieves the agency's regulatory goals, is soundly supported, and was developed in accordance with the applicable policy and legal requirements. Often, FRA varies in some respects from the RSAC recommendation in developing the actual regulatory proposal.

In developing the proposed rule in this proceeding, FRA adopted the RSAC approach by re-convening the PTC Working Group that had produced the rule recommendation resulting in subpart H. As part of this effort, FRA worked with the major stakeholders affected by this rulemaking in collaborative a manner as possible. FRA believes establishing a collaborative relationship early in the product development and regulatory development cycles can help bridge the divide between the railroad carrier's management, railroad labor organizations, the suppliers, and FRA by ensuring that all stakeholders are working with the same set of data and have a common understanding of product characteristics and functionality or their related processes production methods, including the regulatory provisions, with which compliance is mandatory. However, where the group failed to reach consensus on an issue, FRA used its authority to resolve the issue, attempting to reconcile as many of the divergent positions as possible through traditional rulemaking proceedings.

On December 10, 2008, the RSAC accepted a task (No. 08–04) entitled "Implementation of Positive Train Control Systems." The purpose of this task was defined as follows: "To provide advice regarding development of implementing regulations for Positive Train Control (PTC) systems and their deployment under the Rail Safety Improvement Act of 2008." The task called for the RSAC PTC Working Group to perform the following:

- Review the mandates and objectives of the Act related to deployment of PTC systems;
- Help to describe the specific functional attributes of systems meeting the statutory purposes in light of available technology;
- Review impacts on small entities and ascertain how best to address them in harmony with the statutory requirements;
- Help to describe the details that should be included in the implementation plans that railroads must file within 18 months of enactment of the Act;
- Offer recommendations on the specific content of implementing regulations; and

The task also required the PTC Working Group to:

- Report on the functionalities of PTC systems;
- Describe the essential elements bearing on interoperability and the requirements for consultation with other railroads in joint operations; and
- Determine how PTC systems will work with the operation of non-equipped trains.

The PTC Working Group was formed from interested organizations that are members of the RSAC. The following organizations contributed members:

American Association of State Highway and Transportation Officials (AAHSTO)
American Chemistry Council (ACC)
American Public Transportation Association (APTA)
American Short Line and Regional Railroad Association (ASLRRA)
Association of American Railroads (AAR)
Association of State Rail Safety Managers (ASRSM)
Brotherhood of Maintenance of Way Employes Division (BMWED)
Brotherhood of Locomotive Engineers and Trainmen Division (BLET)
Brotherhood of Railroad Signalmen (BRS)
Federal Transit Administration* (FTA)
International Brotherhood of Electrical Workers (IBEW)
National Railroad Construction and Maintenance Association
National Railroad Passenger Corporation (Amtrak)
National Transportation Safety Board (NTSB)*
Railway Supply Institute (RSI)
Transport Canada*
Tourist Railway Association Inc.
United Transportation Union (UTU)

*Indicates associate (non-voting) member.

From January to April 2009, FRA met with the entire PTC Working Group 5 times over the course of 12 days. During those meetings, in order to efficiently accomplish the tasks assigned to it, the PTC Working Group empowered three task forces to work concurrently. These task forces were the passenger, short line and regional railroad, and the radio and communications task forces. Each discussed issues specific to its particular interests and needs and produced proposed rule language for the PTC Working Group's consideration. The majority of the proposals were adopted into the proposed rule as agreed upon by the working group, with rule language related to a remaining few issues being further discussed and enhanced for inclusion into the rule by the PTC Working Group.

The passenger task force discussed testing issues relating to parts 236 and 238 and the definition of "main line" under the statute, including possible passenger terminal and limited operations exceptions to PTC implementation. Recommendations of the task force were presented to the PTC Working Group, which adopted or refined each suggestion.

The short line and regional railroad task force was formed to address the questions pertaining to Class II and Class III railroads. Specifically, the group discussed issues regarding the trackage rights of Class II and III railroads using trains not equipped with PTC technology over a Class I railroad's PTC territory, passenger service over track owned by a Class II or Class III railroads where PTC would not otherwise be required, and rail-to-rail crossings-at-grade involving a Class I railroad's PTC equipped line and a Class II or III railroad's PTC unequipped line. After much discussion, there were no consensus resolutions reached to any of the main issues raised. However, the discussion yielded insights utilized by FRA in preparing this final rule.

The radio and communications task force addressed wireless communications issues, particularly as they relate to communications security, and recommended language for § 236.1033.

FRA staff worked with the PTC Working Group and its task forces in

developing many facets of the final rule. FRA gratefully acknowledges the participation and leadership of representatives who served on the PTC Working Group and its task forces. These points are discussed to show the origin of certain issues and the course of discussion on these issues at the task force and working group levels. We believe this helps illuminate the factors FRA weighed in making its regulatory decisions regarding this final rule and the logic behind those decisions.

In general, the PTC Working Group agreed on the process for implementing PTC under the statute, including decisional criteria to be applied by FRA in evaluating safety plans, adaptation of subpart H principles to support this mandatory implementation, and refinements to subpart H and the part 236 appendices necessary to dovetail the two regulatory regimes and take lessons from early implementation of subpart H, including most aspects of the training requirements. Notable accords were reached, as well, on major functionalities of PTC and on exceptions applicable to passenger service (terminal areas and limited main line exceptions). Major areas of disagreement included whether to allow non-equipped trains on PTC lines, extension of PTC to lines not within the statutory mandate, and whether to provide for onboard displays or terminals visible and accessible to employees other than the locomotive engineer when two or more persons are regularly assigned duties in the cab. Some additional areas of concern were discussed but could not be resolved in the time available. It was understood that where discussion did not yield agreement, FRA would make proposals within a Notice of Proposed Rulemaking (NPRM) and receive public comment.

B. Public Hearing and Comments Filed

FRA issued an NPRM on July 21, 2009, and accepted comments on this proposed regulation until August 20, 2009. A public hearing was also held in connection with the NPRM in Washington, DC, on August 13, 2009, as further described below.

During the comment period, a number of entities filed comments requesting that FRA extend the comment period to the proposed rule in this proceeding. FRA regrettably denied those requests due to the urgent need to prepare, process, and publish a final rule at the earliest possible date. Since railroads subject to the rules are each required to file a PTCIP by April 16, 2010, under the terms of the RSIA08, it was important that FRA provide reliable guidance for this process to occur in a timely manner. However, FRA responded to two of those requests on the record, indicating that it is FRA's policy to consider late-filed comments to the extent practicable and inviting the railroads to supplement their comments as soon as possible even if it is necessary to file after the formal comment period has closed.

On August 13, 2009, FRA held a hearing to provide interested parties an opportunity to enter oral statements into the record. The AAR, Amtrak, BNSF, and CSXT entered prepared statements into the record and UP and NS indicated their concurrence with those statements. An oral statement was also entered into the record by a representative of six (6) rail labor organizations, including the American Train Dispatchers Association (ATDA), BLET, BMWED, BRS, IBEW, and UTU (collectively, the "Rail Labor Organizations" or "RLO"). AASHTO also provided an oral statement at the hearing, indicating that it fully supports the implementation of the proposed rule. Copies of the prepared statements and of the hearing transcript can be found in the docket to this proceeding.

Subsequently, written comments were filed by the American Shortline and Regional Railroad Association (ASLRRA), Amtrak, APTA, ACC, AAR, BNSF, Caltrain, Canadian Pacific (CP), The Chlorine Institute (CI), CSXT, Friends of the Earth, GE Transportation (GE), HCRQ, Inc. and Cattron Group International (collectively, "HCRQ/CGI"), Invensys Rail Group—Safetran Systems ("Safetran"), NTSB, New York State Metropolitan Transportation Authority (NYSMTA), NJ Transit, Northern Indiana Commuter Transportation District (NICTD), Pacific Southwest Railway Museum, RLO, Railroad Passenger Car Alliance, San Bernardino Railway Historical Society, Southern California Regional Rail Authority (SCRRA or Metrolink), The Fertilizer Institute (TFI), Tourist Railway Association, Trinity Railway Express (TRE or Trinity), Utah Transit Authority (UTA) and a number of individuals.

After the comment period closed on August 20, 2009, the RSAC PTC Working Group was reconvened for 3 days. The PTC Working Group agreed on a number of recommendations for resolution of comments which were presented to the full RSAC on September 10. In voting by mail ballot that concluded on September 24, the RSAC adopted the recommendations, which are discussed below in the context of the specific issues that they address.

V. Overview: The Proposed Rule, Comments, and Resolution of Comments

In broad summary, the proposed rule provided for joint filing of PTCIPs by all railroads engaged in joint operations. Each PTCIP was to be accompanied or preceded by a PTC Development Plan (PTCDP) or PTC Safety Plan (PTCSP) detailing the technology to be employed, or by a Type Approval obtained by another railroad through approval of a PTCDP. As further discussed below, this overall structure was generally embraced by the industry parties and the commenters; but the extended period for delivery of interoperability standards has given rise to the need for some significant adjustments that are included in the final rule.

Under the NPRM language, Class I freight railroads would be required to describe in their PTCIPs the routes to be equipped based on traffic densities (lines carrying more than 5 million gross tons) and presence of PIH traffic during calendar year 2008. They would be permitted to amend those plans if FRA found that removal of a line was "consistent with safety and in the public interest." The discussion below reflects the serious objections of the Class I railroads to this "base year" approach and adjustments that FRA makes in this final rule to provide somewhat greater flexibility on the face of the regulation. The discussion and final rule also provide FRA's response to a suggestion by the AAR that FRA create a "*de minimis*" exception to the requirement that lines carrying PIH traffic be equipped with PTC, an issue raised for the first time in response to the NPRM.

FRA proposed to adapt the performance-based structure of subpart H, which had been developed through the consensus process to encourage deployment of PTC and related technologies to provide a means of qualifying PTC systems under the RSIA08. In order to promote completion of PTC deployment by the end of 2015, as required by law, FRA proposed functional requirements that could be met by available technology. These provisions continue to enjoy broad support from the industry parties and commenters, but the final rule makes numerous perfecting changes to the implementing language in response to specific comments.

The NPRM set forth requirements for equipping of trains with PTC that reflected FRA's perception of practical considerations (e.g., not all locomotives can be equipped at once, and switching out locomotives to commit them to

equipped routes would involve significant cost and safety exposure), historic tolerance for some incidental unequipped movements under circumstances where strict adherence would create obvious hardship without commensurate safety benefits (e.g., locomotives of Class II and III railroads generally spend little time on Class I railroads and have a good safety record, yet requiring that they be equipped could result in expenditures greater than the previous value of the locomotives), and movement restrictions applicable where controlling locomotives might have failed onboard PTC equipment. These proposals elicited some strong objections and proposals for improvement. Several commenters asked that occasional movement of trains led by historic locomotives be permitted without equipping the locomotives with PTC technology. The final rule makes a number of changes, while endeavoring to carry forward the lessons of many decades and while recognizing the need for regulatory flexibility.

Relying on existing train control requirements, the NPRM proposed that each assigned crew member be able to view the PTC display and perform assigned functions from their normal position in the cab. The NPRM also addressed the need to avoid task overload on the locomotive engineer by having that person perform functions that could distract from attention to current safety duties. FRA has considered the Class I railroads' argument that, if a single display was acceptable under subpart H, it should be acceptable under the proposed subpart I. Although FRA has considered carefully the carriers' arguments on this point, the final rule carries forward principles of crew resource management by ensuring that each crew member has the information and ability to perform their assigned function and, therefore, where a PTC overlay system is used, that all of the safety features of the underlying operation to which PTC is added will be kept.

One of the critical choices assigned to FRA under the law was specification of any exceptions to passenger "main track" requiring installation of PTC. The NPRM carried forward narrow exceptions crafted at the request of commuter and intercity railroads. Amtrak followed with comments on the NPRM asking for a broader exception. They noted in particular that the incremental costs of PTC on some lines with limited freight traffic and relatively few Amtrak trains might need to be borne by states that support particular services, and the funding might not be available to do so. Following recommendations from the RSAC Working Group, FRA is including additional latitude to bring forward specific exceptions for FRA review and approval, with or without conditions.

The NPRM was technology neutral and directed at the outcomes desired. A number of the comments addressed the issue of market concentration and absence of effective choices in selecting PTC technology. In this regard, some felt that FRA should specify attributes of interoperability in the form of open standards. The final rule continues to rely on safety performance as the basis for FRA certification of PTC systems. FRA declines at this time to deprive those railroads that have served as technology leaders in developing PTC systems of the latitude to implement their systems, given their apparent willingness to provide open standards for attributes of the technology over which they have control, and given the predictable delays that would ensue should alternative approaches be specified. FRA is aware that this creates a degree of reliance on others with respect to those railroads that stood back and waited for others to develop PTC technology. Further, some degree of market concentration may exist on the general freight network, in particular, given the dominance of one vendor or supplier with respect to the core of the onboard systems. FRA financially supported development of interoperability standards through the North American Positive Train Control Program (the technology selected for demonstration was not deployed, and no standards were delivered) and again through the American Railway Engineering and Maintenance Association (standards have been published and are available, but no railroad has signaled an intention to employ them). The choice of technology that will be deployed should, in FRA's view, be made by those who are making the investments.

Finally, the NPRM took a traditional approach to recognition of technology, requiring that railroads step forward, individually or with their suppliers, to request recognition of PTC systems. Suppliers commented that they should be able to step forward without railroad participation and receive recognition for systems, subsystems, and components that would later be incorporated in PTC systems approved by FRA. They noted that the NPRM would burden them with reporting obligations while not conferring status to receive direct product recognition. While recognizing the commenters' logic, FRA could not find a means in the final rule to relieve these concerns, given limited technical staffing at FRA, the potential for filings representing technology that the industry would not employ, the inherent difficulty associated with addressing the safety of technology below the system level, and the critical need to provide rapid responses to necessary filings.

Each of the comments on the NPRM, including comments not within the scope of this overview, is discussed in relation to the topic addressed in the section-by-section analysis below.

VI. Seeking Further Comments

While this final rule is effective on the date indicated herein, FRA believes that certain issues warrant further discussion. Accordingly, FRA will continue to seek comments limited to increasing the clarity, certainty, and transparency of the criteria governing the removal from a PTCIP (and therefore from the requirement to install PTC) of any track segments on which PTC systems have yet to be installed for which a railroad seeks relief from the requirement to install PTC. FRA considers this issue separate and distinct from the discontinuance of any already installed or existing PTC systems, which is governed under § 236.1021, part 235 of this title, and the "Signal Inspection Act" (codified at 49 U.S.C. 20501–20505). Any further comments should be limited to the scope of the issues indicated in this preamble to which FRA seeks further comments.

In § 236.1005(b)(4)(i)(A)(*2*), the final rule provides certain factors that FRA will consider when determining whether to approve exclusion of a line from the PTCIP in the case of cessation of PIH traffic over a particular track segment. For instance, under § 236.1005(b)(4)(i)(A)(*2*)(*ii*), the requesting railroad must show that any rerouting of PIH traffic from the subject track segment is justified based upon the route analysis submitted. FRA seeks comments on how the elements of a route analysis should be weighed by FRA when determining whether rerouting as provided under this paragraph is sufficiently justified.

Section 236.1005(b)(4)(i)(A)(*2*)(*iii*) concerns the risk remaining on a track segment if PIH traffic were to be removed. FRA also seeks comments on how to measure the appropriate level of risk established in § 236.1005(b)(4)(i)(A)(*2*)(*iii*) to require the installation of PTC on lines not carrying PIH or passenger traffic. No railroad has supplied data supporting further track exceptions from PTC system installation consistent with

statutory and safety requirements. Thus, FRA requests additional data to support commenters' positions. FRA also seeks comment and information on ways that it might consider risk mitigations other than by a compensating extension of PTC or PTC technologies.

In § 236.1005(b)(4)(i), the final rule provides an exception to PTC system implementation where such implementation would provide only a *de minimis* PIH risk. While in the proposed rule FRA sought means to reduce the railroads' burdens associated with this rule, no specific *de minimis* exception was proposed. The AAR mentioned this possibility in its comment filed during the comment period and offered in supplementary comments filed after the comment period to work with FRA on this issue. FRA believes that the de minimis exception provided in this final rule falls within the scope of the issues set forth in the proposed rule. However, since none of the parties has had an opportunity to comment on this specific exception as provided in this final rule, FRA seeks comments on the extent of the *de minimis* exception.

As further explained below, this final rule uses 2008 traffic data as an initial baseline in each PTCIP to determine the breadth and scope of PTC system implementation and, in recognition of the fact that traffic patterns are likely to change to some degree before December 31, 2015, provides means of adjusting the track segments on which PTC must be installed where adjustments are appropriately justified. These issues relate to the potential scaling back of the breadth and scope of that baseline through the request by the railroads—made contemporaneously or subsequently to PTCIP submission and prior to actual PTC system implementation—on the subject track segments for FRA to apply certain regulatory exceptions. Under the procedures set forth in this final rule, requests for such amendments may be made after PTCIP submission. Since these issues should not affect the PTCIP required to be filed by the April 16, 2010, statutory deadline, FRA believes that time is available for some further consideration.

VII. Section-by-Section Analysis

Unless otherwise noted, all section references below refer to sections in title 49 of the Code of Federal Regulations (CFR). FRA sought comments on all proposals made in the NPRM. This portion of the preamble discusses the comments received, FRA's assessment of those comments, and the basis for the final rule provisions. Any analysis in the NPRM that is not explicitly modified in this final rule remains applicable.

Proposed Amendments to 49 CFR Part 229

Section 229.135 Event Recorders

The proposed amendment to the existing event recorder section of the Locomotive Safety Standards is intended to make that section parallel to the additions in § 236.1005(d) below. No comments were received, and the section is adopted as proposed.

Proposed Amendments to 49 CFR Part 234

Section 234.275 Processor-Based Systems

Section 234.275 presently requires that each processor-based system, subsystem, or component used for active warning at highway-rail grade crossings that is new or novel technology, or that provides safety-critical data to a railroad signal or train control system which is qualified using the subpart H process, shall also be governed by those requirements, including approval of a Product Safety Plan. Particularly with respect to high-speed rail, FRA anticipates that PTC systems will in some cases incorporate new or novel technology to provide for crossing warning system pre-starts (eliminating the necessity of lengthening the approach circuits for high-speed trains), to verify crossing system health between the wayside warning system and approaching trains, or to slow trains approaching locations where vehicle storage has been detected on a crossing, among other options. Indeed, each of these functions is presently incorporated in at least one train control system, and others may one day be feasible (including in-vehicle warning). There would appear to be no reason why such a functionality intended for inclusion in a PTC system mandated by subpart I could not be qualified with the rest of the PTC system under subpart I. On the other hand, care should be taken to set an appropriate safety standard taking into consideration highway users, occupants of the high-speed trains, and others potentially affected.

In fact, with new emphasis on high-speed rail, FRA needs to consider the ability of PTC systems to integrate this type of new technology and thereby reduce risk associated with high-speed rail service. Risk includes derailment of a high-speed train with catastrophic consequences after encountering an obstacle at a highway-rail grade crossing. To avoid such consequences, as many crossings as possible should be eliminated. To that end, 49 CFR 213.347 requires a warning and barrier plan to be approved for Class 7 track (speeds above 110 miles per hour) and prohibits grade crossings on Class 8 and 9 track (above 125 miles per hour). That leaves significant exposure on Class 5 and 6 track (80 miles per hour for freight and 90 miles per hour for passenger trains, up to 110 miles per hour for either) which is currently not specifically addressed by regulation.

At the public hearing in this proceeding, the RLO indicated its agreement with FRA's interpretation of 49 CFR 213.347 and stated that significant exposure remains at highway-rail grade crossings for Class 5 and 6 track, because "such plans or prohibitions are not currently addressed by Federal Regulation." In addition to the proposed amendments to § 234.275, however, the RLO believes that PTC systems should also be mandated under subpart I to incorporate technology that would verify a highway-rail grade crossing warning system's activation for an approaching train and slow a train approaching a location where such system activation could not be verified. The RLO believes that such verification and speed restriction enforcement would significantly lower the exposure for a potential collision between a highway motor vehicle and a train. According to the RLO, this function is currently incorporated into at least one deployed train control system and is therefore feasible. In addition, the RLO propose that certain existing highway-rail grade crossing warning system regulations and requirements, including those in parts 213 and 234, and in subpart H to part 236, could be cross referenced or included in subpart I to ensure regulatory harmony.

While AAR understands the safety concern, it asserts that this function is not related to the core PTC functions mandated by Congress. Furthermore, asserts AAR, the cost of installing wayside interface units at grade crossings on PTC routes would be prohibitively expensive and would divert resources that would otherwise be devoted to meeting the mandated PTC deadline.

The NTSB recommends that the warning and barrier protection plans similar to those for Class 7 track at grade crossings in 49 CFR 213.347 should also apply to Class 5 and 6 tracks. According to the NTSB, such protection at crossings (similar to protection at crossings afforded within the ITCS project) should be integrated as part of an approved PTC plan to reduce the risk

of high-speed catastrophic derailments at such grade crossings.

FRA, while certainly recognizing these concerns, does not choose to provide further prescriptive requirements for highway-rail grade crossings beyond those set forth in § 213.347. FRA will, however, require that highway-rail grade crossing safety at Class 5 and 6 track speeds be specifically addressed within a railroad's PTCDP and PTCSP (*see* §§ 236.1013 and 236.1015 respectively) subject to FRA approval. FRA has separately developed Guidelines for Highway-Rail Grade Crossing Safety for high-speed rail that will be employed in the grant review and negotiation process under the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111–5, 123 Stat. 115 (2009) (ARRA). These Guidelines encourage use of sealed corridor strategies for Emerging High-Speed Rail systems and integration of highway-rail warning systems with PTC where feasible. *See* Docket No. FRA–2009–0095.

Proposed Amendments to 49 CFR Part 235

Section 235.7 Changes Not Requiring Filing of Application

FRA amends § 235.7, which allows specified changes within existing signal or train control systems be made without the necessity of filing an application. The amendments consist of adding allowance for a railroad to remove an intermittent automatic train stop system in conjunction with the implementation of a PTC system approved under subpart I of part 236, and a couple of minor editorial corrections.

The changes allowable under this section, without filing of an application, are those identified on the basis that the resultant condition will be at least no less safe than the previous condition. The required functions of PTC within subpart I provide a considerably higher level of functionality related to both alerting and enforcing necessary operating limitations than an intermediate automatic train stop system does. Additionally, in the event of the loss of PTC functionality (*see* § 236.1029 regarding a failure en route), the operating restrictions required will provide the needed level of safety in lieu of the railroad being expected to keep and maintain an underlying system such as intermittent automatic train stop for use only in such cases. Therefore, FRA believes that with the implementation of PTC under the requirements of subpart I, the safety value of any previously existing intermittent automatic train stop system is entirely obviated. There were no objections in the PTC Working Group to this amendment.

The AAR submitted comment that within § 236.1021, paragraphs (j)(2) and (j)(3) should be revised to recognize the allowance for removal of a signal used in lieu of an electric or mechanical lock in the same manner as removal of the electric or mechanical lock. These two paragraphs are intended to recognize that where train speed over the switch does not exceed 20 miles per hour, or where trains are not permitted to clear the main track at such switch, removal of the devices intended to provide the necessary protection without filing for approval is appropriate.

The regulation requiring the installation of an electric or mechanical lock identifies the allowance for a signal used in lieu thereof (*see* § 236.410). FRA agrees with the AAR that when the requirement for an electric or mechanical lock, or a signal used in lieu thereof, are eliminated, the removal of any of these devices in their entirety without filing for approval is appropriate. FRA is therefore amending paragraphs (j)(2) and (j)(3) of § 236.1021 as recommended in order to clarify these allowances.

For the same reasoning and in a consistent manner, FRA is amending paragraphs (b)(2) and (b)(3) in existing § 235.7 in order to provide the same allowances for removal of a signal used in lieu of an electric or mechanical lock within block signal systems without filing for approval.

Proposed Amendments to 49 CFR Part 236

Section 236.0 Applicability, Minimum Requirements, and Penalties

FRA amends this existing section of the regulation to remove manual block from the methods of operation permitting speeds of 50 miles per hour or greater for freight trains and 60 miles per hour or greater for passenger trains. Manual block rules create a reasonably secure means of preventing train collisions. However, where the attributes of block signal systems are not present, misaligned switches, broken rails, or fouling equipment may cause a train accident. FRA believes that contemporary expectations for safe operations require this adjustment, which also provides a more orderly foundation for the application of PTC to the subject territories. There were no objections in the PTC Working Group to this change and the NTSB supports the removal of manual block from a method of operation permitting train speeds of above 49 and 59 miles per hour for freight and passenger trains, respectively. According to the NTSB, manual block does not afford the level of safety that block signal or PTC systems provide for the detection of misaligned switches, broken rails, or fouling equipment that may cause a train accident.

After review of the NPRM, AAR stated that paragraph (c)(1)(ii)(A) seemed to preclude the operations identified in paragraph (c)(1)(ii)(B) and that it was unclear whether paragraph (c)(1)(ii)(A) applies to opposing trains or some other condition. Therefore, the AAR recommended that paragraphs (c)(1)(ii)(A) and (c)(1)(ii)(B) be revised. FRA agrees and has therefore revised paragraphs (c)(1)(ii)(A) and (c)(1)(ii)(B), and added paragraphs (c)(1)(ii)(C) and (c)(1)(ii)(D), in the final rule to improve clarity.

FRA has also added paragraph (d)(2) in the final rule to address the use of automatic cab signal, automatic train stop, or automatic train control systems on or after December 31, 2015. On or after December 31, 2015, the method of protecting high-speed train operations will be through the use of PTC. FRA recognizes that there may be justifiable reasons for continued use of automatic cab signal, automatic train stop, or automatic train control systems on or after December 31, 2015 on certain lines, where the installation of PTC would be inappropriate. In situations where the automatic cab signal, automatic train stop, or automatic train control systems are an integral part of the PTC system design, no action will be required by a railroad. In any other situation, however, FRA will only allow continued use of an automatic cab signal, automatic train stop, or automatic train control system on a case-by-case basis after sufficient justification has been provided to the Associate Administrator.

FRA has also added a preemption provision at the end of section 236.0. Part 236, which FRA inherited from the Interstate Commerce Commission at the time FRA was created, has had preemptive effect by operation of law at least since enactment of the Federal Railroad Safety Act of 1970 (Pub. L. 111–43). However, no preemption provision was ever added, largely as an historical accident. Since enactment of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Commission Act of 2007), Public Law 110–53, which amended 49 U.S.C. 20106 significantly, FRA has been updating the preemption provisions of its regulations to conform to the current statute as opportunities to do so are

presented. New subsection 236.0(i) is added to accomplish that and to recite the preemptive effect of the Locomotive Boiler Inspection Act (49 U.S.C. 20701–20703), which has been held by the U.S. Supreme Court to preempt the entire field of locomotive safety; therefore, this part preempts any state law, including common law, covering the design, construction, or material of any part of or appurtenance to a locomotive.

The text of section 236.0(i)(1) and (2) directly reflects FRA's interpretation of 49 U.S.C. 20106, as amended. Read by itself, 49 U.S.C. 20106(a) preempts state standards of care, including common law standards, *Norfolk Southern Ry.* v. *Shanklin,* 529 U.S. 344, 358–359 (2000), *CSX Transp., Inc.* v. *Easterwood,* 507 U.S. 658, 664 (1993), but does not expressly state whether anything replaces the preempted standards of care for purposes of tort suits. The focus of that provision is clearly on who regulates railroad safety: The federal government or the states. It is about improving railroad safety, for which Congress deems nationally uniform standards to be necessary in the great majority of cases. That purpose has collateral consequences for tort law which new statutory section 20106 paragraphs (b) and (c) address. New paragraph (b)(1) creates three exceptions to the possible consequences flowing from paragraph (a). One of those exceptions (paragraph (b)(1)(B)) precisely addresses an issue presented in *Lundeen* v. *Canadian Pacific Ry.,* 507 F.Supp.2d 1006 (D.Minn. 2007) that Congress wished to rectify: It allows plaintiffs to sue a railroad in tort for violation of its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the secretaries. None of those exceptions covers a plan, rule, or standard that a regulated entity creates for itself in order to produce a higher level of safety than federal law requires, and such plans, rules, or standards were not at issue in *Lundeen.* The key concept of section 20106(b) is permitting actions under state law seeking damages for personal injury, death, or property damage to proceed using a federal standard of care. A plan, rule, or standard that a regulated entity creates pursuant to a federal regulation logically fits the paradigm of a federal standard of care—federal law requires it and determines its adequacy. A plan, rule, or standard, or portions of one, that a regulated entity creates on its own in order to exceed the requirements of federal law does not fit the paradigm of a federal standard of care—federal law does not require that the law be surpassed and, past the point at which the requirements of federal law are satisfied, says nothing about its adequacy. That is why FRA believes that section 20106(b)(1)(B) covers the former, but not the latter. The basic purpose of the statute—improving railroad safety—is best served by encouraging regulated entities to do more than the law requires and would be disserved by increasing potential tort liability of regulated entities that choose to exceed federal standards, which would discourage them from ever exceeding federal standards again.

In this manner, Congress adroitly preserved its policy of national uniformity of railroad safety regulation expressed in section 20106(a)(1) and assured plaintiffs in tort cases involving railroads, such as *Lundeen,* of their ability to pursue their cases by clarifying that federal railroad safety regulations preempt the standard of care, not the underlying causes of action in tort. Under this interpretation, all parts of the statute are given meanings that work together effectively and serve the safety purposes of the statute.

Section 236.410 Locking, Hand-Operated Switch; Requirements

In this final rule, FRA is removing the Note following paragraph (b) of this section. During FRA's review of the requirements contained in this part, FRA discovered that the Note following paragraph (b), which had previously been removed as part of FRA's 1984 amendments to this part, was inadvertently reprinted in the rule text several years later and has remained there. As reflected in the preamble discussion of the 1983 proposed rule, FRA moved the provisions for removal of electric or mechanical locks to § 235.7 based on FRA's determination that the industry was capable of achieving compliance of train operations in procedures more suitable to individual properties.

In light of the history of this section, FRA is taking the opportunity within this rulemaking to remove the Note following paragraph (b), which presents information in conflict with the allowances that have been added into §§ 235.7(b)(2) and (b)(3).

Section 236.909 Minimum Performance Standard

FRA is modifying paragraph (e)(1) of this section to include a requirement for the risk metric sensitivity analysis to be an integral part of the full risk assessment that is required to be provided in the Product Safety Plan (PSP) submittal in accordance with § 236.907(a)(7). Paragraph (e)(2) of this section is also being modified to eliminate an alternative option for a railroad to use a risk metric in which consequences of potential accidents are measured strictly in terms of fatalities.

Prior to the modification of this section, paragraph (e)(1) discussed how safety and risk should be measured for the full risk assessment, but did not accentuate the need for running a sensitivity analysis on chosen risk metrics to ensure that the worst case scenarios for the proposed system failures or malfunctions are accounted for in the risk assessment. On the other hand, Appendix B to this part mandates that each risk metric for the proposed product must be expressed with an upper bound, as estimated with a sensitivity analysis. The FRA's experience gained while reviewing PSP documents required by subpart H of this part and submitted to FRA for approval revealed that railroads did not consider it mandatory to run a sensitivity analysis for the chosen risk metrics. Thus, an additional effort was required from the FRA staff reviewing PSP submittals to demonstrate to the railroads the validity and significance of such a request. Therefore, this final rule amends paragraph (e)(1) to explicitly require the performance of a sensitivity analysis for the chosen risk metrics. The language in paragraph (e)(1) of this section explains why the sensitivity analysis is needed and what key input parameters must be analyzed.

FRA received comments on the proposed modification to paragraph (e)(1) of this section. While the RLO expressed support for making the risk metric sensitivity analysis an integral part of the full risk assessment, GE sought clarification and a sample regarding the proposed amendment to the clause regarding the risk assessment sensitivity analysis. GE believes that a literal interpretation of this clause would mean that the risk analysis must evaluate the risk sensitivity to variations in every individual electronic and mechanical component of the system. If so interpreted, GE asserts that the combinatorial calculations would present a significant barrier to the safety analysis and delay PTC system approval. GE further asserts that safety coverage of discrete component failures can be assured through other techniques in the overall system design. GE believes that the intent of this rule is that "component" should mean "functional subsystem," as system safety can be completely addressed by performing the sensitivity analysis at that level. Accordingly, GE proffers that paragraph (e)(1) of this section should be modified to allow the level of detail

of the risk analysis to be chosen based on the system safety philosophy and technology chosen.

Similar concerns were expressed by HCRQ/CGI, which questioned the need for an additional requirement in the rule that would require the sensitivity analysis to document the sensitivity to worst case failure scenarios. In the alternative, HCRQ/CGI suggested that the final rule should require a reasonable justification for all failure rates.

In response to these comments, FRA would like to clarify that the lowest level of system elements constructing the overall system that would be subject to risk analysis and the following sensitivity analysis are "components," "modules," "pieces of equipment," or "subsystems" that are processor-based in nature, the functionality and performance of which are governed by this part. FRA declines, however, to provide a sample sensitivity analysis in this rulemaking document, as the technique of sensitivity analysis has been well covered by a number of system safety engineering studies.

FRA notes that the term, "worst case failure scenario" is a subject of general theory of system safety and reliability. Therefore, it does not appear to be necessary to provide an interpretation of this term. Nonetheless, in response to comments that have been received on this issue, FRA would like to add a clarifying statement. A sensitivity analysis must be conducted by defining the range of values (i.e., lower bound, upper bound, and associated distribution) for key input parameters and assessing the impact of variations over those ranges on the overall system risk. The worst case analysis must consider realistic combinations of the key input parameters as they tend toward their worst case values. Justification must be provided for the ranges and process used in the design of the sensitivity analysis.

Another comment from HCRQ/CGI relates to the requirement that "the sensitivity analysis must confirm that the risk metrics of the system are not negatively affected by sensitivity analysis input parameters. * * *" HCRQ/CGI requested that the meaning of the phrase "negatively affected" be specified. FRA agreed to provide such an explanation and therefore offered an interpretation of the words "negatively affected" in paragraph (e)(1).

The modification to paragraph (e)(2) of this section is intended to clarify how the exposure and its consequences, as main components of the risk computation formula, must be measured. As stated in paragraph (e)(2), the exposure must be measured in train miles per year over the relevant railroad infrastructure where a proposed system is to be implemented. When determining the consequences of potential accidents, the railroad must identify the total costs involved, including those relating to fatalities, injuries, property damage, and other incidentals. This final rule eliminates the option of using an alternative risk metric, which would allow the measurement of consequences strictly in terms of fatalities. It is FRA's experience that measuring consequences of accidents strictly in term of fatalities did not serve as an adequate alternative to metrics of total cost of accidents for two main reasons. First, the statistical data on railroad accidents shows that accidents involving fatalities also cause injuries and significant damage to railroad property and infrastructure for both freight and especially passenger operations. Even though the cost of human life is often the highest component of monetary estimates of accident consequences, the dollar estimates of injuries, property losses, and damage to the environment associated with accidents involving fatalities cannot and should not be discounted in the risk analysis. Second, allowing fatalities to serve as the only risk metrics of accident consequences confused the industry and the risk assessment analysts attempting to determine the overall risk associated with the use of certain types of train control systems. As a result, some risk analysts inappropriately converted injuries and property damages for observed accidents into relative estimates of fatalities. This method cannot be considered acceptable because, while distorting the overall picture of accident consequences, it also raises questions on appropriateness of conversion coefficients. Therefore, FRA considers it appropriate to eliminate from the rule the alternative option for consequences to be measured in fatalities only. This approach gained the support of the RLO, who in their comments concur with a modification of paragraph (e)(2) that is eliminating an option of risk consequences to be measured in fatalities only.

Subpart I—Positive Train Control Systems

Section 236.1001 Purpose and Scope

This section describes both the purpose and the scope of subpart I. Subpart I provides performance-based regulations for the development, test, installation, and maintenance of PTC systems, and the associated personnel training requirements, that are mandated for installation by FRA. This subpart details the process and identifies the documents that railroads and operators of passenger trains are to utilize and incorporate in their PTC implementation plans. This subpart also details the process and procedure for obtaining FRA approval of such plans.

A number of railroads indicated concern with a potentially significant reprogramming of funds due to the statutorily mandated implementation of PTC systems. These railroads claim that the costs associated with PTC system implementation will lead to deferred capital improvements and maintenance elsewhere in the general railroad system, including degraded track, bridge, or drainage conditions, which may then lead to accidents. Thus, according to these railroads, the mandated PTC implementation, within an extremely aggressive timeframe, may lead to an overall reduced level of safety. FRA recognizes that the cost of PTC will be substantial. FRA does note that capital expenditures can often be financed; and the Railroad Rehabilitation and Improvement Financing (RRIF) program is one source of such financing. Other potential sources include private financing, public bond authority, and state and federal appropriations. It is the responsibility of each public and private railroad to determine appropriate funding sources to meet its needs.

Various railroads also urge FRA to not use its discretion to require more than the minimum mandated by the RSIA08. These railroads note that under FRA's economic analysis, the costs of PTC implementation outweigh its benefits by a ratio of 15 to 1. While these railroads acknowledge that these costs are mostly unavoidable due to the congressional mandate, they believe that there are ways FRA may mitigate these and other costs associated with this rule. FRA has crafted this final rule to limit the cost of implementation and to avoid further PTC development that could require additional funding and additional time. Accordingly, in the proposed and final rule, FRA indicates a willingness to approve suitable systems employing non-vital onboard processing, to recognize wayside signal logic as an appropriate means of protecting movements over switches, to recognize systems that enforce the upper limit of restricted speed as suitable collision avoidance in the case of following trains and joint authorities, to avoid any requirements for monitoring of derails off the main line in conventional speed territory, to allow for conventional arrangements at rail-to-rail crossings at-

grade where speeds are moderate, and to recognize to the maximum extent possible safety case showings made under subpart H prior to the effective date of this rule. In addition, FRA has made allowances for operation of Class II and III locomotives in PTC territory and significant "main line" exceptions for passenger routes. Together, these actions will save the railroads billions of dollars of initial expense, as well as continuing expense in maintenance over the coming years.

Section 236.1003 Definitions

Given that a natural language such as English contains, at any given time, a finite number of words, any comprehensive list of definitions must either be circular or leave some terms undefined. In some cases, it is not possible and indeed not necessary to state a definition. Where possible and practicable, FRA prefers to provide explicit definitions for terms and concepts rather than rely solely on a shared understanding of a term through use.

Paragraph (a) reinforces the applicability of existing definitions of subparts A through H. The definitions of subparts A through H are applicable to subpart I, unless otherwise modified by this part.

Paragraph (b) introduces definitions for a number of terms that have specific meanings within the context of subpart I. Paragraph (b) has been modified in the final rule by adding a definition for the term, "Notice of Product Intent."

In lieu of analyzing each definition here, however, some of the delineated terms will be discussed as appropriate while analyzing other sections below.

As a general matter, however, FRA believes it is important to explain certain organizational changes required pursuant to the RSIA08. The statute establishes the position of a Chief Safety Officer within FRA. The Chief Safety Officer has been designated as the Associate Administrator for Railroad Safety. Thus, the use of the term Associate Administrator in this subpart refers to the Associate Administrator for Railroad Safety and Chief Safety Officer, or as otherwise referenced, the Associate Administrator for Railroad Safety/Chief Safety Officer.

The NPRM defined "host railroad" to mean "a railroad that has effective operating control over a segment of track." This term is used in § 236.1005(b) to identify the party responsible for installing PTC and in § 236.1007 with respect to attributes of PTC systems for high-speed service. The host railroad is also responsible for planning and filing requirements (see, e.g., § 236.1009). In proposing this definition, FRA sought to capture in a word the essence of fundamental responsibility for the rail operation. FRA considered terms such as "track owner" (used in the Track Safety Standards), but found that the alternatives had drawbacks of one kind or another. There are places, for instance, where a non-railroad State or local government or private corporation owns the underlying fee beneath the railroad infrastructure but is not engaged in any way in managing or benefitting from the railroad (except in some cases by receiving revenue from a lease). There are also situations where multiple railroads are dispatched from a common location, either by one of the railroads or by a third party. It is increasingly the case that commuter service is provided by a public authority through multiple contractors who are responsible for discrete portions of service as agents of the sponsoring entity (e.g., equipment maintenance, track and signal maintenance, train operations, dispatching). In short, it is hard to describe, in a common way, who is responsible here; nevertheless, in any concrete case, there can be but one entity ultimately responsible.

The Southern California Regional Rail Authority submitted comments requesting that FRA provide additional clarification to what constitutes "effective operating control" as stated in the definition of the term "host railroad." Specifically, SCRRA questioned whether FRA would consider control of dispatching as "effective operating control" even if responsibilities for the installation and maintenance of wayside devices and infrastructure are under a different party than the dispatcher. Although FRA does not find it necessary to change the definition contained in the regulation, FRA will offer clarification as to the intended meaning. As noted above, very often railroads cooperate in dispatching trains that traverse contiguous lines in order to maximize tactical planning and efficiency. Whether one railroad might dispatch another railroad's territory would not cause the dispatching railroad to take on the responsibilities of the host. Similarly, the fact that a railroad might contract with another railroad to dispatch all or a portion of its lines would not relieve the former railroad of responsibilities of the host.

In the example of SCRRA's Metrolink operations, we would expect SCRRA, which defines its route structure and timetable for passenger operations, to undertake the duties of the host for the lines for which it enjoys effective control in the sense that it has the right to determine who operates over the lines and under what conditions. In general, those are the lines it owns directly or through public authorities that cooperate in the joint powers arrangement. Lines owned and operated by BNSF or UP and over which Metrolink trains operate would be the responsibility of BNSF and UP, respectively, even if SCRRA or its contractor has day-to-day responsibility for dispatching some of them.

GE Transportation expressed concern regarding the definition and use of the term Type Approval in § 236.1003 and subsequent sections, including § 236.1031. GE Transportation notes that under the proposed rule Type Approvals apply only to complete PTC systems, although it is generally recognized in the industry that there are five core component subsystems in a PTC system configuration: (1) A locomotive onboard subsystem; (2) a dispatch center supervisory control and data acquisition (SCADA) subsystem; (3) a PTC server (central or wayside) if a server is required; (4) wayside interface units; and (5) a data communications network connecting the other subsystems. When a Type Approval is granted to a PTC system, GE Transportation suggests that core subsystems of that PTC system should be granted Component Type Approval under certain conditions. According to GE Transportation, the granting of such Component Type Approvals will drive simplified filings, faster approval, and faster deployment for new system configurations using a building block approach. In addition, states GE Transportation, it reduces the risks associated with PTC deployment by simplifying substitution of components in the event of a problem, the market for PTC system components becomes less restrictive, and the next logical step is for a supplier to be permitted to introduce a core subsystem component for approval. GE Transportation asserts that this will encourage market development and further reduce risks for PTC deployment and sustained operation.

FRA understands GE's concern. However, it appears to be based on a misunderstanding of FRA's definition of "Type Approval." In developing the "Type Approval" concept, FRA looked to the Federal Aviation Administration (FAA) model of system approval as a basis. However, FRA modified the FAA approach to better fit FRA's regulatory mandate and resources. FRA considers the "Type Approval" to be more akin to the FAA concept of an "Airworthiness Certificate." Under FAA rules, an airworthiness certificate is only issued

to a system (and, in the case of the FAA, this system is an aircraft). This analogy is made only to make a minor clarification and should not necessarily be construed to entirely equate subpart I's Type Approval concept with that of FAA's Airworthiness Certificate concept.

FRA has also considered GE's position that an FRA failure to issue component level approvals could restrict the development of new products. FRA notes that the current industry practice is based on vendor or supplier determination that there will be a market for a particular product. This determination may be based on a specific request from a customer, or on the vendor's or supplier's perception that there is a need for the product. While this process may consider the regulatory requirements that may be applicable to a component, it has not required FRA to issue an "approval" for any particular component. Given the number of new products that have been brought to market, FRA believes that this development model has worked very successfully. Further, the requirements of the RSIA08 require FRA to certify that the PTC system, not the PTC system components, meets the regulatory requirements. The "Type Approval" does not in any way certify a PTC system as required by statute; it only indicates to the system developer/integrator that FRA believes that the proposed system, if properly implemented, may meet the statutory requirements. FRA therefore declines, at this time, to issue component level "type approvals".

The AAR believes that the definition of "safe state" includes conditions not necessarily applicable. According to AAR, this term may be utilized to describe the operation of a system in non-failure scenarios and, in fact, is arguably used in this fashion even within the NPRM preamble (*see, e.g.*, 74 FR 35,966 (July 21, 2009) ("If a switch is misaligned, the PTC system shall provide an acceptable safe state of train operations.")). Accordingly, the AAR asserts that the definition of "safe state" should be modified to strike the clause "when the system fails."

Some other commenters expressed the opinion that in the current definition of "safe state," the clause "cannot cause harm" lacks specificity. FRA agrees to modify the definition of "safe state" by replacing the clause "system configuration that cannot cause harm when the system fails" with the clause "system state that, when the system fails, cannot cause death, injury, occupational illness, or damage to or loss of property, or damage to the environment." This definition corresponds to that of the safe state definition in the U.S. Department of Defense Military Standard (MIL–STD) 882C. FRA, however, disagrees with AAR that the term "safe state" should be also applicable for the description of system state in non-failed conditions. The definition of the term "safe state" should not be confused with the term "safe operation" or "operating safely." The term "safe state" was added in § 236.1003 strictly for the purpose of defining a "protective" state (safe state) of the system, which the system must take when it fails. At the same time, FRA admits erroneous use of the term "safe state" in the section quoted by AAR (74 FR 35,966) and amends it to read: "If a switch is misaligned, the PTC system shall provide an acceptable level of safety of train operations."

Section 236.1005 Requirements for Positive Train Control Systems

The RSIA08 specifically requires that each PTC system be designed to prevent train-to-train collisions, overspeed derailments, incursions into established work zone limits, and the movement of a train through a switch left in the wrong position. Section 236.1005 includes the minimum statutory requirements and provides amplifying information defining the necessary PTC functions and the situations under which PTC systems must be installed. Each PTC system must be reliable and perform the functions specified in the RSIA08.

Train-to-train collisions. Paragraph (a)(1)(i) applies the statutory requirement that a mandatory PTC system must be designed to prevent train-to-train collisions. FRA understands this to mean head-to-head, rear-end, and side and raking collisions between trains on the same, converging, or intersecting tracks. Currently available PTC technology can meet these needs by providing current and continuous guidance to the locomotive engineer and enforcement using predictive braking to stop short of known targets. FRA notes that the technology associated with currently available PTC systems may not completely eliminate all collisions risks. For instance, a PTC system mandated by this subpart is not required to prevent a collision caused by a train that derails and moves onto a neighboring or adjacent track (known in common parlance as a "secondary collision").

During discussions regarding available PTC technology, it has been noted that this technology also has inherent limitations with respect to prevention of certain collisions that might occur at restricted speed. In signaled territory, there are circumstances under which trains may pass red signals, other than absolute signals without verbal authority, either at restricted speed or after stopping and then proceeding at restricted speed. To avoid rear end collisions, available PTC technology does not always track the rear-end of each train, but instead relies on the signal system to indicate the appropriate action. In this example, the PTC system would display "restricted speed" to the locomotive engineer as the action required and would enforce the upper limit of restricted speed (i.e., 15 or 20 miles per hour, depending on the railroad). This means that more serious rear end collisions will be prevented, because the upper limit of restricted speed is enforced. This also means that fewer low speed rear-end collisions will occur because a continuous reminder of the required action will be displayed to the locomotive engineer (rather than the engineer relying on the aspect displayed by the last signal, which may have been passed some time ago). However, some potential for a low speed rear-end collision will remain in these cases, and the rule is clear that this limitation has been accepted. Similar exposure may occur in non-signaled territory where trains are conducting switching operations or other activities under joint authorities. The PTC system can enforce the limits of the authority and the upper limit of restricted speed, but it cannot guarantee that the trains sharing the authority will not collide. Again, however, the likelihood and average severity of any potential collisions would be greatly reduced considering such movements would be made under restricted speed. FRA may address this issue in a later modification to subpart I if necessary as technology becomes available.

FRA received comments on this discussion of the inherent limitations of available PTC technology with respect to the prevention of certain collisions that may occur at restricted speed from NYSMTA. NYSMTA sought clarification that PTC is not intended to enforce conformance of block entry speeds associated with wayside signal aspects or similar cab signal aspects provided without speed control, except when a train is operating under a wayside signal or cab signal aspect requiring a speed not to exceed restricted speed. FRA noted in the NPRM, and repeats here, that FRA recognizes that some PTC architectures will not directly enforce speed restrictions imposed by all intermediate signals. FRA does expect that the

PTCDP will be clear on how the system accomplishes train separation and regulation of speeds over turnouts.

The final rule text, however, does provide an example of a potential train-to-train collision that a PTC system should be designed to prevent. Rail-to-rail crossings-at-grade—otherwise known as diamond crossings—present a risk of side collisions. FRA recognizes that such intersecting lines may or may not require PTC system implementation and operation. Since a train operating with an unregulated PTC system cannot necessarily recognize a train not operating with a PTC system or moving on an intersecting track without a PTC system, the PTC system—no matter how intelligent—may not be able to prevent a train-to-train collision in such circumstances.

Accordingly, paragraph (a)(1)(i) requires certain protections for such rail-to-rail crossings-at-grade. While these locations are specifically referenced in paragraph (a)(1)(i), their inclusion is merely illustrative and does not necessarily preclude any other type of potential train-to-train collision. Moreover, a host railroad may have alternative arrangements to the specific protections referenced in the associated table under paragraph (a)(1)(i), which it must submit in its PTCSP—discussed in detail below—and receive a PTC System Certification associated with that PTCSP.

Rail-to-rail crossings-at-grade that have one or more PTC routes intersecting with one or more routes without a PTC system must have an interlocking signal arrangement in place developed in accordance with subparts A through G of part 236 and a PTC enforced stop on all PTC routes. FRA has also determined that the level of risk varies based upon the speeds at which the trains operate through such crossings, as well as the presence, or lack, of PTC equipped lines leading into the crossing. Accordingly, under a compromise accepted by the PTC Working Group, if the maximum speed on at least one of the intersecting tracks is more than 40 miles per hour, then the routes without a PTC system must also have either some type of positive stop enforcement or a split-point derail on each approach to the crossing and incorporated into the signal system, and a permanent maximum speed limit of 20 miles per hour. FRA expects that these protections be instituted as far in advance of the crossing as is necessary to stop the encroaching train from entering the crossing. The 40 miles per hour threshold appears to be appropriate given three factors. First, the frequency of collisions at these rail intersections is low, because typically one of the routes is favored on a regular basis and train crews expect delays until signals clear for their movement. Second, the special track structure used at these intersections, known as crossing diamonds, experiences heavy wear; and railroads tend to limit speeds over these locations to no more than 40 miles per hour. Finally, FRA recognizes that for a train on either intersecting route, elevated speed will translate into higher kinetic energy available to do damage in a collision-induced derailment. Thus, for the small number of rail crossings with one or more routes having an authorized train speed above 40 miles per hour, including higher speed passenger routes, it is particularly important that any collision be prevented. FRA believes that these more aggressive measures are required to ensure train safety in the event the engineer does not stop a train before reaching the crossing when the engineer does not have a cleared route displayed by the interlocking signal system and higher speed operations are possible on the route intersected. The split-point derail would prevent a collision in such a case by derailing the offending train onto the ground before it reaches the crossing. Should the train encounter a split-point derail as a result of the crew's failure to observe the signal indication, the slower speed at which the unequipped train is required to travel would minimize the damage to the unequipped train and the potential affect on the surrounding area.

As an alternative to split-point derails, the non-PTC line may be outfitted with some other mechanism that ensures a positive stop of the unequipped crossing train. If a PTC system or systems are installed and operated on all crossing lines, there are no speed restrictions other than those that might be enforced as part of a civil or temporary speed restriction. However, the crossing must be interlocked and the PTC system or systems must ensure that each of the crossing trains can be brought safely to a stop before reaching the crossing in the event that another train is already cleared through or occupying the crossing.

The Rail Labor Organizations shares FRA's concerns regarding diamond crossings, supporting the requirements for interlocking signal arrangements, a PTC enforced stop on PTC routes, and installation of split-point derails with a 20 miles per hour maximum authorized speed on the approach of any intersecting non-PTC route. However, the RLO believe that split-point derails should be required regardless of the PTC route's maximum speed in order to protect the PTC route against a non-equipped train passing through a stop indication and equipment inadvertently rolling out (i.e., a roll away) from the non-PTC route.

AAR and CSXT challenge the imposition of split-point derails. CSXT believes that the proposed rule merely shifts the safety risks associated with Class II and III railroads, but does not eliminate them altogether. For instance, CSXT points out that unlike a PTC-compliant system, the split-point derail would not avoid derailment altogether; rather, it would simply cause the non-PTC Class II or III train to derail away from the crossing. According to CSXT, the most comprehensive safety regime that would avoid both collisions and derailments would be to require Class II and Class III railroads operating on PTC routes also to be PTC equipped.

One commenter objected to the costs of derails being borne by PTC equipped Class I railroads. The NPRM did not purport to address who would pay this cost, but merely recited in a brief reference that the assumption had been made in the Regulatory Flexibility Analysis that the railroad installing PTC would bear the cost. FRA does not stipulate who is responsible for the cost of split-point derails at rail-to-rail crossings at-grade, as the cost will be borne in conformance with any agreements between the railroads or prior rights arising out of previous transactions under which property was acquired. FRA would have appreciated some indication of how those costs are likely to fall, but no information was provided on this point.

The commenter also proposes exploration of lower-cost alternatives in lieu of split-point derails. FRA agrees that less expensive alternatives to split-point derails at rail-to-rail crossings at-grade can and should be proposed in a railroad's PTCIP or PTCDP. As FRA stated in the preamble discussion of paragraph (a)(1)(i) in the proposed rule, "the non-PTC line may be outfitted with some other mechanism that ensures a positive stop of the unequipped * * * train." (74 FR 35,950, 35,960). FRA expects, however, that any alternative to the split-point derail will provide the same level of separation as that afforded by the installation of the split-point derail.

CSXT submitted comments stating that the installation of split-point derails would create a new danger, including a secondary collision. However, FRA believes that these aggressive measures at locations where train speeds exceed 40 miles per hour through rail-to-rail crossings at-grade, where not all routes

have been equipped with a PTC system or positive stop enforcement, are necessary in order to ensure train safety. FRA fully agrees that full PTC technology that provides positive stop enforcement from all directions is a more desirable method of protecting such locations. However, where such technology has not been installed, the prescribed use of split-point derails in approach to the crossing-at-grade is deemed necessary in the event the engineer of a train operating on a line without positive stop enforcement does not have a cleared route and fails to stop the train prior to reaching the crossing. The split-point derail, in combination with the required speed limitation of 20 miles per hour or less, would prevent a collision by derailing the offending train onto the ground before it reached the crossing. Should such a train encounter a split-point derail in its derailing position as a result of the crew's failure to observe or adhere to the signal indication, the slower speed at which an unequipped train is required to travel would minimize damage to the unequipped train and the potential effect on the surrounding area.

FRA has also considered the comments of the RLO that more secure arrangements should be provided at each rail-to-rail crossing-at-grade, regardless of speed. FRA believes that where the PTC-equipped and non-PTC-equipped lines of the Class I railroads intersect, the railroads will generally utilize the available PTC technology to ensure a positive stop short of the crossing for any train required to stop short of the interlocking. The WIU at the location and available onboard capability supported by a radio data link should make this an obvious solution. FRA will scrutinize Class I PTCDPs to ensure that this is the case. FRA remains concerned that more aggressive solutions for intersections with Class II and III lines could impose substantial costs without returning significant benefits.

Overspeed derailments. Paragraph (a)(1)(ii) requires that PTC systems mandated under subpart I be designed to prevent overspeed derailments and addresses specialized requirements for doing so. FRA notes that a number of passenger train accidents with a significant number of injuries have been caused by trains exceeding the maximum allowable speed at turnouts and crossovers and upon entering stations. Accordingly, FRA emphasizes the importance of enforcement of turnout and crossover speed restrictions, as well as civil speed restrictions.

For instance, in the Chicago region, two serious train accidents occurred on the same Metra commuter line when locomotive engineers operated trains at more than 60 miles per hour while traversing between tracks using crossovers, which were designed to be safely traversed at 10 miles per hour. For illustrative purposes, the rule text makes clear that such derailments may be related to railroad civil engineering speed restrictions, slow orders, and excessive speeds over switches and through turnouts and that these types of speed restrictions are to be enforced by the system.

The UTA and APTA each submitted the same basic comment pertaining to paragraph (a)(1)(ii), with which SCRRA concurred. They contend that speed restrictions are often set at a speed that is far below a speed that would cause a derailment. Therefore, they request that a PTC system should allow or display a speed higher than the actual speed restriction, but well short of a speed that may cause a derailment.

The RLO submitted a comment that, while the language "prevent overspeed derailments" accurately reflects the language found in the RSIA08, this paragraph misses the congressional intent of the statute and appears to be unenforceable unless a derailment occurs in conjunction with a PTC system that fails to enforce an overspeed event. The RLO believe that FRA should amend this paragraph to establish that it will be a violation of this section if the PTC system fails to enforce an overspeed condition that is not corrected by the locomotive engineer regardless of whether or not such overspeed results in a derailment. Since most overspeed occurrences do not result in a derailment, the RLO asserts that waiting for a derailment to happen before declaring that the PTC system is not operating as intended is contrary to the purpose of the law.

FRA intends and believes that the PTC core feature concerning "overspeed derailments" is such that the system shall enforce various speed restrictions (i.e., civil speed restrictions, temporary slow orders, excessive speeds over switches and through turnouts and crossovers, etc.) regardless of whether a derailment actually occurs. However, FRA elects to leave the rule text of paragraph (a)(1)(ii) as it was written in the proposed rule. FRA is aware of various train control systems that have a tolerance of 3 miles per hour before the system displays a warning to the train operator and that apply a penalty brake application when the train reaches a speed 5 miles per hour above the posted speed restriction. Appropriate speed margins or leeways associated with maximum authorized speed are expected, but they must be presented, justified, and approved within the context of a railroad's PTCDP and PTCSP.

Roadway work zones. Paragraph (a)(1)(iii) requires that PTC systems mandated under subpart I be designed to prevent incursions into established work zone limits. Work zone limits are defined by time and space. The length of time a work zone limit is applicable is determined by human elements. Working limits are obtained by contacting the train dispatcher, who will confirm an authority only after it has been transmitted to the PTC system's server. Paragraph (a)(1)(iii) emphasizes the importance of each PTC system to provide positive protection for roadway workers working within the limits of their work zone. Accordingly, once a work zone limit has been established, the PTC system must be notified. The PTC system must continue to obey that limit until it is notified by the dispatcher or roadway worker in charge, with verification from the other, either that the limit has been released and the train is authorized to enter or the roadway worker in charge has authorized movement of the train through the work zone.

As a way to achieve this technological functionality, FRA's Office of Railroad Development has funded the development of a Roadway Worker Employee in Charge (EIC) Portable Terminal that allows the EIC to control the entry of trains into the work zone. While no rule includes the commonly used term EIC, FRA recognizes that it is the equivalent to the term "Roadway Worker In Charge" as used in part 214. With the portable terminal, the EIC can directly control the entry of trains into the work zone and restrict the speed of the train through the work zone. If the EIC does not grant authority for the train to enter the work zone, the train is forced to a stop by the PTC system prior to violating the work zone authority limits. If the EIC authorizes entry of the train into the work zone, the EIC may establish a maximum operating speed for the train consistent with the safety of the roadway work employees. This speed is then enforced on the train authorized to enter and pass through the work zone. The technology is significantly less complex than the technology associated with dispatching systems and the PTC onboard system. In view of this, FRA strongly encourages deployment of such portable terminals as opposed to current methods that only require the locomotive engineer to, in some manner, "acknowledge" his or her

authority to operate into or through the limits of the work zone (e.g., by pressing a soft key on the onboard display, even if in error).

Pending the adoption of more secure technology, such as the EIC Portable Terminal, FRA will scrutinize each submitted PTCDP and PTCSP to determine whether they leave any opportunity for single point human failure in the enforcement of work zone limits. FRA again notes that some methods in the past have allowed the locomotive engineer to simply acknowledge a work zone warning, even if inappropriately, after which the train could proceed into the work zone. FRA expects that more secure procedures will be included in safety plans submitted under subpart I.

The RLO submitted a comment that, in order for a PTC system to effectively perform the core function of protecting roadway workers operating within the limits of their authority, the PTC system must be designed in a manner that prevents override of an enforced stop prior to entering an established work zone through simple acknowledgement of the existence of work zone limits by a member of the train crew (i.e., by pressing a soft key on the onboard display, even if in error). The RLO expressed support for FRA's intention to closely scrutinize each PTCSP to determine whether they leave any opportunity for a single point human failure in the enforcement of work limits. The RLO strongly encouraged FRA to withhold approval of any PTC system that does not enforce a positive stop at the entrance to established work zones until notified directly by the dispatcher or the roadway worker in charge, with verification from the other, that the movement into the work zone has been authorized by the roadway worker in charge.

FRA agrees with the concern expressed by the RLO on this issue. However, in the spirit of staying strictly within the mandate of the RSIA08 relating to required PTC functionality, FRA will require that the actual method of enforcement and acknowledgement associated with work zones be presented within the PTCDP and PTCSP and subject to FRA approval. FRA continues to strongly encourage use of EIC portable terminals with electronic handshake of acknowledgement and authorizations to enter work zones.

Movement over main line switches. Paragraph (a)(1)(iv) requires that PTC systems mandated under subpart I be designed to prevent the movement of a train through a main line switch in the improper position. Given the complicated nature of switches—especially when operating in concert with wayside, cab, or other similar signal systems—the final rule provides more specific requirements in paragraph (e) as discussed further below.

In numerous paragraphs, the final rule requires various operating requirements based primarily on signal indications. Generally, these indications are communicated to the engineer, who would then be expected to operate the train in accordance with the indications and authorities provided. However, a technology that receives the same information does not necessarily have the wherewithal to respond unless it is programmed to do so. Thus, paragraph (a)(2) requires PTC systems implemented under subpart I to obey and enforce all such indications and authorities provided by these safety-critical underlying systems. The integration of the delivery of the indication or authority with the PTC system's response to those communications must be described and justified in the PTCDP—further described below—and the PTCSP, as applicable, and then must comply with those descriptions and justifications. Again, FRA recognizes that in the case of intermediate signals, this may not involve direct enforcement of the signal indication.

APTA submitted a comment that the draft language of paragraph (a)(2) appears to disallow systems such as moving block overlays that may provide superior service. Since APTA does not believe this was the intent of the provision, APTA suggests that FRA clarify the language in this paragraph.

Paragraph (a)(2) is clear that the specified functions must be performed "except as justified" in the PTCDP or PTCSP. Here, FRA specifically intends to afford a means by which advanced systems permitting moving block operations could be qualified, either as stand-alone systems or as overlays integrated with the existing signal and train control arrangements.

The PTC Working Group had extensive discussions concerning the monitoring of main line switches and came to the following general conclusions:

First, signal systems do a good job of monitoring switch position, and enforcement of restrictions imposed in accordance with the signal system is the best approach within signaled territory (main track and controlled sidings). As a general rule, the enforcement required for crossovers, junctions, and entry into and departure from controlled sidings will be a positive stop, and the enforcement provided for other switches (providing access to industry tracks and non-signaled sidings and auxiliary tracks) will be display and enforcement of the upper limit of restricted speed. National Transportation Safety Board representatives were asked to evaluate whether this strategy meets the needs of safety from their perspective. The NTSB returned with a list of accidents caused by misaligned switches that it had investigated in recent years, none of which was in signaled territory. Based on that data, the NTSB staff decided that it was not necessary to monitor individual switches in signaled territory.

In a filing to this proceeding, the NTSB indicated that switch monitoring in both dark and signaled territories must demonstrate that a train will be stopped before crossing through a misaligned switch. Although the NTSB recognizes that signal systems currently provide information about switch positions, it asserts that FRA must ensure that any PTC system that uses the signal system to monitor switch positions will provide adequate safeguards to prevent trains from being routed through misaligned switches. Accordingly, the NTSB agreed with FRA's decision to protect switches within sidings with speed limits greater than 20 miles per hour to prevent switch misalignment accidents.

Second, switch monitoring functions of contemporary PTC systems provide an excellent approach to addressing this requirement in dark territory. However, it is important to ensure that switch position is determined with the same degree of integrity that one would expect within a signaling system (e.g., fail-safe point detection, proper verification of adjustment). The PTC Working Group puzzled over sidings in dark territory and how to handle the requirement for switch monitoring in connection with those situations. (While these are not "controlled" sidings, as such, they will often be mapped so that train movements into and out of the sidings are appropriately constrained.) At the final PTC Working Group meeting, a proposal was accepted that would treat a siding as part of the main line track structure requiring monitoring of each switch off of the siding if the siding is non-signaled and the authorized train speed within the siding exceeds 20 miles per hour. This issue is more fully discussed below.

Other functions. While FRA has included the core PTC system requirements in § 236.1005, there is the possibility that other functions may be explicitly or implicitly required elsewhere in subpart I. Accordingly, under paragraph (a)(3), each PTC system required by subpart I must also perform

any other functions specified in subpart I. According to 49 U.S.C. 20157(g), FRA must prescribe regulations specifying in appropriate technical detail the essential functionalities of positive train control systems and the means by which those systems will be qualified.

In addition to the general performance standards required under paragraphs (a)(1)–(3), paragraph (a)(4) contains more detailed standards relating to the situations paragraphs (a)(1)–(3) intend to prevent. Paragraph (a)(4) defines specific situations where FRA has determined that specific warning and enforcement measures are necessary to provide for the safety of train operations, their crews, and the public and to accomplish the goals of the PTC system's essential core functions. Under paragraph (a)(4)(i), FRA intends to prevent unintended movements onto PTC main lines and possible collisions at switches by ensuring proper integration and enforcement of the PTC system as it relates to derails and switches protecting access to the main line.

Paragraph (a)(4)(ii) intends to account for operating restrictions associated with a highway-rail grade crossing active warning system that is in a reduced or non-operative state and unable to provide the required warning for the motoring public. In this situation, the PTC system must provide positive protection and enforcement related to the operational restrictions of alternative warning that are issued to the crew of any train operating over such crossing in accordance with part 234. Paragraph (a)(4)(iii) concerns the movement of a PTC operated train in conjunction with the issuance of an after arrival mandatory directive. While FRA recognizes that the use of after arrival mandatory directives poses a risk that the train crew will misidentify one or more trains and proceed prematurely, PTC provides a means to intervene should that occur. Further, such directives may sometimes be considered operationally useful. Accordingly, FRA fully expects that the PTC system will prevent collisions between the receiving trains and the approaching train or trains.

Numerous comments were received related to PTC system functional requirements associated with highway-rail grade crossing active warning systems. At the public hearing, the RLO asserted that the use of technologies providing warning system pre-starts, activation verification, and various health monitoring information related to the warning system to approaching trains needs to be a required component of the PTC system warning and enforcement functionalities where warranted. AASHTO submitted comments expressing agreement that inclusion of hazard warning detection in PTC systems for highway-rail grade crossing warning systems is a significant enhancement to mitigate potential risk. AASHTO also underlined its position of enhancing grade crossing safety further by implementation of a program to fully eliminate at-grade highway-rail crossings through consolidation and grade separation wherever possible.

Some commenters expressed various logistic concerns with the proposed rule language relating to operational restrictions issued in response to a warning system malfunction as required by §§ 234.105, 236.106, and 236.107 of this part. Other commenters asserted that any PTC system functional requirements related to highway-rail grade crossing warning systems fall entirely outside the scope of the statutory mandate contained within the RSIA08 and therefore should not be addressed in this rulemaking.

The AAR stated that, while they understand the safety concern, this function is not even remotely related to the "core" PTC functions mandated by Congress. Furthermore, the AAR asserts that the great cost of installing wayside interface units at grade crossings on PTC routes would be prohibitively expensive and would divert resources that would otherwise be devoted to meeting the mandated PTC deadline.

NJ Transit stated that the RSIA08 does not indicate a requirement for highway-rail grade crossing inclusion in the PTC system speed and stop enforcement. Thus, the requirement contained in paragraph (a)(4)(ii) to include warning and enforcement functionality simply adds an additional effort to an already extremely aggressive December 31, 2015, mandate for PTC.

APTA and SCRRA stated that the requirements contained in proposed paragraph (a)(4)(ii) were unclear. APTA and SCRRA recommended that FRA should clarify that the language in paragraph (a)(4)(ii) is intended solely to provide that a dispatcher can place a restriction on a crossing that the PTC system must enforce in the event that a malfunction is reported. However, according to APTA, paragraph (a)(4)(ii) should not be read to require a PTC system to protect a grade crossing and restrict or prevent a movement authority of a train from being advanced across the crossing in the event of a failure being detected in real time; nor should paragraph (a)(4)(ii) be interpreted to require a grade crossing warning system to self-monitor and, if in a degraded condition, impose a speed restriction or stop for an approaching train.

NYSMTA states that the addition of highway-rail grade crossings to this subpart falls outside the statutory mandate for PTC systems within the RSIA08. This additional functionality presents an additional burden for LIRR and Metro-North. Both railroads have hundreds of grade crossings in their rail networks. NYSMTA further asserted that the language in paragraph (a)(4)(ii) was ambiguous with respect to whether "warning or enforcement" of reported grade crossing failures would be required, and what constitutes a "warning." Required enforcement will increase the capital cost of PTC, have an adverse impact on operations, risk modifications to ACSES that could trigger verification and validation, and create a further impediment to meeting the other requirements of the proposed FRA regulations. NYSMTA therefore recommended that the final rule be limited at this time to the four requirements of the RSIA08.

FRA believes that, although the RSIA08 does not specifically require PTC systems to cover highway-rail grade crossing warning system malfunctions and associated operational requirements, it does stipulate that FRA must develop rules and standards for PTC system functionality, which include the four core features identified. In light of the safety-critical nature of the specified operational limitations for providing alternative warning to highway users pursuant to §§ 234.105, 236.106, and 236.107, and the catastrophic consequences that have often been experienced when those operational limitations have not been accomplished (including actual and potential impacts with motor vehicles involving serious injury and loss of life) and the fact that these operational limitations equate to speed and stop targets that PTC systems may surely warn and enforce, FRA intends to carry the language contained within the proposed paragraph into this final rule. Although FRA believes that the proposed rule was clear that its purpose was to enforce dispatcher-issued "stop-and-flag" orders and slow orders associated with credible reports of highway-rail grade crossing warning device malfunctions, reference has been added to "mandatory directives," a term with a well-established meaning in FRA regulatory parlance (*see* 49 CFR part 220).

While FRA recognizes that technologies exist to provide even further interface with warning system activation and health, and encourages railroads to include these technologies

to the extent possible, FRA elects to not require those interfaces beyond that which has been already identified within this paragraph.

The NTSB submitted comments recommending that requirements for warning and barrier protection plans for Class 7 track should also apply to Class 5 and 6 tracks as part of an approved PTCSP in order to reduce the risk of high-speed catastrophic derailments at associated grade crossings. FRA notes that the requirements contained within § 213.347 of this part require that a warning/barrier plan be approved and adhered to for Class 7 track operations and prohibit grade crossings on Class 8 and 9 track. Those requirements do not, however, address Class 5 and 6 tracks specifically. Therefore, FRA believes that this comment falls outside the scope of the present rulemaking. As noted elsewhere in this preamble, FRA has developed Guidelines for Highway-Rail Grade Crossing Safety on high-speed rail lines that endeavor to improve engineering with a strong emphasis on closures. Those Guidelines will be used to review and negotiate grants under ARRA.

FRA recognizes that movable bridges, including draw bridges, present an operational issue for PTC systems. Under subpart C, § 236.312 already governs the interlocking of signal appliances with movable bridge devices and FRA believes that this section should equally apply to PTC systems governing movement over such bridges. While subparts A through H apply to PTC systems—as stated in § 236.1001—paragraph (a)(4)(iv) proposes to make this abundantly clear. Accordingly, in paragraph (a)(4)(iv) and consistent with § 236.312, movable bridges within a PTC route are to be equipped with an interlocked signal arrangement which is also to be integrated into the PTC system. A train shall be forced to stop prior to the bridge in the event that the bridge locking mechanism is not locked, the locking device is out of position, or the bridge rails of the movable span are out of position vertically or horizontally from the rails of the fixed span. Effective locking of the bridge is necessary to assure that the bridge is properly seated and thereby capable to support both the weight of the bridge and that of a passing train(s) and preventing possible derailment or other potential unsafe conditions. Proper track rail alignment is also necessary to prevent derailments, either of which again could result in damage to the bridge or a train derailing off the bridge. No comments were received on this issue, and the provision is carried forward in the final rule.

Paragraph (a)(4)(v) requires that hazard detectors integrated into the PTC system—as required by paragraph (c) of this section or the FRA approved PTCSP—must provide an appropriate warning and associated applicable enforcement through the PTC system. There are many types of hazard detection systems and devices. Each type has varying operational requirements, limitations, and warnings based on the types and levels of hazard indications and severities. FRA expects this enforcement to include a positive stop where necessary to protect the train (e.g., areas with high water, flood, rock slide, or track structure flaws) or to provide an appropriate warning with possible movement restriction being acknowledged (i.e., hot journal or flat wheel detection). The details of these warnings and associated required enforcements are to be specifically addressed within a PTCDP and PTCSP subject to FRA approval, and the PTC system functions are to be maintained in accordance with the system specifications. FRA does not expect that all hazard detectors be integrated into the PTC systems, but where they are, they must interact properly with the PTC system to protect the train from the hazard that the detector is monitoring. With the exception of the RLO's strong emphasis on safety in PTC system deployment, no comments were received on this issue; and the provision is carried forward in the final rule.

Paragraph (a)(5) addresses the issue of broken rails, which is the leading cause of train derailments. FRA proposes to strictly limit the speed of passenger and freight operations in those areas where broken rail detection is not provided. Under § 236.0(c), as amended in this final rule, 24 months after the publication of this final rule, freight trains operating at or above 50 miles per hour, and passenger trains operating at or above 60 miles per hour, are required to have a block signal system unless a PTC system meeting the requirements of this part is installed. Since current technology for block signal systems relies on track circuits—which also provide for broken rail detection—this final rule requires limiting speeds where broken rail detection is not available to the maximums allowed under amended § 236.0 when a block signal system is not installed. No comments were received on this issue, and the provision is carried forward in the final rule.

Deployment requirements. Paragraph (a) of 49 U.S.C. 20157, as enacted by the RSIA08, reads as follows:

"(a) IN GENERAL.—

"(1) PLAN REQUIRED.—Not later than 18 months after the date of enactment of the Rail Safety Improvement Act of 2008, each Class I railroad carrier and each entity providing regularly scheduled intercity or commuter rail passenger transportation shall develop and submit to the Secretary of Transportation a plan for implementing a positive train control system by December 31, 2015, governing operations on—

"(A) its main line over which intercity rail passenger transportation or commuter rail passenger transportation, as defined in section 24102, is regularly provided;

"(B) its main line over which poison- or toxic-by-inhalation hazardous materials, as defined in parts 171.8, 173.115, and 173.132 of title 49, Code of Federal Regulations, are transported; and

"(C) such other tracks as the Secretary may prescribe by regulation or order.

"(2) IMPLEMENTATION.—The plan shall describe how it will provide for interoperability of the system with movements of trains of other railroad carriers over its lines and shall, to the extent practical, implement the system in a manner that addresses areas of greater risk before areas of lesser risk. The railroad carrier shall implement a positive train control system in accordance with the plan."

It is plain on the face of the statute that certain actions are required and some are discretionary and that these actions must come together progressively over a period beginning on April 16, 2010 (18 months after enactment) and ending on December 31, 2015. FRA has included revisions in this final rule designed to fully express this intent.

In paragraph (b) of § 236.1005 in the NPRM, FRA proposed to use 2008 traffic levels as a baseline to fix the network that would receive PTC, subject to any subsequently requested and approved amendments to the PTCIP that would justify removal of the line, and subject to the addition of lines that might qualify under the statutory mandate based on later data. In addition to FRA's understanding of the rail lines Congress intended to cover, FRA had several other fundamental reasons for doing so. First, in order to reach completion by December 31, 2015, as required by law, the railroads and FRA need to identify the relevant route structure very early in the short implementation period and the railroads need to stage the financing and logistics to reach completion. Otherwise, the statutory deadline will not be met. Second, 2009 traffic levels will be notably atypical as a result of the recession, which has caused overall traffic levels to fall by as much as 20%. Third, the burden of installing PTC, which the statute applies obligatorily to very large railroads but not to others, may create an incentive to further "spin off" certain lines to avoid installing PTC

on lines Congress intended to cover. Finally, FRA was concerned about responsive and anticipatory actions being taken by some railroads in the face of emerging regulatory influences. Accordingly, FRA sought in the NPRM to take a snapshot of the Class I system at the time the Congress directed the implementation of PTC and then, using its discretionary authority under the statute, to evaluate what adjustments may be in order.

The Class I railroads responded with the suggestion that FRA is without discretion to require inclusion of lines that do not qualify as of 2015. However, FRA has already quoted the statute, which makes clear the inclusion of FRA-identified lines in the 2015 mandate. The statutory "shall" applies to these lines. Also, FRA and its predecessor agency have long enjoyed the power to require installation of train control under the "Signal Inspection Act" (codified at 49 U.S.C. 20501–20505). Further, FRA has been mandated since 1970 to issue rules and standards covering "every area of railroad safety" (49 U.S.C. 20103). In conferring new responsibilities, the Congress in no sense repealed what preceded them.

Arguing in the alternative, the Class I railroads said that FRA had failed to rely on its discretionary authority to accomplish its purpose. In fact, the subject statutory provisions were called out in the authority section of the NPRM text, with the exception of the Signal Inspection Act, as codified (an oversight remedied here).[1] FRA also explicitly stated in the preamble to the NPRM its intention to use its statutory discretion to preserve congressional intent and tied that intention to the use of 2008 traffic levels. The railroads' ancillary claim is that, in effect, FRA would be "arbitrary and capricious" should the agency require PTC on lines not carrying PIH as of the end of 2015 absent a further congressional mandate or a showing that PTC on the subject lines would be "cost beneficial."

FRA is very conscious of the fact that PTC is expensive, and the agency's regulatory evaluation for the proposed rule does not seek to conceal it. The unit costs will be particularly high during the period before December 31, 2015, and trying to do too much too fast could result in significant disruption of rail transportation. Accordingly, during the initial implementation period, FRA will not exercise its authority to require a build out of the PTC network beyond something on the order of what the Congress contemplated. However, FRA will exercise its discretion to ensure that the network design reflects safety needs and places a value on PTC that reflects an understanding of the value applied by the Congress.

FRA understands the arguments surrounding PTC costs and benefits, having filed three congressionally-required reports since 1994 with information on the subject, having worked through the RSAC for several years evaluating this issue, having funded PTC technology development and overseen PTC pilot projects from the State of Washington to the State of South Carolina, and having provided testimony to the Congress on many occasions. However, FRA believes that the issue is now presented in a different light than before. The Congress was aware that the monetized safety benefits of PTC were not large in comparison with the loss of life and injuries associated with PTC-preventable accidents. With the passage of RSIA08, Congress has in effect set its own value on PTC and directed implementation of PTC without regard to the rules by which costs and benefits are normally evaluated in rulemaking.

One could conclude that the Congress set the value only with respect to passenger trains and PIH releases, but that would assume that the interest expressed by the Congress over much more than a decade and a half was so limited. In fact, longtime congressional interest stemmed in large part from the loss of life among railroad crew members in collisions, as well the potential for release of other hazardous materials. Most of the NTSB investigations and investigations pertaining to this "most wanted" transportation safety improvement in fact derived from such events.

In this light, the focus of the statute on PIH and scheduled passenger trains was clearly intended to provide specific guidance to the agency—a minimum standard for action—and reflected the prominence of passenger train accidents (Placentia, CA, April 23, 2002; Chatsworth, CA); and PIH releases (Macdona, TX, June 28, 2004; Graniteville, SC) in the most serious of the recent PTC-preventable accidents. FRA does not take this to mean that the Congress meant us to be indifferent to the crew fatality at Shepherd, Texas, on September 15, 2005, which resulted from a misaligned main track switch in a collision very similar to the one at Graniteville. Nor do we believe that FRA was expected to be indifferent to the collision between two freight trains at Anding, Mississippi, on July 10, 2005, which killed four crew members, or the collision with release of liquefied propylene gas and ensuing explosion at Texarkana, Arkansas, on October 15, 2005, which killed a resident of a community abutting the railroad.[2] *See, e.g., Rail Safety Reauthorization: Hearing Before the Subcomm. on Surface Transportation and Merchant Marine of the S. Comm. on Commerce, Science, & Transportation,* 110th Cong. (May 22, 2007) (statement of Robert L. Sumwalt, Vice Chairman, National Transportation Safety Board). Thus, FRA was provided latitude to require PTC system installation and operation on lines beyond those specifically prescribed by Congress. While FRA has enjoyed the same latitude under pre-existing authority, RSIA08 indicates Congress' elevated concern that FRA ensure the more serious and thoughtful proliferation of PTC system technologies. Although, as noted above, FRA would expect to exercise any such authority with significant reserve, given the high costs involved, it would be an abdication of the agency's responsibility not to determine that the basic core of the Class I system is addressed, *as would be the case based on 2008 traffic patterns.*

The tone of the Class I freight railroad comments justified FRA's concerns that railroads might take the wrong lesson from the statutory mandate. The lesson FRA perceives is that the core of the national rail system, which carries passenger and PIH traffic, needs to be equipped with PTC and that Congress used 5 million gross tons of freight traffic, the presence of PIH traffic, and the presence of passenger service as readily perceptible markers identifying the core lines on which Congress wants PTC to be installed. In making its judgments, Congress was necessarily looking at the national rail system as it existed in 2008 when the statute was passed. A corollary of that lesson is that the later disappearance or diminution of

[1] Here we recognize the interest of railroads that will be making very costly investments to meet the requirements of the statute and this rule. The "Signal Inspection Act," as codified, makes it explicit that the presence of a signal or train control system on one line may not be considered in a civil action with respect to an accident on another line. This law is also explicit that, once installed, such a system may not be removed without approval. 49 U.S.C. 20501–20505. It should have been cited in the NPRM.

[2] Unique among these events, the Texarkana collision may not have been prevented by PTC technology now being perfected. However, the consequences which ensued, including the fatality, destruction of two residences and a highway bridge, and a significant evacuation are illustrative of the consequences that can result from release of flammable compressed gases in train accidents. There are approximately 100,000 carloads of PIH commodities shipped each year. There are approximately 228,000 carloads of flammable compressed gases (other than those classified as PIH) shipped each year.

one of those markers from a line does not necessarily mean that Congress would no longer see that line as part of the core national rail system meriting PTC. An alternative response would be to adopt policies and tactics that penalize rail passenger service and attempt to drive PIH traffic off the network, consolidating the traffic that remains on the smallest possible route structure for PTC.

The freight railroads do not pretend that FRA is wrong in perceiving that the freight railroads wish to remove PIH traffic from the network. That is wise, since the public record is replete with pleas from the Class I railroads to remove their common carrier obligation to transport PIH traffic. Rather, they contend, in effect, that FRA should not trouble itself with this issue, since the Congress and the Surface Transportation Safety Board (STB) will ensure that PIH shippers receive fair treatment, and the Pipeline and Hazardous Materials Safety Administration (PHMSA) Rail Route Analysis Rule will determine whether the traffic goes on the safest and most secure routes.

There are significant problems with this contention. First, while the Congress shows no interest in relieving the carriers of duty to transport PIH commodities, and STB has likewise brushed back a recent attempt by a Class I railroad to avoid this duty (*see* Surface Transportation Board Decision, Union Pacific Railroad Company—Petition for Declaratory Order, STB Finance Docket No. 35219 (June 11, 2009)), it is by no means yet determined how the cost burden associated with PTC will be borne. A railroad seeking to make the most favorable case for burdening a PIH shipper with the cost of PTC installation would first clear a line of overhead traffic through rerouting and then seek to surcharge the remaining shipper(s) for the incremental cost of installing the system. Under those circumstances, would the STB decide that the railroad should transfer all of those costs to other shippers, or would the STB uphold the surcharge in whole or in part, thereby potentially making the cost of transportation unsupportable?

The carriers would have us rely on the PHMSA Rail Route Analysis Rule in determining whether the PIH criterion requires installation of PTC on a particular line. The Class I railroads' comments state that "FRA is not even the DOT agency with substantive responsibility for how railroads route TIH." This is an odd point, considering that: (1) The statutory authority for both this rulemaking and the Rail Route Analysis Rulemaking are vested in the Secretary of Transportation, and FRA and PHMSA have a long and well established history of working together for the safe transportation of hazardous materials; (2) as reflected in the rulemaking documents, FRA initiated the Rail Routing action in concert with PHMSA and participated in developing the proposed rule well before the Congress mandated that the rulemaking be concluded; (3) the final rule affirms that PHMSA issued the revision in coordination with FRA and TSA; (4) by delegation from the Secretary, FRA is the agency responsible for administering and enforcing the Rail Route Analysis Rule and has issued a final rule (73 FR 72,194 (Nov. 26, 2008)) detailing the procedures railroads must follow when challenging FRA enforcement decisions; and (5) FRA and has worked with TSA to provide funding and oversight for development of the risk model intended for use under the rule.

As it happens, FRA has good reason to be concerned with rail routing of PIH commodities (as well as explosives and high level radioactive waste, which are also covered by the PHMSA rule), both on the merits of the routing decisions (as the agency responsible for administering the rule) and in relation to the incidental impacts of re-routing decisions on the network of lines that will be equipped with PTC technology. Because the Rail Route Analysis Rule addresses both security and safety risks, operations under that rule necessarily lack the transparency typically afforded to safety risks.

Significant re-routing has already occurred since 2008 as a result of the TSA Rail Transportation Security Rule (73 FR 72,130 (Nov. 26, 2008)). In its comments, CSXT states that the TSA rule "required railroads to modify their routing operations to ensure that only attended interchanges are used for transporting TIH." The resulting changes are said to be "dramatic." Comment of CSX Transportation, Inc., Docket FRA–2008–0132–0028.1, at 12 (Aug. 24, 2009). However, the TSA regulation requires a secure chain of custody, not re-routing; and so any re-routing resulting from the TSA regulation presumably resulted not from the direct command of the rule itself but from the desire to hold down costs by focusing the handoffs of these commodities where personnel are already employed to oversee the transfers. This is perfectly sensible, of course, to the extent that the re-routing did not create greater safety or security concerns. However, since railroads have contended for years that their current routings were already optimized for safety, investigation is warranted.

The Rail Route Analysis Rule is only now being put into effect. Most railroads will not complete their initial analysis until the first quarter of 2009, using 12 months of 2008 data (per their request in the subject rulemaking). While the rule requires railroads to consider the use of interchange agreements when considering alternative routes, FRA has not had the opportunity to verify that this has actually occurred with the two railroads opting to comply with the September 2009 due date for use of only six months of data.

The risk model intended to provide the foundation for the rail routing process is still subject to considerable refinement. No methodology is currently specified for evaluating the potential impact of a PTC system (which would vary in risk reduction depending upon the underlying or previous method of operation). Under these circumstances, there is a distinct possibility the railroads may not give sufficient weight to train control (existing or planned).[3] Railroads are not required to submit their route analysis and route selections to FRA for approval. While FRA intends to aggressively oversee railroads' route analysis and route selections during FRA's normal review process, including their consideration of PTC, and require rerouting when justified, this process will be resource-intensive and time-consuming to complete. So FRA sees no reason necessarily to defer in this context to decision making made under the Rail Route Analysis Rule, even as to the role of PTC in safeguarding the transportation of traffic within its ambit (PIH, certain explosives, and spent nuclear fuel). Instead, those decisions are simply useful information under this rule. In April of 2010 when railroads must complete their PTCIP's, a railroad may know its own routing decisions under the Rail Route Analysis Rule, but not FRA's evaluation of those decisions. Furthermore, the Rail Route Analysis Rule analysis does not consider the safety risk posed by the rail movement of hazardous materials it does not cover—but, as noted above, this is a legitimate concern when deciding where to put PTC.

The Rail Route Analysis Rule considers both safety and security, and PHMSA and FRA have worked with TSA to ensure that the inherently

[3] At least one Class I railroad consolidated some of its PIH traffic on signalized lines prior to adoption of the Rail Route Analysis Rule. This reflects a recognition that method of operations matters, but that is not the same thing as having completed a fully mature routing analysis against the 27 factors—something that will occur only over time in the face of great complexity.

speculative risk of a security incident does not overwhelm known safety risks in the decision making. At the same time, the structure is very responsive to known threats and special circumstances. However, FRA is aware of at least one railroad that has balanced its evaluation of safety and security risks under the rule affording equal weight to each across the board. FRA will be working with that railroad to determine the basis for this action and may later require the railroad to revise its analysis and possibly reroute traffic. *See* Railroad Safety Enforcement Procedures; Enforcement, Appeal and Hearing Procedures for Rail Routing Decisions, 73 FR 72,194 (Nov. 26, 2008).

Since any given railroad may have thousands of origin-destination pairs for its PIH traffic, and since railroads are just at the threshold of cooperation to evaluate interline re-routing options, this new program will settle out over a period of several years during which lessons are learned. As custodian of this program, FRA is best situated to conclude that using the products of initial analysis within a framework that confers significant discretion to utilize judgment should not control where PTC is built—particularly given the strong incentives that carriers perceive to reduce the wayside mileage equipped with PTC and the fact that installation of PTC might overwhelm other considerations with respect to PIH routing.

In the proposed rule, FRA said that changes from the 2008 base could be granted if "consistent with safety." Even though this is a familiar phrase drawn from FRA's basic safety statute, concern was expressed regarding how this term might be applied. The final rule further defines that standard by adding a rule for FRA decision making, i.e., if the remaining safety risk on the line exceeds the average safety risk per route mile on lines carrying PIH traffic, as determined in accordance with Appendix B to 49 CFR part 236, FRA denies the request. The provision leaves open the possibility of granting the request if the railroad making application offers a compensating further build out on another line where the resources would be better spent because they would enhance safety to a greater degree. FRA has available to it adequate data to construct a simple risk model for use in this context and expects to do so when reviewing such requests. This provision treats similarly risky rail lines similarly in carrying out the perceived congressional intent for PTC to be installed on the portion of the rail system Congress described, and it is an appropriate exercise of FRA's statutory discretion because it is rationally related to the reduction in risk Congress sought to achieve across the national rail system.

The structure of paragraph (b) of § 236.1005 is as follows:

Paragraph (b)(1) brings together the policy of the statute requiring a phased, risk-based roll out of PTC with the types of lines required to be equipped. FRA has included the additional language "progressively equip" to remind the industry that the law does not expect a risk-based implementation in which no safety benefits are achieved until December 31, 2015. To the contrary, the law and FRA evidence a strong expectation that PTC safety benefits will be increasingly achieved as lines and locomotives are equipped. *See* § 236.1006. FRA was distressed to hear claims in the Class I railroad testimonies and filings to the effect that, not only are the railroads under no legal obligations to deploy incrementally and take advantage of safety technology required by the law, FRA is without authority to require PTC system operation until December 31, 2015. We consider both claims to be without merit on the face of the law, including FRA's pre-existing authority over signal and train control systems.

Paragraph (b)(2) describes the operation of the 2008 baseline as the initial point of PTC implementation. The section is clear that if any track segment mandated for PTC exclusively on the basis of PIH traffic falls below 5 million gross tons for two consecutive years, the line would be eligible for removal. The paragraph also identifies the presence of PIH traffic in 2008 (or prior to filing the PTCIP) as initially identifying the track segment in the PTCIP for PTC implementation, but refers to paragraph (b)(4) as a means of removing it.

Paragraph (b)(3) refers to changed conditions after the filing of the PTCIP that might require a line or track segment to be added. This could occur, *inter alia,* because overall freight volume increases, a shipper requests PIH service on the line, or PIH traffic is (actually or prospectively) rerouted over the line to satisfy the Rail Route Analysis Rule. The provision requires "prompt" filing when conditions change. It makes clear that the railroad will have at least 24 months after approval of its RFA to install the PTC system on the line.

In the NPRM, FRA proposed that, in order to have a line segment no longer carrying the PIH traffic be excepted from the requirement that it be initially equipped, the railroad would need to provide estimated traffic projections for the next 5 years (e.g., as a result of planned rerouting, coordinations, location of new business on the line). In addition, where the request involves prior or planned rerouting of PIH traffic, the railroad would be required to provide a supporting analysis that takes into consideration the rail security provisions of the PHMSA rail routing rule, including any railroad-specific and interline routing impacts. FRA proposed that it could approve an exception if FRA finds that it would be consistent with safety and in the public interest.

The AAR acknowledged in its comments that "FRA does offer railroads the ability to apply to FRA for approval to not install PTC on a route which, in 2015, is no longer used for PIH traffic or which no longer meets the definition of a main line." However, asserted AAR, "FRA approval is predicated on the nebulous criteria of "consistent with safety and in the public interest."

In this final rule, paragraph (b)(4) provides the methods by which a railroad may seek the exclusion or removal of track segments from its PTCIP. Paragraph (b)(4)(i) deals with the evaluation of track segments that no longer carry 5 million gross tons or PIH traffic that the railroad seeks to remove from the PTCIP, either at the time of initial filing or through an RFA thereafter. A request to remove a line would need to be accompanied by future traffic projections. FRA understands that, in some cases, railroads will not be able to state with certainty whether total tonnage or PIH traffic will return to a line; and certainty is not required. However, in other cases a railroad may in fact be able to make reasonable projections (because of control over a parallel main line that is approaching capacity, planned coordination with another railroad, etc.).

In the case of cessation of passenger service or a decline of tonnage on a PIH line, FRA anticipates that approval of such requests will normally be routine. However, in light of AAR's comments, the final rule provides that, where PIH traffic has been removed (or is projected to be removed), three conditions must be met in order for FRA to approve such requests. First, it is not expected that there will be any local PIH traffic on the subject track segment. Second, to the extent overhead traffic has been (or will be) removed from the line, the request must be supported by routing analysis justifying the alternative routing of any traffic formerly traversing the line or which might traverse the line as an alternative routing. This is not the same routing analysis required under part 49 CFR part 172, but it may be presented

in the same format. The difference is that, under the Rail Route Analysis Rule, the current best route for the movement of security sensitive materials (which included PIH materials) must be determined, taking into consideration both safety and security and assuming the existing method of operation, any changes that a carrier may reasonably be anticipated to occur in the upcoming year, and any mitigation measures that the carrier intends to implement. That is a tactical question, which focuses on a particular geographical or logistical area. The question that needs to be addressed for PTC planning is the future best route, taking into consideration the fact that any route used for PIH will need to be equipped within the schedule contained in the approved PTCIP (but not later than December 31, 2015, for the least risky lines that need to be equipped). This is a strategic question, which applies to the carrier's entire network. Accordingly, this analysis would need to show that, even by equipping the subject line with PTC, it would not have an advantage over the route proposed to be selected.

As noted in section VI of this preamble, FRA seeks comments on how elements of a route analysis should be weighed by FRA when determining whether rerouting under this paragraph is sufficiently justified.

FRA includes one additional requirement that invokes its discretionary authority under the law. Even if a line has not or will not carry PIH traffic after the 2008 base year or later time period prior to filing of the PTCIP (i.e., for those filing a PTCIP for new service initiated after the statutory deadlines), the final rule requires an additional test that fleshes out the "consistent with safety" notion contained in the proposed rule with the desired objective of providing greater predictability, transparency, and consistency in decision making. This test requires that, in order for a track segment to be excluded, the remaining risk on the line not exceed the average risk extant on lines required to be equipped with PTC because they meet the threshold for tonnage of 5 million gross tons and carry PIH traffic. The effect of this test should be to allow a majority of lines that formerly carried PIH, which has been removed for legitimate reasons, to be removed from the PTCIP. With no intercity/commuter passenger traffic and no PIH, these will mostly be lines with moderate traffic involving commodities such as coal or grain and minimal quantities of other hazardous materials. However, with respect to lines with higher risk, PTC may be required despite the consolidation of PIH traffic on other lines. For instance, FRA does not believe that consolidation of PIH traffic due to security reasons should unduly influence PTC deployment. Train crews, roadway workers, and communities along the routes have a strong interest in seeing PTC provided for their benefit. Examples of lines that could be captured by this requirement are very high density lines to coal fields or between major terminals where collision risk is significant and other very dangerous or environmentally sensitive hazardous materials are transported in significant quantities (e.g., flammable compressed gas, halogenated organic compounds). Non-signaled lines with traffic nearing capacity and many manually operated switches, together with significant hazardous materials, would also be candidates for retention.

As previously noted in the Introduction and section VI to this preamble, FRA seeks further comments on paragraph (b)(4)(i). This provision describes the specific considerations FRA will take into account in determining whether a deviation from the baseline is "consistent with safety." FRA believes that this final rule could still benefit from input concerning this application of the "consistent with safety" standard FRA has applied for decades in considering waivers under 49 U.S.C. 20103(d) and whether FRA should interpret that standard differently or in greater detail here. Accordingly, FRA continues to seek comments on this issue with the desired objective of providing greater predictability, transparency, and consistency in decision making. More specifically, FRA seeks comments that would help clarify what issues, facts, standards, and methodologies it should consider when determining whether to approve a request for amendment made pursuant to paragraph (b)(4)(i). FRA also seeks comments on how it should compare the levels of risk between lines with PIH and lines without PIH for the purposes of paragraph (b)(4)(i).

Paragraph (b)(4)(ii) contains a new provision that provides a basis for a railroad to request removal of a track segment from a PTCIP either at the time of initial filing or through an RFA thereafter. The provision is being added in an effort to respond to comments submitted on the NPRM requesting a *de minimis* exception for low density track segments with minimal PIH traffic. The AAR noted that, under the proposed regulations, even one car containing PIH on a main line would require installation of PTC. AAR believes that this position is untenable in light of the cost-benefit concerns (*e.g.,* the 15-to-1 cost to benefit ratio under FRA's economic analysis), especially on routes with minimal PIH traffic. The AAR takes the position that it would therefore be arbitrary and capricious for FRA to not employ a *de minimis* exception. According to AAR, its preliminary analysis shows that a meaningful *de minimis* exception could save the industry hundreds of millions of dollars without significantly changing the safety benefit calculation.

The AAR and some of its member railroads assert that FRA has the authority to include a *de minimis* exception in the final rule. In separate comments, CSXT also recommends that FRA recognize a *de minimis* exception for PIH transport. CSXT asserts that, in cases where a limited quantity of PIH materials are transported on a particular route—or where a segment of track happens to carry PIH materials on a single occasion because of mere happenstance—there are no safety benefits that would justify costly PTC implementation. In addition, in the absence of specific language in the RSIA08 that would preclude FRA from recognizing a *de minimis* exception, CSXT asserts that FRA possesses the requisite authority to do so. In support of this assertion, CSXT points to three cases from the DC Circuit (*Shays* v. *FEC,* 414 F.3d 76 (DC Cir. 2005); *Environmental Def. Fund, Inc.* v. *EPA,* 82 F.3d 451 (D.C. Cir. 1996); and *State of Ohio* v. *EPA,* 997 F.2d 1520 (DC Cir. 1993)), in which the DC Circuit acknowledged the inherent authority conferred upon agencies, in the absence of an express prohibition, to promulgate a *de minimis* exception as a tool for implementing legislative design and avoiding pointless expenditures of effort.

FRA has reviewed the suggestion of the Class I railroads that FRA possesses an inherent, or at least reasonably inferred, authority to withhold any requirement for deployment of PTC on lines with very low risk. FRA agrees that, as a general matter, it has an inherent authority to create *de minimis* exceptions in its regulations to statutes FRA administers. In fact, FRA has utilized this inherent authority in this final rule in the following areas: Providing limited exceptions for yard operations; addressing the movement of equipment with inoperative PTC systems; and providing for limited movements by non-equipped trains operated by Class II and Class III

railroads over PTC equipped main line.[4] FRA believes these are all appropriate uses of its discretionary authority. Based on existing case law, as well as its review of the comments provided in this proceeding, FRA believes that a *de minimis* exception to the statutory mandate requiring the installation of PTC systems on any and all main lines transporting any quantity of PIH hazardous materials should also be provided to low density main lines with minimal safety hazards that carry a truly minimal quantity of PIH hazardous materials.

With this said, however, and as explained below, that discretionary authority will not sustain the creation of the broad-brush exception sought by the Class I railroads in this proceeding. United States Circuit Court decisions recognize that federal agencies may promulgate *de minimis* exemptions to statutes they administer. *See, e.g., Shays* v. *FEC,* 414 F.3d 76, 113 (DC Cir. 2005); *Ass'n of Admin. Law Judges* v. *FLRA,* 397 F.3d 957, 961–62 (DC Cir. 2005) ("[T]he Congress is always presumed to intend that pointless expenditures of effort be avoided" and that such authority "is inherent in most statutory schemes, by implication."); *Environmental Defense Fund, Inc.* v. *EPA,* 82 F.3d 451, 466 (DC Cir. 1996) ("[C]ategorical exemptions from the requirements of a statute may be permissible as an exercise of agency power, inherent in most statutory schemes, to overlook circumstances that in context may fairly be considered de minimis.") (inner quotations and citation omitted); *Alabama Power Co.* v. *Costle,* 636 F.2d 323, 360 (DC Cir. 1979) (the ability to create a *de minimis* exemption "is not an ability to depart from the statute, but rather a tool to be used in implementing the legislative design."); *New York* v. *EPA,* 443 F.3d 880, 888 (DC Cir. 2006) (noting the maxim *de minimis non curat lex*—"the law cares not for trifles.").

However, "a de minimis exemption cannot stand if it is contrary to the express terms of the statute." *Environmental Defense Fund,* 82 F.3d at 466 (citing *Public Citizen* v. *Young,* 831 F.2d 1108, 1122 (DC Cir. 1987)). In other words, agency authority to promulgate *de minimis* exemptions does not extend to "extraordinarily rigid" statutes. *See Shays,* 414 F.3d at 114 ("By promulgating a rigid regime, Congress signals that the strict letter of its law applies in all circumstances."); *Ass'n of ALJs,* 397 F.3d at 962; *Alabama Power,* 636 F.2d at 360–61 (As long as the Congress has not been "extraordinarily rigid" in drafting the statute, however, "there is likely a basis for an implication of de minimis authority."). Furthermore, such authority does not extend to situations "where the regulatory function does provide benefits, in the sense of furthering regulatory objectives, but the agency concludes that the acknowledged benefits are exceeded by the costs." *Public Citizen* v. *FTC,* 869 F.2d 1541, 1557 (DC Cir. 1989) (quoting Alabama Power, 636 F.2d at 360–61) (emphasis removed); *see also Shays,* 414 F.3d at 114; *Kentucky Waterways Alliance* v. *Johnson,* 540 F.3d 466, 483 (6th Cir. 2008). "Instead, situations covered by a de minimis exemption must be truly de minimis." *Shays,* 414 F.3d at 114. That is, they must cover only situations where "the burdens of regulation yield a gain of trivial or no value." *Environmental Defense Fund* at 466 (inner quotations omitted) (citing *Alabama Power,* 636 F.2d at 360–61).

In this case, where release of the contents of one PIH tank car can have catastrophic consequences (e.g., the 2005 Graniteville accident), FRA must determine whether the gain yielded by installing PTC on any rail line that carries a minimal amount of PIH materials is "of trivial or no value." During the RSAC Working Group discussions conducted on August 31–September 2, 2009, the major freight railroads suggested that any track segment carrying fewer than 100 PIH cars annually should be considered to present a *de minimis* risk and be subject to an exception. (Their representatives were very clear that the request did not extend to lines carrying intercity or commuter passenger trains.) During the Working Group discussion, AAR was asked to describe additional safety limitations that might apply to these types of track segments (e.g., tonnage, track class, population densities). The AAR elected not to do so, adhering to the simple less than 100 car exception. Subsequently, in an October 7, 2009, docket filing, AAR suggested that safety mitigations could be applied where necessary to bring risk down to *de minimis* levels.

FRA has considered AAR's proposed exception and has noted that, although the number of cars appears small, in fact only about 100,000 loaded PIH cars are offered for transportation in the United States each year (approximately 200,000 loads and residue cars). Accordingly, FRA would expect that such an exception might have a significant impact on the number of miles of railroad subject to the PTC mandate. None of the filings in this docket, and none of the discussion in the PTC Working Group, shed light on the relevant facts despite an express request from FRA to Class I railroads to supply facts bearing on their requested exception. Based on the limited information available to FRA, FRA believes that such an exception would excuse installation of PTC on roughly 10,000 miles of railroad out of the almost 70,000 route miles FRA has projected would need to be equipped based on the proposed requirements. Based on the limited information available, it appears that some of the lines within the AAR request carry very heavy tonnages (with many train movements raising the risk for a collision) at freight speeds up to 60 or 70 miles per hour (predicting severe outcomes when accidents do occur). Putting trains with PIH bulk cargoes into this mix in the absence of effective train control would not be a *de minimis* risk as to those cars of PIH actually transported. Further, any public policy decision to excuse PTC installation under these circumstances would have to ignore other risk on those track segments. Creating a *de minimis* exception for less than 100 PIH cars on a very busy and risk-laden track segment simply on the basis of the number of PIH cars would, accordingly, ignore the separate charge that the Congress gave to the agency in 1970 to adopt regulations "as necessary" for "every area of railroad safety" (49 U.S.C. 20103(a)) and the value that the Congress has obviously placed on PTC as a means of reducing risk within the reach of the four PTC core functions under the RSIA08. Further, it would stand on its head the structure of 49 U.S.C. 20157, as added by the RSIA08, which mandates completion by the end of 2015 of PTC on (1) lines of intercity and commuter passenger trains, (2) lines of Class I railroads carrying 5 million gross tons and PIH, and (3) "such other tracks as the Secretary may prescribe by regulation or order."

FRA believes that the broad-based type of *de minimis* exception sought by the AAR and its member railroads based

[4] This is not to say that there are independent justifications for each of these decisions. Yard operations involve a mix of switching movements and train movements and have never been within public expectations for PTC because of issues of impracticability and inapplicability, as well as greatly reduced safety concerns. Movement of trains with inoperative PTC equipment has historically been allowed for and governed within Interstate Commerce Commission and FRA regulations, and proceeding otherwise would be a virtual impossibility. FRA does not understand RSIA08 to specify whether all trains operating on PTC lines must be PTC equipped, and accordingly FRA believes that it is required to make discretionary decisions in that regard. That said, the *de minimis* concept clearly offers an alternative justification for each of these decisions.

solely on the number of PIH cars transported annually is not supported either legally or on a safety basis. However, FRA believes a limited exception is necessary and justified for those main lines that transport a truly limited quantity of PIH materials and that pose little safety hazard to the general public by not being equipped with an operational PTC system. Thus, FRA is including paragraph (b)(4)(ii) in this final rule to permit railroads exclude these types of main track segments from the statutory requirement to install a PTC system. The initial qualifying criterion is that of less than 100 PIH cars per year (loaded or residue), as suggested by the AAR.

In order to foster as much clarity as possible regarding the exceptions provided, FRA has broken the concept into two separate divisions. The first creates a presumption that a requested exception will be provided based on existing circumstances on the line, plus an operating restriction. The second involves more challenging circumstances and involves no presumption, but the railroad may proffer safety mitigations in order to drive down risk to demonstrably negligible levels (subject to FRA review). Both are limited to lines that carry less than 15 million gross tons of traffic annually, a figure three times the threshold in the law. FRA has no confidence that a railroad could assure "negligible risk" in a busier and therefore more complex operation, and allowing for consideration of lines with more traffic could lead to neglect of other risk of concern (e.g., harm to train crews in collisions, casualties to roadway workers, release of other hazardous materials).

Paragraph (b)(4)(ii)(B) specifies additional tests that apply to the first exception:

- The line segment must consist exclusively of Class 1 or 2 track under the Track Safety Standards (maximum authorized speed 25 mph);
- The line segment must have a ruling grade of less than 1 percent; and
- Any train transporting a car containing PIH materials (including a residue car) must be operated under conditions of temporal separation, as explained in § 236.1019(e) and in Appendix A to part 211 of this title, from other trains using the line segment, as documented by a temporal separation plan submitted with the request and approved by FRA.

Limiting maximum authorized train speed reduces the kinetic energy available in any accident, and the forces impinging on the tank should be sustainable.[5] Placing a limit on ruling grade helps to avoid any situation in which a train "gets away" as a result of a failure to invoke a brake application until momentum is such that no stop is possible (as the surface between the brake shoe and wheel "goes liquid"). (PTC can prevent the initial overspeed and intervene early.) Requiring that a train carrying PIH and other trains be "temporally separated" can help prevent a collision in which a PIH car is struck directly by the locomotive of another train while traversing a turnout (potentially exceeding the force levels the tank can withstand). Given these combinations of circumstances, a *de minimis* exception should ordinarily be warranted. FRA would withhold approval only upon a showing of special circumstances, such as where there might be a need to protect movements over a moveable bridge. Should FRA identify such a circumstance, the railroad might elect to proceed under the additional exception.

Paragraph (b)(4)(ii)(C) provides an alternative path to a *de minimis* exception by opening the door for proposed risk mitigations that could drive risk down to negligible levels. The railroad could offer any combination of operating procedures, technology, or other means of risk reduction. Basically, the paragraph requires the railroad to "make its case" to FRA as to why a limited exception should be provided for the identified main line. The railroad must provide FRA sufficient information to justify the application of a *de minimis* exception to the identified track segment, including current and future traffic predictions, detailed information regarding the safety hazards present on the involved track segment, and an explanation of how the proposed mitigations would reduce the risk to a negligible level. FRA believes that, beyond the relatively narrow categorical exception provided in (*B*), a separate case-by-case analysis of each request is necessary to properly apply its inherent discretionary authority to grant *de minimis* exceptions in this area. Approaching the issue in this manner also permits full consideration of mitigations tailored to the particular circumstances. FRA would evaluate the submittal and, if satisfied that the proffered mitigations would be successful, approve the exception of the line segment. FRA wishes to note that elements of PTC technology may in some cases provide the means for accomplishing this. Developing a track database for a line segment, installing an intermittent data radio capability, and utilizing PTC-equipped locomotives on the line could be used to enforce temporary speed restrictions and enforce track warrants without the major expense on the wayside. Where necessary, based on somewhat higher train speeds, key switches could be monitored; or, alternately, only those trains containing PIH cars could be speed restricted (with speed enforced on board). The notion here is to leverage investments already made with modest additional expenditures that capture the bulk of the safety benefits while specially protecting trains with PIH cars.

FRA believes that the savings from these provisions should be substantial. Most of the line segments falling within the criteria set forth for *de minimis* risk will be non-signaled lines with limited freight traffic. The ability to omit equipping these routes with full data radio infrastructure and with switch position monitoring at all switches should constitute a significant savings. In fact, based on available information, FRA believes that as much as 3,500 miles of railroad could be included in one of the exceptions provided. FRA estimates that the gross savings from omitting PTC from these lines might amount to about $175 million and that mitigations might offset roughly $32 million of those savings, for net savings still exceeding $140 million. Of that amount, approximately $15 million could come from the first exception, which deals with very low risk lines left in their current state and operated under temporal separation of trains containing PIH traffic.

This provision was developed in the absence of a robust record. On October 7, 2009, the AAR filed supplementary comments offering to work with FRA on a more flexible process for *de minimis* exceptions that would consider safety mitigations designed expressly to drive risk down to *de minimis* levels on candidate line segments. FRA attempted to respond to this late-filed comment in full recognition that the final rule will impose substantial costs and that avoiding unnecessary cost is desirable. However none of the parties has had an opportunity to comment on the exception provided in this final rule. Accordingly, FRA seeks comments on the extent of the *de minimis* exception. Such comments should be supported by sufficient and applicable safety data. FRA notes that the time required for

[5] *See Engineering Studies on Structural Integrity of Railroad Tank Cars Under Accident Conditions* (DOT/FRA/ORD–9/18; October 2009); *see also* 78 FR 17,818, 17,821 (Apr. 1, 2008) (discussion of proposed limitation on PIH train speeds in non-signaled territory prior to introduction of fully crashworthy tank cars, which was later withdrawn for other reasons).

refinement of this provision should fit within the existing PTC system implementation timetable, since any lines where risk is low will be slated for PTC system installation relatively late in the implementation period that ends on December 31, 2015.

Paragraph (b)(5) addresses an additional reason for proposing to use 2008 data as a baseline for PTC installation, rather than *de facto* conditions in 2015: i.e., the prospect that Class I railroads will divest lines in order to avoid the PTC mandate. Based on past practice at the Interstate Commerce Commission and STB, lines sales can occur under circumstances where the new operator of the line is to a large extent the alter ego of the seller. The seller may retain overhead trackage rights or merely lease the line; or circumstances may be such that the seller is the only available interchange partner and thus continues to enjoy the "long haul" portion of the rate. Typically the buyer will have a lower cost structure, and to the extent the sale is merely a recognition that the line has declined in traffic and will need to be redeveloped as a source of carload traffic, that may be the best way to preserve rail service. However, to the extent that the seller sheds costs while retaining significant practical control and depriving the buyer of adequate revenues, safety issues can arise. FRA has historically been reluctant to allow discontinuance of signal systems in some of these cases, particularly where it remained within the seller's ability to rebuild overhead traffic on the line downstream, where the seller retained the right to repossess the property at a later time, or where the line carried passenger traffic.

This background may help explain why FRA made reference to the issue of whether omitting PTC on a line that carried PIH traffic in 2008 might be "in the public interest" in the proposed rule. In references during the subsequent RSAC working group deliberations, some question was raised about what that could mean. In light of that confusion, FRA has omitted the phrase from the final rule but has added language addressing the issue of line sales that expresses more directly how FRA would handle line sales and modifications to a PTCIP. FRA's purpose is to ensure that decisions regarding where PTC is deployed are made in light of all the relevant circumstances. To the extent that this approach represents an exercise of discretionary authority (and should any such exercise in fact occur), FRA would expect to make the decision based upon safety criteria after the STB had determined the public interest with respect to rail service. Again, FRA would expect to recognize the value that the Congress placed on PTC as a means of risk reduction while not rewarding transactions designed to avoid installation of PTC on the line in question.

Paragraph (b)(6) states that no new intercity or commuter passenger service shall commence after December 31, 2015, until a PTC system certified under this subpart has been installed and made operative. FRA believes this is a clearly necessary requirement to satisfy the statute. In response to the comments, FRA has removed the reference to "continuing" of previous passenger service. FRA agrees that the remedy associated with any delays in completing PTC system installation should be determined based upon circumstances at the time and without disfavoring passenger service in relation to freight service.

General objections to a 2008 baseline. FRA is aware that the approach embodied in the final rule may not play out as an elegantly optimized risk reduction strategy. If FRA were writing on a blank slate, the agency may have considered factors that drive risk and thresholds for those factors, taking into consideration more than PIH and intercity or commuter passenger traffic. Some lines that the Congress has required to be equipped by the end of 2015 because of PIH traffic would be left for deployment well downstream. Under such a hypothetical scenario, others with heavy train counts or without signal systems (and with robust traffic) may have been in theory added to the list for deployment of PTC by the end of 2015. But FRA is not writing on a clean slate. Rather, FRA is endeavoring to implement the statute with fidelity both to its terms and its intent, utilizing the discretion underscored by the law to get the job done.

Part of the complexity of this task is the schedule. FRA has labored to publish this final rule as soon as humanly possible so that the industry could be ready to file PTC Implementation Plans by the statutory deadline of April 16, 2010. FRA will then be required, again by the statute, to approve or disapprove each plan within a period of 90 days. Accordingly, establishing some degree of order in framing the Implementation Plan requirements is clearly necessary. Taking the 2008 traffic base as a known starting point, and evaluating any deviations from that base, will permit FRA to identify any potentially inappropriate traffic consolidations and focus on those areas as matters for review. FRA could, of course, take a different approach and order a categorically broader implementation. However, that has been understandably opposed by the railroads; and crafting any such approach would likely not have been feasible during the time available for this rulemaking. Accordingly, what we have done in § 236.1011(b) is to require the PTCIP to include a statement of criteria that the Class I railroad will apply in planning future deployment of PTC and a requirement that the railroad's Risk Reduction Program Plan (required by the RSIA08 to be filed in 2013) contain a specification of additional lines that will be equipped in full (meeting all of the requirements of subpart I) or as a partial implementation (subset of functionalities). Approaching the end of the initial deployment period, therefore, FRA should be in a position to consider whether requiring additional PTC deployments will be appropriate to address remaining risk or whether elective actions by the railroads will meet that need. Over time, then, any rough edges that remain should be smoothed over.

Another objection to the 2008 baseline is that more may need to be accomplished (i.e., the need to capture more lines) in the period between enactment and December 31, 2015. FRA responds as follows: First, no more will need to be done than the Congress likely expected. If FRA, an expert agency, did not foresee the "dramatic" consolidation of PIH traffic resulting from the TSA rule, it is fairly unlikely that the Congress did. Second, the Class I freight industry has had it within its control to get this done, and one of FRA's major objectives in conducting this rulemaking has been to ensure success by keeping the technology bar at a reasonable height and deferring as much as possible to work already accomplished. During the September 10, 2009, RSAC meeting, the leaders of the Interoperable Train Control project—an effort led by BNSF, CSXT, NS, and UP to develop interoperability standards for the general freight system—advised that those standards will not be available until the end of 2010 to the many commuter railroads and Amtrak working in concert with a major freight carrier. But the industry developed Advanced Train Control Standards in the 1980s, standards that FRA pronounced mature in its 1994 Report, after which the industry abandoned the project. PTC interoperability standards were identified as a need in the consensus report of the original PTC

Working Group to the FRA Administrator in 1999, and creation of such standards was a major deliverable of the North American PTC Program (funded jointly by the FRA, industry, and the State of Illinois). That delivery was never made. In the interim, the major signal suppliers, working through the American Railway Engineering and Maintenance Association managed to produce interoperability standards (again with FRA support), but these are not standards that the freight railroads have elected to employ. Accordingly, FRA concludes that the principal obstacle to completion of PTC is the perfection of technology, including interoperability standards, by an industry that has had two decades to work. Any further delays in that quadrant should not deprive the Nation of a reasonably scaled PTC deployment.

Other comments. FRA received generally favorable comments on the base year issue from Friends of the Earth[6] and the Rail Labor Organizations. The Chlorine Institute also urged the broadest application of PTC to the national rail network, and the American Chemistry Council submitted generally favorable comments without lingering on this specific issue. The Fertilizer Institute commented that limiting lines to the 2008 PIH network could restrict shipping options in the future and also advocated a broader mandate.

Final rule adjustments. FRA has further considered the need to optimize the risk reduction strategy captured in this final rule with respect to lines that may no longer carry PIH traffic as of some point (whether at filing of the PTCIP or thereafter). FRA has included a requirement that the subject line from which PIH has been removed would be required to be equipped with PTC only if the line's remaining traffic involves a level of risk that is above the average for lines that carry PIH traffic. As noted above, FRA would expect most lines from which PIH traffic might be legitimately removed, exclusive of those that carry intercity or commuter passenger traffic (which will need to be equipped in any event), to fall below the average risk level and be removed from the PTCIP. These will be primarily what are referred to as branch lines or secondary main lines, carrying moderate traffic volumes. However, if a line such as a very busy coal line with intermixed general freight (including, e.g., flammable compressed gas or halogenated organic compounds) were in question, FRA would expect that line to remain equipped. Further optimization of this approach is offered in the form of compensating risk reduction. That is, a railroad could offer up a line that was not included in 2008 traffic base for PTC implementation if it carries traffic that involves very substantial risk. Although this option is offered, FRA does not expect any such situation to arise. Based on FRA's review of known traffic flows and densities, FRA expects that most lines omitted from those reported in the PTCIP based on 2008 data will fall into a very low range of risk in relation to lines carrying PIH traffic. Further, FRA believes it is very unlikely that any legitimate consolidation of PIH traffic after 2008 would have utilized a line that was not previously carrying at least some PIH traffic. In short, although the agency may not have taken the same approach, there is wisdom behind the congressional formulation based on conditions when the Congress acted.

In summary, FRA has fashioned an approach to review of candidate track segments for PTC Implementation that seeks to uphold the letter and the intent of the RSIA08, that utilizes FRA discretionary authority sparingly but in a risk-informed manner, that it is administrable within the time allowed by law to review PTCIPs, that offers the best chance of creating some stability in deployment strategy by permitting the agency to focus on areas of greatest sensitivity early in the process (including, as necessary, a threshold evaluation of whether Rail Route Analysis Rule decisions require further evaluation), and that will ensure, to the extent possible, that safety alone is the governing criterion in determining where PTC will be required to be deployed.

Paragraph (c) provides amplifying information regarding the installation and integration of hazard detectors into PTC systems. Paragraph (c)(1) reiterates FRA's position that any hazard detectors that are currently integrated into an existing signal and train control system must be integrated into mandatory PTC systems and that the PTC system will enforce as appropriate on receipt of a warning from the detector. Paragraph (c)(2) states that each PTCSP submitted by a railroad must identify any additional hazard detectors that will be used to provide warnings to the crew which a railroad may elect to install. If the PTCSP so provides, the PTCSP must clearly define the actions required by the crew upon receipt of the alarm or other warning or alert. FRA does not expect a railroad to install hazard detectors at every location where a hazard might possibly exist.

Paragraph (c)(3) requires, in the case of high-speed service (as described in § 236.1007 as any service operating at speeds greater than 90 miles per hour), that the hazard analysis address any hazards on the route and provide a reason why additional hazard detectors are not required to provide warning and enforcement for hazards not already protected by an existing hazard detector. The hazard analysis must clearly identify the risk associated with the hazard, and the mitigations taken if a hazard detector is not installed and interfacing with a PTC system. For instance, in the past, large motor vehicles with parallel or overhead structures have been left fouling active passenger rail lines. Depending upon the circumstances, such events can cause catastrophic train accidents. Although not every such event can be prevented, detection of such obstacles may make it more likely that the accident could be prevented.

In its comments, Amtrak assumes that on those lines where FRA has previously approved such speeds (e.g., portions of Amtrak's Northeast Corridor (NEC) and Michigan line), a new hazard analysis, which would serve only to allow that which is already allowed, will not be required. If so, it asserts that the rule should make that explicit. FRA has done so in the final rule. No further changes were indicated by the comments.

Under paragraph (d), the final rule requires that each lead locomotive operating with a PTC system be equipped with an operative event recorder that captures safety-critical data routed to the engineer's display that the engineer must obey, including all mandatory directives that have been electronically delivered to the train, maximum authorized speeds, warnings presented to the crew, including countdowns to braking enforcement and warnings indicating that braking enforcement is in effect, and the current system state ("ACTIVE", "FAILED", "CUTIN", "CUTOUT", etc.)

FRA intends that this information be available in the event of an accident with a PTC-equipped system to determine root causes and the necessary actions that must be taken to prevent reoccurrence. Although FRA expects implemented PTC systems will prevent PTC-preventable accidents, in the event of system failure FRA believes it is necessary to capture available data relating to the event. Further, FRA sees value in capturing information regarding any accident that may occur outside of the control of a PTC system

[6] Friends of the Earth also made detailed comments regarding administration of the Rail Route Analysis Rule that are beyond the scope of this proceeding.

as it is currently designed—including the prevention of collisions with trains not equipped with PTC systems—and accidents that could otherwise have been prevented by PTC technology, but were unanticipated by the system developers, the employing railroad, or FRA.

The data may be captured in the locomotive event recorder, or a separate memory module. If the locomotive is placed in service on or after October 1, 2009, the event recorder and memory module, if used, shall be crashworthy, otherwise known as crash-hardened, in accordance with § 229.135. For locomotives built prior to that period, the data shall be protected to the maximum extent possible within the limits of the technology being used in the event recorder and memory module.

One commenter stated that paragraph (d) was not clear. The commenter is unsure if FRA is requiring that all of the operator's display be recorded and replicated upon playback. FRA only requires that the railroad capture the safety-critical data routed to the display which the engineer must obey. The choice of format to play back this data has been left to the railroad, keeping in mind that whatever format used for data playback needs to be available to FRA for accident investigations and other investigation activities.

As required by the RSIA08 and by paragraph (a)(1)(iv), as noted above, a PTC system required by subpart I must be designed to prevent the movement of a train through a main line switch in the wrong position. Paragraph (e) provides amplifying information on switch point monitoring, indication, warning of misalignment, and associated enforcement. According to the statute, each PTC system must be designed to prevent "the movement of a train through a switch left in the wrong position." FRA understands "wrong position" to mean not in the position for the intended movement of the train. FRA believes that Congress' use of the phrase "left in the wrong position" was primarily directed at switches in non-signaled (dark) territory such as the switch involved in the aforementioned accident at Graniteville, South Carolina. FRA also believes that, in order to prevent potential derailment or divergence to an unintended route, it is critical that all associated switches be monitored by a PTC system in some manner to detect whether they are in their proper position for train movements. If a switch is misaligned, the PTC system must provide an acceptable level of safety for train operations.

Prior to the statute, PTC provided for positive train separation, speed enforcement, and work zone protection. The addition of switch point monitoring and run through prevention would have eliminated the Graniteville accident where a misaligned switch resulted in the unintended divergence of a train operating on the main track onto a siding track and the collision of that train with another parked train on the siding. The resulting release of chlorine gas caused nine deaths and required the evacuation of the entire town while remediation efforts were in progress.

As discussed above, FRA considered requiring PTC systems to be interconnected with each main line switch and to individually monitor each switch's point position in such a manner as to provide for a positive stop short of any misalignment condition. However, after further consideration and discussion with the PTC Working Group, FRA believes that such an approach may be overly aggressive and terribly expensive in signaled territory.

Under paragraph (e), FRA instead provides to treat switches differently, depending upon whether they are within a wayside or cab signal system—or are provided other similar safeguards (i.e., distant switch indicators and associated locking circuitry) required to meet the applicable switch position standards and requirements of subparts A through G—within non-signaled (dark) territory.

While a PTC system in dark territory would be required to enforce a positive stop—as discussed in more detail below—a PTC system in signaled territory would require a train to operate at no more than the upper limit of restricted speed between the associated signal, over any switch in the block governed by the signal, and until reaching the next subsequent signal that is displaying a signal indication more permissive than proceed at restricted speed.

Signaled territory includes various types of switches, including power-operated switches, hand-operated switches, spring switches, electrically-locked switches, electro-pneumatic switches, and hydra switches, to name the majority. Each type of switch poses different issues as it relates to PTC system enforcement. We will look at power- and hand-operated switches as examples.

On a territory without a PTC system, if a power-operated switch at an interlocking or control point were in a condition resulting in the display of a stop indication by the signal system, an approaching train would generally have to stop only a few feet from the switch, and in the large majority of cases no more than several hundred feet away from it. In contrast, in PTC territory adhering to the aforementioned overly aggressive requirement, a train would have to stop at the signal, which may be in close proximity to its associated switch, and operate at no more than the upper limit of restricted speed to that switch, where it would have to stop again. FRA believes that, since the train would be required to stop at the signal, and must operate at no more than the upper limit of restricted speed until it completely passes the switch (with the crew by rule watching for and prepared to stop short of, among other concerns, an improperly lined switch), a secondary enforced stop at the switch would be unnecessarily redundant.

Operations using hand-operated switches would provide different, and arguably greater, difficulties and potential risks. Generally, in between each successive interlocking and control point, signal spacing along the right of way can approximately be 1 to 3 miles or more apart, determined by the usual length of track circuits and the sufficient number of indications that would provide optimal use for train operations. Each signal governs the movement through the entire associated block up to the next signal. Thus, a train approaching a hand-operated switch may encounter further difficulties since its governing signal may be much further away than the governing signal for a power-operated switch. If within signaled territory a hand-operated switch outside of an interlocking or control point were in a condition resulting in the display of a restricted speed signal indication by the signal system, an approaching train may be required to stop before entering the block governed by the signal and proceed at restricted speed, or otherwise reduce its speed to restricted speed as it enters the block governed by the signal. The train must then be operated at restricted speed until the train reaches the next signal displaying an indication more permissive than proceed at restricted speed, while passing over any switch within the block. The governing signal, however, may be anywhere from a few feet to more than a mile from the hand-operated switch. For instance, if a signal governs a 3 mile long block, and there is a switch located 1.8 miles after passing the governing signal (stated in advance of the signal), and that switch is misaligned, the train would have to travel that 1.8 miles at restricted speed. Even if the train crew members were able to correct the misaligned switch,

they would need to remain at restricted speed at least until the next signal (absent an upgrade of a cab signal indication).

In signaled territory, to require a PTC system to enforce a positive stop of an approaching train at each individual misaligned switch would be an unnecessary burden on the industry, particularly since movement beyond the governing signal would be enforced by the PTC system to a speed no more than the upper limit of restricted speed. Accordingly, in signaled territory, paragraph (e)(1) requires a PTC system to enforce the upper limit of restricted speed through the block. By definition, at restricted speed, the locomotive engineer must be prepared to stop within one-half the range of vision short of any misaligned switch or broken rail, etc., not to exceed 15 or 20 miles per hour depending on the operating rule of the railroad. Accordingly, if a PTC system is integrated with the signal system, and a train is enforced by the PTC system to move at restricted speed past a signal displaying a restricted speed indication, FRA feels comfortable that the PTC system will meet the statutory mandate of preventing the movement of the train through the switch left in the wrong position by continuously displaying the speed to be maintained (i.e., restricted speed) and by enforcing the upper limit of the railroads' restricted speed rule (but not to exceed 20 mph). While this solution would not completely eliminate human factors associated with movement through a misaligned switch, it would significantly mitigate the risk of a train moving through such a switch and would be much more cost effective.

Moreover, it would be cost prohibitive to require the industry to individually equip each of the many thousands of hand-operated switches with a wayside interface unit (WIU) necessary to interconnect with a PTC system in order to provide a positive stop short of any such switch that may be misaligned. Currently each switch in signaled territory has its position monitored by a switch circuit controller (SCC). When a switch is not in its normal position, the SCC opens a signal control circuit to cause the signal governing movement over the switch location to display its most restrictive aspect (usually red). A train encountering a red signal at the entrance to a block will be required to operate at restricted speed through the entire block, which can be several miles in length depending on signal spacing. The signal system is not capable of informing the train crew which switch, if any, in the block may be in an improper position since none of switches are equipped with an independent WIU. There could be many switches within the same block in a city or other congested area. Thus, there is a possibility that one or more switches may be not in its proper position and the signal system would be unable to transmit which switch or switches are not in normal position. The governing signal could also be displaying a red aspect on account of a broken rail, broken bond wire, broken or wrapped line wire, bad insulated joint, bad insulated switch or gage rods, or other defective condition.

FRA believes that requiring a PTC system to enforce the upper limit of restricted speed in the aforementioned situations is statutorily acceptable. The statute requires each PTC system to prevent "the movement of a train through a switch left in the wrong position." Under this statutory language, the railroad's intended route must factor into the question of whether a switch is in the "wrong" position. In other words, in order to determine whether a switch is in the "wrong position," we must know the switch's "right position." The "right position" is determined by the intended route of the railroad. Thus, when determining whether a switch is in the wrong position, it is necessary to know the railroad's intended route and whether the switch is properly positioned to provide for the train to move through the switch to continue on that route. The intended route is normally determined by the dispatcher.

Under the final rule, when a switch is in the wrong position, the PTC system must have knowledge of that information, must communicate that information to the railroad (e.g., the locomotive engineer or dispatcher), and must control the train accordingly. Once the PTC system or railroad has knowledge of the switch's position, FRA expects the position to be corrected in accordance with part 218 before the train operates through the switch. *See, e.g.,* §§ 218.93, 218.103, 218.105, 218.107.

If the PTC system forces the train to move at no more than the upper limit of restricted speed, the railroad will have knowledge that a misaligned switch may be within the subject block, and the railroad, by rule or dispatcher permission, will then make the decision to move through the switch (i.e., the railroad's intent has changed as indicated by rule or dispatcher instructions), so the switch will no longer be in the "wrong position." The RSAC PTC Working Group was unanimous in concluding that these arrangements satisfy the safety objectives of RSIA08. Utilization of the signal system to detect misaligned switches and facilitate safe movements also provides an incentive to retain existing signal systems, with substantial additional benefits in the form of broken rail detection and detection of equipment fouling the main line.

Paragraph (e)(2) addresses movements over switches in dark territory and under conditions of excessive risk, even within block signal territory. In dark territory, by definition, there are no signals available to provide any signal indication or to interconnect with the switches or PTC system. Without the benefit of a wayside or cab signal system, or other similar system of equivalent safety, the PTC system will have no signals to obey. In such a case, the PTC system may be designed to allow for virtual signals, which are waypoints in the track database that would correspond to the physical location of the signals had they existed without a switch point monitoring system. Accordingly, paragraph (e)(2)(i) requires that in dark territory where PTC systems are implemented and governed by this subpart, the PTC system must enforce a positive stop for each misaligned switch whereas the lead locomotive must be stopped short of the switch to preclude any fouling of the switch. Once the train stops, the railroad will have an opportunity to correct the switch's positioning and then continue its route as intended.

Unlike in signaled territory, FRA expects that on lines requiring PTC in dark territory, each switch will be equipped with a WIU to monitor the switch's position. A WIU is a device that aggregates control and status information from one or more trackside devices for transmission to a central office and/or an approaching train's onboard PTC equipment, as well as disaggregating received requests for information, and promulgates that request to the appropriate wayside device. Most of the switches in dark territory are hand-operated with a much smaller number of them being spring and hydra switches. In dark territory, usually none of the switches have their position monitored by a SCC and railroads have relied on the proper handling of these switches by railroad personnel. When it is necessary to throw a main line switch from normal to reverse, an obligation arises under the railroad's rules to restore the switch upon completion of the authorized activity. Switch targets or banners are intended to provide minimal visual indication of the switch's position, but in the typical case trains are not required to operate at a speed permitting them to stop short of open switches. As

evidenced by the issuance of Emergency Order No. 24 and the subsequent Railroad Operating Rules Final Rule (73 FR 8,442 (Feb. 13, 2008)), proper handling of main line switches cannot be guaranteed in every case. However, now with the implementation and operation of PTC technology, if a switch is not in the normal position, that information will be transmitted to the locomotive. The PTC system will then know which switch is not in the normal position and require a positive stop at that switch location only.

In the event that movement through a misaligned switch would result in an unacceptable risk, whether in dark or signaled territory, paragraph (e)(2)(ii) requires the PTC system to enforce a positive stop on each train before it crosses the switch in the same manner as described above for trains operating in dark, PTC territory. FRA acknowledges that regardless of a switch's position, and regardless of whether the switch is in dark or signaled territory, movement through certain misaligned switches—even at low speeds—may still create an unacceptable risk of collision with another train.

FRA understands the term "unacceptable risk" to mean risk that cannot be tolerated by the railroad's management (and in this case FRA plays the role of ensuring consistency). It is a type of identified risk that must be eliminated or controlled. For instance, such an unacceptable risk may exist with a hand-operated crossover between two main tracks, between a main track and a siding or auxiliary track, or with a hand-operated switch providing access to another subdivision or branch line. The switches mentioned in paragraph (e)(2)(ii) are in locations where, if the switch is left lined in the wrong position, a train would be allowed to traverse through the crossover or turnout and potentially into the path of another train operating on an adjoining main track, siding, or other route. Even if such switches were located within a signaled territory, the signal governing movements over the switch locations, for both tracks as may be applicable, would be displaying their most restrictive aspect (usually red). This restrictive signal indication would in turn allow both trains to approach the location at restricted speed where one or both of the crossover switches are lined in the reverse position. Since the PTC system is not capable of actually enforcing restricted speed other than its upper limits, the PTC system would enforce a 15 or 20 mile per hour speed limit dependent upon the operating rules of the railroad. However, there is normally up to as much as a 5 mile per hour tolerance allowed for each speed limit before the PTC system will actually enforce the applicable required speed. Thus, in reality, the PTC system would not enforce the restricted speed condition until each train obtained a speed of up to 25 miles per hour. In this scenario, it is conceivable that two trains both operating at a speed of up to 25 miles per hour could collide with each other at a combined impact speed (closing speed) of up to 50 miles per hour. While these examples are provided in the rule text, they are merely illustrative and do not limit the universe of what FRA may consider an unacceptable risk for the purpose of paragraph (e). FRA emphasizes that FRA maintains the final determination as to what constitutes acceptable or unacceptable risk in accordance with paragraph (e)(2)(ii).

Caltrain submitted a comment recommending the removal of the following text from this section: "Unacceptable risk includes conditions when traversing the switch, even at low speeds, could result in direct conflict with the movement of another train (including a hand-operated crossover between main track, a hand-operated crossover between main track and an adjoining siding or auxiliary track, or a hand-operated switch providing access to another subdivision or branch line, etc.)" Caltrain asserted that the PTC Safety Plan is required to, and will address, whether a particular configuration is an acceptable risk. The examples cited can include a non-signaled siding or auxiliary track several feet below the grade of the mainline track. The possibility of the equipment on the auxiliary track conflicting with movement on the main line track is no greater at a crossover than if it is a single switch and turnout. Main to main crossovers are another topic that will be addressed in the risk analysis.

FRA believes it to be important to identify the requirement that a PTC system must enforce a positive stop short of any main line switch, and any switch on a siding where the allowable speed is in excess of 20 miles per hour, if movement of a train over such a switch not in its proper position could create an unacceptable risk. FRA is providing within the language of the rule example of movements through an improperly lined switch that FRA believes would result in unacceptable risk. This unacceptable risk is not related to the potential "roll-out" of equipment from another track onto the main track, which was referenced in the comment submitted by Caltrain, but constitutes any situation where a movement may diverge from one track onto an adjacent track potentially directly in front of a proceeding movement of a separate train on that track.

Furthermore, FRA provides in paragraph (e)(3) that a railroad may submit, with justification, alternative PTC system enforcement associated with unacceptable risk of train movements through improperly aligned switches in their applicable PTCDP or PTCSP for FRA approval. FRA therefore elects to leave the rule text of paragraph (e)(2)(ii) as it was written in the proposed rule.

The PTC system must also enforce a positive stop short of any misaligned switch on a PTC controlled siding in dark territory where the allowable track speed is in excess of 20 miles per hour. Sidings are used for meeting and passing trains and where those siding movements are governed by the PTC system, safety necessitates the position of the switches located on sidings to be monitored in order to protect train movements operating on them. Conversely, on signaled sidings, train movements are governed and protected by the associated signal indications, track circuits, and monitored switches, none of which are present in dark territory.

Paragraph (e)(3) notes that while switch position detection and enforcement must be accomplished, the PTCSP may include a safety analysis for alternative means of PTC system enforcement associated with switch position. Moreover, an identification and justification of any alternate means of protection other than that provided in this section shall be identified and justified. FRA recognizes that, in certain circumstances, this flexibility may allow the reasonable use of a track circuit in lieu of individually monitored switches (addressing rail integrity as well as identification of open switches).

Paragraph (e)(4) provides amplifying information regarding existing standards of subparts A through G of this part related to switches, movable-point frogs, and derails in the route governed that are equally applicable to PTC systems unless otherwise provided in a PTCSP approved under this subpart. This paragraph explains that the FRA required and accepted railroad industry standard types of components used to monitored switch point position and how those devices are required to function. This paragraph allows for some alternative method to be used to accomplish the same level of protection if it is identified and justified in a PTCSP approved under this subpart.

The AAR submitted comment that the language within paragraph (e)(4), which was presumably derived from subpart C of this part, prescribes conditions under which "movement authorities *can only be provided.*" (emphasis added). The AAR contends that, in the context of PTC design, this paragraph seems to prescribe a specific method (the withholding of movement authorities) to provide switch position protection per the requirements identified by paragraphs (e)(1) through (e)(3). The AAR asserts that paragraph (e)(4) should be clarified or revised to allow for PTC systems that may meet these requirements by methods other than, or in addition to, those methods prescribed by paragraph (e)(4). Thus, the AAR suggests rewording paragraph (e)(4) to include the language: "unrestricted movement authorities can only be provided".

FRA agrees with the principle of the AAR's comment. The intention appears to be that the permissiveness of *all* movement authorities over any switches, movable-point frogs, or derails must be determined by control circuits or their electronic equivalent selected through a circuit controller or functionally equivalent device that is operated directly by the switch points, derail, or switch locking mechanism, or through relay or electronic device controlled by such circuit controller or functionally equivalent device. *Unrestricted* movement authorities can only be provided when each switch, movable-point frog, or derail in the route governed is in proper position. FRA has therefore revised paragraph (e)(4) to read as follows: "The control circuit or electronic equivalent for all movement authorities over any switches, movable-point frogs, or derails shall be selected through circuit controller or functionally equivalent device operated directly by switch points, derail, or by switch locking mechanism, or through relay or electronic device controlled by such circuit controller or functionally equivalent device, for each switch, movable-point frog, or derail in the route governed. Circuits or electronic equivalents shall be arranged so that any movement authorities *less restrictive than those prescribed in paragraphs (e)(1) and (e)(2) of this section* can only be provided when each switch, movable-point frog, or derail in the route governed is in proper position, and shall be in accordance with subparts A through G of this part, unless it is otherwise provided in a PTCSP approved under this subpart."

Paragraph (f) provides amplifying information for determining whether a PTC system is considered to be configured to prevent train-to-train collisions, as required under paragraph (a). FRA will consider the PTC system as providing the required protection if the PTC system enforces the upper limits of restricted speed. These criteria will allow following trains to pass intermediate signals displaying a restricting aspect and will allow for the issuance of joint mandatory directives.

Where a wayside signal displays a "Stop," "Stop and Proceed," or "Restricted Proceed" indication, paragraph (f)(1)(i) requires the PTC system to enforce the signal indication accordingly. In the case of a "Stop" or "Stop and Proceed" indication, operating rules require that the train will be brought to a stop prior to passing the signal displaying the indication. The train may then proceed at 15 or 20 miles per hour, as applicable according to the host railroad's operating rule(s) for restricted speed. In the case of a "Restricted Proceed" indication, the train would be allowed to pass the signal at 15 or 20 miles per hour. Some existing PTC systems do not enforce the stop indication under these circumstances, and FRA believes that this is acceptable. However, in either event, the speed restriction would be enforced until the train passes a more favorable signal indication. NJ Transit asserted, and FRA agrees, that in dark territory where trains operate by mandatory directive, the PTC system would be expected to enforce the upper limit of restricted speed on a train when the train was allowed into a block already occupied by another preceding train traveling in the same direction. In freight operations, there may be situations where, in order to accomplish local switching, further latitude would be necessary, so long as the upper limit of restricted speed is enforced.

NJ Transit suggests that the FRA consider modifying the verbiage to more clearly define the expectation of the operating rules and enforcement requirements associated with the Stop and Proceed indication.

FRA fully understands the concern presented by NJ Transit, but suggests that the recommended modification to verbiage is already provided for in the language of paragraph (f)(1)(ii). FRA has therefore elected to retain the language of paragraph (f) in the final rule.

Paragraphs (g) through (k) all concern situations where temporary rerouting may be necessary and would affect application of the operational rules under subpart I. While the final rule attempts to reduce the opportunity for PTC and non-PTC trains to co-exist on the same track, FRA recognizes that this may not always be possible, especially when a track segment is out of service and a train must be rerouted in order to continue to destination. Accordingly, paragraph (g) allows for temporary rerouting of traffic between PTC equipped lines and lines not equipped with PTC systems. FRA anticipates two situations—emergencies and planned maintenance—that would justify such rerouting.

Paragraph (g) provides the preconditions and procedural rules to allow or otherwise effectuate a temporary rerouting in the event of an emergency or planned maintenance that would prevent usage of the regularly used track. Historically, FRA has dealt with temporary rerouting on an ad hoc basis. For instance, on November 12, 1996, FRA granted UP, under its application RS&I–AP–No. 1099, conditional approval for relief from the requirements of § 236.566, which required equipping controlling locomotives with an operative apparatus responsive to all automatic train stop, train control, or cab signal territory equipment. The conditional approval provided for "detour train movements necessitated by catastrophic occurrence such as derailment, flood, fire, or hurricane" on certain listed UP territories configured with automatic cab signals (ACS) or automatic train stop (ATS). Ultimately, the relief would allow trains not equipped with the apparatus required under § 236.566 to enter those ACS and ATS territories. However, the relief was conditional upon establishing an absolute block in advance of each train movement—as prescribed by General Code of Operating Rules (GCOR) 11.1 and 11.2—and notifying the applicable FRA Regional Headquarters. The detour would only be permissible for up to seven days and FRA could modify or rescind the relief for railroad non-compliance.

On February 7, 2006, that relief was temporarily extended to include defined territory where approximately two months of extensive track improvements were necessary. Additional conditions for this relief included a maximum train speed of 65 miles per hour and notification to the FRA Region 8 Headquarters within 24 hours of the beginning of the non-equipped detour train movements and immediately upon any accident or incident. On February 27, 2007, FRA provided similar temporary relief for another three months on the same territory.

While the aforementioned conditional relief was provided on an ad hoc basis, FRA feels that codifying rules regulating temporary rerouting involving PTC system track or locomotive equipment is

necessary due to the potential dangers of allowing mixed PTC and non-PTC traffic on the same track and the inevitable increased presence of PTC and PTC-like technologies. Moreover, FRA believes that the subject railroads and FRA would benefit from more regulatory flexibility to work more quickly and efficiently to provide for temporary rerouting to mitigate the problems associated with emergency situations and infrastructure maintenance.

Under the final rule, FRA is providing for temporary rerouting of non-PTC trains onto PTC track and PTC trains onto non-PTC track. A train will not be considered rerouted for purposes of the conditions set forth in this section if it operates on a PTC line that is other than its "normal route," which is equipped and functionally responsive to the PTC system over which it is subsequently operated, or if it is a non-PTC train (not a passenger train or a freight train having any PIH materials) operating on a non-PTC line that is other than its "normal route."

Paragraph (g) effectively provides temporary civil penalty immunity from various applicable requirements of this subpart, including provisions under subpart I relating to controlling locomotives, similar to how waivers from FRA have provided certain railroads immunity from § 236.566.

FRA expects that emergency rerouting will require some flexibility in order to respond to circumstances outside of the railroad's control—most notably changes in the weather, vandalism, and other unexpected occurrences—that would result in potential loss of life or property or prevent the train from continuing on its normal route. While paragraph (g) lists a number of possible emergency circumstances, they are primarily included for illustrative purposes and are not a limiting factor in determining whether an event rises to an emergency. For instance, FRA would also consider allowing rerouting in the event use of the track is prevented by vandalism or terrorism. While these events are not the primary reasons for which paragraph (g) would allow rerouting, FRA recognizes that they may fall outside of the railroad's control.

In the event of an emergency that would prevent usage of the track, temporary rerouting may occur instantly by the railroad without immediate FRA notice or approval. By contrast, the vast majority of maintenance activities can be predicted by railroad operators. While the final rule provides for temporary rerouting for such activities, the lack of exigent circumstances does not require the allowance of instantaneous rerouting without an appropriate request and, in cases where the request is for rerouting to exceed 30 days, FRA approval. Accordingly, under paragraph (g), procedurally speaking, temporary rerouting for emergency circumstances will be treated differently than temporary rerouting for planned maintenance. While FRA continues to have an interest in monitoring all temporary rerouting to ensure that it is occurring as contemplated by FRA and within the confines of the rule, the timing of FRA notification, and the approval procedures, reflects the aforementioned differences.

When an emergency circumstance occurs that would prevent usage of the regularly used track, and would require temporary rerouting, the subject railroad must notify FRA within one business day after the rerouting commences. To provide for communicative flexibility in emergency situations, the final rule provides for such notification to be made in writing or by telephone. FRA provides that written notification may be accomplished via overnight mail, e-mail, or facsimile. In any event, the railroad should take the steps necessary for the method of notification selected to include confirmation that an appropriate person actually on duty with FRA receives the notification and FRA is duly aware of the situation.

While telephone notification may provide for easy communications by the railroad, a mere phone call would not provide for documentation of information required under paragraph (g). Moreover, if for some reason the phone call is made at a time when the designated telephone operator is not on duty or if the caller is only able to leave a message with the FRA voice mail system, the possibility exists that the applicable FRA personnel would not be timely notified of the communication and its contents.

Emergency rerouting can only occur without FRA approval for fourteen (14) consecutive calendar days. If the railroad requires more time, it must make a request to the Associate Administrator. The request must be made directly to the Associate Administrator and separately from the initial notification sometime before the 14-day emergency rerouting period expires. Unless the Associate Administrator notifies the railroad of his or her approval before the end of the allowable emergency rerouting timeframe, the relief provided by paragraph (g) will expire at the end of that timeframe.

While a mere notification is necessary to commence emergency rerouting, a request must be made, with subsequent FRA approval, to perform planned maintenance rerouting. The relative predictability of planned maintenance activities allows railroads to provide FRA with much more advanced request of any necessary rerouting and allows FRA to review that request. FRA requires that the request be made at least 10 calendar days before the planned maintenance rerouting commences.

To ensure a retrievable record, the request must be made in writing. It may be submitted to FRA by fax, e-mail, or courier. Because of security protocols placed in effect after the terrorist attacks of September 11, 2001, regular mail undergoes irradiation to ensure that any pathogens have been destroyed prior to delivery. The irradiation process adds significant delay to FRA's receipt of the document, and the submitted document may be damaged due to the irradiation process. Thus, FRA implores those making a rerouting request in writing to deliver the request through other, more acceptable, means.

The lack of emergency circumstances makes telephonic communication less necessary, since the communication need not be immediate, and less preferable, since it may not be accurately documented for subsequent reference and review. Like notifications for emergency rerouting, the request for planned rerouting must include the number of days that the rerouting should occur. If the planned maintenance will require rerouting up to 30 days, then the request must be made with the Regional Administrator. If it will require rerouting for more than 30 days, then the request must be made with the Associate Administrator. These longer time periods reflects FRA's opportunity to review and approve the request. In other words, since FRA expects that the review and approval process will provide more confidence that a higher level of safety will be maintained, the rerouting period for planned maintenance activities may be more than the 14 days allotted for emergency rerouting.

Regardless of whether the temporary rerouting is the result of an emergency situation or planned maintenance, the communication to FRA required under paragraph (g) must include the information listed under paragraph (i). This information is necessary to provide FRA with context and details of the rerouting. To attempt to provide railroads with the flexibility intended under paragraph (g), and to attempt to prevent enforcement of the rules from which the railroad should be receiving relief, FRA must be able to coordinate with its inspectors and other personnel.

This information may also eventually be important to FRA in developing statistical analyses and models, reevaluating its rules, and determining the actual level of danger inherent in mixing PTC and non-PTC traffic on the same tracks.

For emergency rerouting purposes, the information is also necessary for FRA to determine whether it should order the railroad or railroads to cease rerouting or provide additional conditions that differ from the standard conditions specified in paragraph (i). FRA recognizes the importance of allowing temporary rerouting to occur automatically in emergency circumstances. However, FRA must also maintain its responsibility of ensuring that such rerouting occurs lawfully and as intended by the rules. Accordingly, the final rule provides the opportunity for FRA to review the information required by paragraph (g) to be submitted in accordance with paragraph (i) and order the railroad or railroads to cease rerouting if FRA finds that such rerouting is not appropriate or permissible in accordance with the requirements of paragraphs (g) through (i), and as may be so directed in accordance with paragraph (k), as discussed further below.

For rerouting due to planned maintenance, the information required under paragraph (i) is equally applicable and will be used to determine whether the railroad should not reroute at all. If the request for planned maintenance is for a period of up to 30 days, then the request and information must be sent in writing to the Regional Administrator of the region in which the temporary rerouting will occur. While such a request is self-executing—meaning that it will automatically be considered permissible if not otherwise responded to—the Regional Administrator may prevent the temporary rerouting from starting by simply notifying the railroad or railroads that its request is not approved. The Regional Administrator may otherwise provide conditional approval, request that further information be supplied to the Regional Administrator or Associate Administrator, or disapprove the request altogether. If the railroad still seeks to reroute due to planned maintenance activities, it must provide the Regional Administrator or Associate Administrator, as applicable, the requested information. If the Regional Administrator requests further information, no planned maintenance rerouting may occur until the information is received and reviewed and the Regional Administrator provides his or her approval. Likewise, no planned maintenance rerouting may occur if the Regional Administrator disapproves of the request. If the Regional Administrator does not provide notice preventing the temporary rerouting, then the planned maintenance rerouting may begin and occur as requested. However, once the planned maintenance rerouting begins, the Regional Administrator may at any time order the railroad or railroads to cease the rerouting in accordance with paragraph (k).

Requests for planned maintenance rerouting exceeding 30 days, however, must be made to the Associate Administrator and are not self-executing. No such rerouting may occur without Associate Administrator approval, even if the date passes on which the planned maintenance was scheduled to commence. Under paragraph (h), like the Regional Administrator, the Associate Administrator may provide conditional approval, request further information, or disapprove of the request to reroute. Once approved rerouting commences, the Associate Administrator may also order the rerouting to cease in accordance with paragraph (k).

Where a train rerouted onto a track equipped with a PTC system is, for whatever reason, not compatible and functionally responsive to that PTC system (e.g., an unequipped controlling locomotive, or one equipped but not compatible with the associated wayside, office, or communications system), such train must be operated in accordance with § 236.1029. Where any train is rerouted onto a track segment that is not equipped with a PTC system, such train must be operated in accordance with the operating rules applicable to the track segment on which the train is being rerouted.

Moreover, as referenced in paragraph (g) as it applies to both emergency and planned maintenance circumstances, the track upon which FRA expects the rerouting to occur would require certain mitigating protections listed under paragraph (j) in light of the mixed PTC and non-PTC traffic. While FRA purposefully intends paragraph (j) to apply similarly to § 236.567, FRA recognizes that § 236.567 does not account for the statutory mandates of interoperability and the core PTC safety functions. Accordingly, paragraph (j) must be more restrictive.

Section 236.567, which applies to territories where "an automatic train stop, train control, or cab signal device fails and/or is cut out en route," requires trains to proceed at either restricted speed or, if an automatic block signal system is in operation according to signal indication, at no more than 40 miles per hour to the next available point of communication where report must be made to a designated officer. Where no automatic block signal system is in use, the train shall be permitted to proceed at restricted speed or where an automatic block signal system is in operation according to signal indication but not to exceed medium speed to a point where absolute block can be established. Where an absolute block is established in advance of the train on which the device is inoperative, the train may proceed at not to exceed 79 miles per hour. Paragraph (j) utilizes that absolute block condition, which more actively engages the train dispatcher in managing movement of the train over the territory (in both signaled and non-signaled territory). Recognizing that re-routes under this section will occur in non-signaled territory, the maximum authorized speeds associated with such territory are used as limitations on the speed of re-routed trains. FRA agrees with the comments of labor representatives in the PTC Working Group who contend that the statutory mandate alters to some extent what would otherwise be considered reasonable for these circumstances.

It should be noted that this paragraph (j) was added by FRA after further consideration of this issue and was not part of the PTC Working Group consensus. FRA received several comments associated with the temporary rerouting requirements and the restrictive operational conditions imposed by paragraphs (j)(1) and (j)(2) as being overly burdensome, unsupported and inappropriate. Specifically, the idea that a train rerouted from a PTC line to a non-PTC line should be treated differently than the existing traffic on the non-PTC line is unjustified. The commenters suggest current FRA operational requirements contained in §§ 236.0(c) and (d) providing for speeds greater than 49 miles per hour for freight and 59 miles per hour for passenger trains where a block signal system and/or an automatic cab signal, automatic train stop, or automatic train control system is in place, is applied safely today and should continue as the applicable regulation for this reroute scenario. Thus, the commenters suggest rewording paragraph (j)(2) to read as follows: "Each rerouted train movement shall operate in accordance with § 236.0."

When the PTC Working Group was reconvened following the public hearing and the NPRM comment period, the PTC Working Group formed three

separate task forces for the purpose of discussing and resolving several specific issues. One such task force, deemed the Operational Conditions Task Force, was assigned the task of resolving the issues associated with operational limitations presented in the proposed rule associated with temporary rerouting within § 236.1005, unequipped trains operating within a PTC system within § 236.1006, and en route failures within § 236.1029.

Following significant discussion of these issues, a PTC Working Group task force recommended rule text changes that would maintain the intended level of safety in an acceptable manner while recognizing the impractical nature and perhaps even resultant increase in risk associated with restricting the operation of a rerouted train from a PTC-equipped line onto a non-PTC equipped line more than other similarly equipped trains that normally operated on the non-PTC equipped line. Therefore, the task force recommended that paragraph (j) be revised to read as follows: "(j) *Rerouting conditions.* Rerouting of operations under paragraph (g) of this section may occur according to the following: (1) Where a train not equipped with a PTC system is rerouted onto a track equipped with a PTC system, it shall be operated in accordance with § 236.1029; (2) Where any train is rerouted onto a track not equipped with a PTC system, it shall be operated in accordance with the operating rules applicable to the line on which it is routed."

This recommended revision to paragraph (j) was presented to the PTC Working Group and gained consensus from the group. However, upon further consideration, FRA has decided to adopt a slight variation of the recommended revised rule text in order to provide additional clarification regarding the applicability of paragraph (j)(1) to either a train not equipped with a PTC system, or one not equipped with a PTC system that is compatible and functionally responsive to the PTC system utilized on the line on which the train is rerouted. Therefore, paragraph (j) has been revised in the final rule to read as follows: "(j) *Rerouting conditions.* Rerouting of operations under paragraph (g) of this section may occur under the following conditions: (1) Where a train not equipped with a PTC system is rerouted onto a track equipped with a PTC system, or a train not equipped with a PTC system that is compatible and functionally responsive to the PTC system utilized on the line to which the train is being rerouted, the train shall be operated in accordance with § 236.1029; or (2) Where any train is rerouted onto a track not equipped with a PTC system, the train shall be operated in accordance with the operating rules applicable to the line on which the train is rerouted."

Paragraph (k), as previously noted, provides the Regional Administrator with the ability to order the railroad or railroads to cease rerouting operations that were requested for up to 30 days. The Associate Administrator may order a railroad or railroads to cease rerouting operations regardless of the length of planned maintenance rerouting requested. FRA believes this is an important measure necessary to prevent rerouting performed not in accordance with the rules and FRA's expectations based on the railroad's communications and to ensure the protection of train crews and the public. However, FRA is confident that in the vast majority of cases railroads will utilize the afforded latitude reasonably and only under necessary circumstances.

FRA expects each host railroad to develop a plan to govern operations in the event temporary rerouting is performed in accordance with this section. Thus, as noted further below in § 236.1015, this final rule requires that each PTCSP include a plan accounting for such rerouted operations.

Section 236.1006 Equipping Locomotives Operating in PTC Territory

As reflected by § 236.566, the basic rule for train control operations is that all trains will be equipped with responsive onboard apparatus. Paragraph (a) so provided in the NPRM, and the language is continued in the final rule. Paragraph (a) requires that, as a general rule, all trains operating over PTC territory must be PTC-equipped. In other words, paragraph (a) requires that each controlling locomotive be operated with a PTC onboard apparatus if it is controlling a train operating on a track equipped with a PTC system in accordance with subpart I. The PTC onboard apparatus should operate and function in accordance with the PTCSP governing the particular territory. Accordingly, it must successfully and sufficiently interoperate with the host railroad's PTC system.

In the NPRM, FRA recognized the possibility of controlling locomotives not necessarily being placed in a train's lead position and sought comments on this issue. Comments were filed indicating that the lead locomotive is not always necessarily the controlling locomotive. In light of this information, the final rule reflects a change from "lead locomotive" to "controlling locomotive" as necessary. FRA's understanding of a "controlling locomotive" is the same understanding as it is used in part 232 and as defined in § 232.5. Hence, a definition has been added to § 236.1003 merely cross-referencing to § 232.5.

First, it is understood that during the time PTC technology is being deployed to meet the statutory deadline of December 31, 2015, there will be movements over PTC lines by trains with controlling locomotives not equipped with a PTC onboard apparatus. In general, Class I railroad locomotives are used throughout the owning railroad's system and, under shared power agreements, on other railroads nationally. FRA anticipates that the gradual equipping of locomotives—which will occur at a relatively small number of specialized facilities and which will require a day or two of out of service time as well as time in transit—will extend well into the implementation period that ends on December 31, 2015. It will not be feasible to tie locomotives down to PTC lines, and the RSAC stakeholders fully understood that point. The RLO did urge that railroads make every effort to use equipped locomotives as controlling units, and FRA believes that, in general, railroads will do so in order to obtain the benefits of their investment.

The debate on this point has dealt with the possibility of exceptions, which was addressed in paragraph (b) in the NPRM. The discussion below pertains to the issue of temporary and permanent exceptions to the rule.

The first issue arose under proposed paragraphs (b)(1) and (b)(2), which endeavored to set out the rules for the transitional period during which PTC will be deployed. It is well understood and accepted that it is not feasible to require all trains operating on a PTC line to be PTC-equipped and operative from the first day the system is turned on. Locomotive fleets will be equipped over a multi-year period, and deployment of locomotives will be driven by many factors, of which PTC status is only one. Efficient use of locomotives requires them to be available for use on multiple routes and even under "shared power" agreements with other railroads. In some cases, even when a PTC-equipped locomotive is placed in a consist destined for a PTC line there may be legitimate reasons why it is not placed in the controlling position.

Accordingly, the NPRM provided what FRA thought was a very modest proposal that equipped locomotives placed in the lead on trains bound for PTC territory have their PTC equipment turned on. FRA even made allowance for a declining percentage of such locomotives being dispatched into PTC

territory after having failed "initialization." The reaction from Class I railroad commenters was startling, to say the least.

The AAR stated that the proposal was beyond FRA's authority and that FRA has no ability to require use of PTC before December 31, 2015. According to AAR, railroads will be required to use PTC-equipped locomotives on PTC routes come December 31, 2015, and AAR does not understand how this obligation could be addressed in the implementation plan other than to state PTC-equipped locomotives would be used on PTC routes. In the AAR's view, requiring PTC-equipped locomotives to be turned on would create a disincentive to equip locomotives early. Limiting the ability of railroads to operate trains with locomotives that fail initialization could result in railroads attempting to avoid rail system congestion by delaying the equipping of locomotives. To avoid such a disincentive for equipping locomotives, AAR believes that FRA should permit, without limitation, the operation of locomotives that fail initialization before December 31, 2015.

CSXT asserted that the requirements contained in paragraph (b)(2)(iii) with respect to the allowable percentage of controlling locomotives operating out of each railroad's initial terminals with failed systems over track segments equipped with PTC will deter early implementation efforts and unfairly punish railroads that are diligently working to implement PTC on designated tracks. In addition, CSXT questioned the usefulness of such a provision, as CSXT argued that there is no meaningful difference between a locomotive that is not equipped with PTC and a locomotive that is equipped with a PTC system that is not fully functioning.

Recognizing that matching PTC lines with PTC-equipped controlling locomotives will be a key factor in obtaining the benefits of this technology in the period up to December 31, 2015, FRA requested comments on whether PTCIPs should be required to include power management elements describing how this will be accomplished to the degree feasible. In response, NJ Transit asserted that the PTCIP does require both the lines risk assessment (to establish the track segment order of PTC commissioning) and the schedule to equip rolling stock and suggests that these schedules can and should indicate the effort of a railroad to assure that vehicles are equipped and available for the PTC equipped lines. According to NJ Transit, inclusion of a power management plan as well within the PTCIP provides an additional effort that has a high probability of requiring updates during the PTC implementation period, while the schedules and a good faith effort alone may serve the purpose most efficiently, especially for the short time period anticipated (this should be recognized as 2012 through 2015 at worst). NJ Transit suggests that FRA should not include this plan as a PTCIP requirement, but require the best good faith effort by each railroad for providing equipped vehicles during the short interim period subject to this concern.

The AAR also stated that, for trains in long-haul service, the train's point of origin or location where the locomotive was added to the train may be many crew districts or hundreds or thousands of miles prior to the location where the locomotive's onboard PTC apparatus is initialized for operation in PTC-equipped territory. In this case, the paragraph is overly restrictive and should be modified to be predicated on the location prior to entering PTC-equipped territory where initialization failed. Accordingly, AAR suggests that paragraph (b)(2)(i) be revised to read: "The subject locomotive failed initialization at the point of crew origin for the train or at the location where the locomotive was added to the PTC initialized train."

The RLO also urges FRA to adopt a requirement that railroads place equipped engines in the lead or controlling position whenever such equipped engines are in the engine consist during the implementation period. The RLO states that implementing such consist management initiatives will help identify any problems in the interface of the onboard and wayside systems. In the future, states the RLO, railroad operations will come to rely heavily upon the proper function of these PTC systems. According to the RLO, requiring railroads to adopt this approach would require the minor operational maneuver of switching a trailing unit to the train's lead position. Since technical anomalies that go undetected can be catastrophic, the RLO asserts that FRA should not squander the opportunity for discovering them during the implementation period.

During the public hearing conducted on August 13, 2009, FRA specifically asked how the RLO expected a railroad to handle the situation where an engine that is PTC-equipped may be positioned with long hood forward or may have a broken air conditioning system. In its comments dated August 20, 2009, the RLO responded by stating that it is broadly accepted industry practice to operate trains with the short hood in the direction of movement. Operating trains with the long hood forward presents safety concerns because the engineer has a limited view of the track with that configuration. However, if any safety feature or safe practice is impaired, altered, or compromised in any locomotive, it should not be in the lead or operating position of the train. Therefore, if the engine is not equipped with air conditioning or if the long hood is facing forward, the railroad would have three choices: grant the crew the right to switch a fully-compliant locomotive to the lead at the first location where this can be accomplished, do not operate at all, or remove the engine from the engine consist entirely. The RLO asserts that this approach would create the safest possible working environment, as the safest locomotive is the one with PTC, AC, and the short hood forward.

GE asserts that, by using emerging technology, it is possible to operate a PTC system from the lead controlling locomotive using at least some parts of a PTC system on trailing locomotives in the consist if the onboard network is extended through the locomotive consist. According to GE, this can provide a useful contingent operation if some component fails in the locomotive and a backup component on a trailing unit is linked over the network, providing higher overall PTC availability. For example, should the data radio fail on the lead locomotive, PTC could continue to operate through a working radio on the second or third locomotive unit.

FRA agrees that PTC-equipped locomotives should be utilized when available on PTC territory during the implementation period, and it is recognized that it is possible for a unit to serve as the controlling locomotive when not positioned first in the consist. FRA believes that railroads have strong incentives to take advantage of their investments in PTC, but also includes in the final rule a requirement that the PTCIP include goals for PTC-equipped locomotives in PTC territory.

This issue was discussed further in the PTC Working Group during the review of the comments, but no formal resolution was achieved. FRA is not obligated to provide any exception here whatsoever, and the contention that FRA may not require use of PTC prior to December 31, 2015, is utterly without merit. Nevertheless, FRA does not wish to proceed in such a manner as to create even a temporary disincentive to deploy PTC locomotives on PTC-equipped lines. However, clearly leaving the carriers to their own devices without

accountability or oversight appears unwarranted given the tenor of their comments and the known conflicts among departments of the railroad that can arise during any implementation of new technology. Leaving the use of available PTC technology wholly unregulated until December 31, 2015, would not only open the possibility that safety gains would not be made during the period, it would also increase the possibility that PTC systems would not be sufficiently stable and reliable as of the statutory completion date.

Accordingly, FRA has included in the final rule, in lieu of the language initially proposed, a requirement that each railroad include in its PTCIP specific goals for progressively effective use of its equipped locomotives on PTC lines that have been made operational. FRA would review the goals and stated justification as part of its review of the PTCIP. The railroad would then be required to report annually its progress toward achieving its goals, including any adjustments required to remedy shortfalls. Although FRA does not intend to second guess details of power management, FRA does believe it is reasonable to expect results in the form of steadily declining PTC-preventable accidents during the implementation period. The only way to accomplish that is to ensure that PTC onboard apparatus is deployed on PTC lines in reasonable proportion to its deployment elsewhere and that, when so deployed, it is utilized as intended.

The second major issue arose under paragraph (b)(4), which proposed limited exceptions for movements of Class II and III trains over PTC lines of the Class I railroads. The disagreements attendant to that proposal warrant more detailed treatment.

New PTC systems will be like existing train control systems in the sense that they are comprised of onboard and wayside components. They will also involve a more substantial centralized "office" function. The railroad that has the right to control movements over a line of railroad (generally the entity providing or contracting for the dispatching function) will provide for equipping of the wayside and appropriate links to and interface with the office. In preparing the recommendations that led to the NPRM, the PTC Working Group discussed at great length the issues related to operation of PTC-equipped locomotives, and locomotives not equipped with PTC onboard apparatus, over lines equipped with PTC. As explained above, the PTC Working Group recognized that the typical rule with respect to train control territory is that all controlling locomotives must be equipped and operative (*see* § 236.566). It was also noted in the discussion that the Interstate Commerce Commission (FRA's predecessor agency in the regulation of this subject matter) and FRA have provided some relief from this requirement in discrete circumstances where safety exposure was considered relatively low and the hardship associated with equipping additional locomotives was considered substantial. (For instance, in the case of intermittent automatic train stop installed many years ago on the former Atchison, Topeka and Santa Fe Railroad (now BNSF Railway), only passenger trains were subject to the requirement for onboard apparatus. That arrangement continues to the present day, and it is particularly unusual since none of the host railroad's locomotives are equipped, while all Amtrak locomotives operating over the territory must be equipped.)

The ASLRRA noted that its member railroads conduct limited operations over Class I railroad lines that will be required to be equipped with PTC systems in a substantial number of locations. These operations are principally related to the receipt and delivery of carload traffic in interchange. The small railroad service extends onto the Class I railroad track in order to hold down costs and permit both the small railroad and the Class I railroad to retain traffic that might be priced off the railroad if the Class I had to dispatch a crew to pick up or place the cars. This, in turn, supports competitive transportation options for small businesses, including marginal small businesses in rural areas.

The ASLRRA advocated an exception that would permit the trains of its members and other small railroads to continue use of existing trackage rights and agreements without the necessity for equipping their locomotives with PTC technology. They suggested that any incremental risk be mitigated by requiring that such trains proceed subject to the requirement for an absolute block in advance (similar to operating rules consistent with § 236.567 applicable to trains with failed onboard train control systems). This position was consistently opposed both by the rail labor organizations and the Class I railroads. These organizations took the position that all trains should be equipped with PTC in order to gain the benefits sought by the congressional mandate and to provide the host railroad the full benefit of its investment in safety. Informal discussions suggested that Class I railroads might offer technical or financial assistance to certain small railroads in equipping their locomotives, but that this would, of course, be done based on the corporate interest of the Class I railroad. Although, in general, market forces and the public interest can be expected to correspond over time, this is not always the case. So, for instance, there is a risk that requiring all Class II and Class III railroads operating on Class I PTC lines to be equipped with PTC could be financially unsustainable absent a more generous division of the rate or other assistance (technical or otherwise) from the Class I interchange partner. A Class I railroad might respond to such situations based exclusively on the value of the traffic interchanged with respect to the transportation charge recovered for the long haul less costs. Although that might be a good market decision for the Class I railroad, the result could be loss of rail service for a rural community and diversion of the traffic to the highway—a result that might not be in the public interest. Over the past several decades the federal government and many of the states have made investments in light density rail service (through grants, loans, or tax concessions) that could be undermined should this occur.

In the PTC Working Group and in informal discussions around its activities, Class I railroads indicated that they intended to take a strong position against non-equipped trains operating on their PTC lines, and that in order to enforce this restriction fairly, they understood that they would need to equip their own locomotives, including older road switchers that might venture onto PTC-equipped lines only occasionally. However, during these discussions, FRA was not able to develop a clear understanding regarding the extent to which the Class I railroads, under previously executed private agreements or because of a senior position derived from a prior transaction, enjoy the effective ability to enforce a requirement that all trains be equipped.

Proposed rule. On this question of non-equipped trains on PTC lines, the proposed rule represented a compromise position between the requests of the Class II and III railroads and the Class I railroads and labor organizations. It proposed to permit the practice only on territory where there was no scheduled intercity or commuter passenger service. On any given subject track segment, a particular Class II or III railroad could operate up to 4 trains per day (2 round trips) for up to 20 miles in perpetuity. For hauls in excess of 20

miles, the practice could continue until the end of 2020.

FRA offered this proposal in order to limit the burden on small entities and to avoid costs that were both avoidable and more greatly disproportionate to anticipated benefits than the basic requirements of the congressional mandate. FRA noted that the exceptions would constitute a small portion of the movements over the PTC-equipped line. FRA asserted that the accident/incident data show that the risk attendant upon these movements is small. As reflected in the NPRM, a review of the last seven years of accident data covering 3,312 accidents that were potentially preventable by PTC showed that there were only two of those accidents that involved a Class I railroad's train and a Class II or III railroad's train. (Left unstated in the NPRM was the fact that the presence of PTC would have prevented one of the accidents even absent equipping of the tenant train, while the other would not be prevented due to limitations of PTC architectures with respect to low-speed rear-end collisions.) FRA believed that the low level of risk revealed by these statistics justified an exception for Class II and III railroad trains traversing a PTC-equipped line for a relatively short distance. FRA noted that the cost of equipping those trains would be high when viewed in the context of the financial strength of the Class II or III railroad and the marginal safety benefits would be relatively low in those cases where a small volume of traffic is moved over the PTC-equipped line.

Comments on the NPRM exceptions; FRA response. None of the commenters responded directly to FRA's safety analysis, but they did take strong and disparate stands. The RLO filed joint comments that protested allowing an unequipped train owned by a Class II or III railroad to move on PTC-required track with only minor restrictions. The RLO believed that there are alternatives that are consistent with safety and the intent of RSIA08, including temporal separation or using the host railroad's equipped locomotives. According to the RLO, simply limiting the number of moves and miles of unequipped locomotives on PTC-required track would not eliminate the risk associated with the hazard or provide compliance with the intent of RSIA08.

The AAR has also expressed concerns with the proposal, stating that "[s]urely Congress did not enact a requirement for the Class I railroads to spend billions of dollars on PTC systems only to permit Class II and III railroads to operate trains unequipped with PTC technology on the PTC routes. AAR asserts that FRA has not shown that there would actually be a financial strain on Class II and III railroads. According to AAR, a Class II or III railroad would not have to equip a locomotive with PTC technology until December 31, 2015. In any event, states AAR, the statute makes no distinction among Class I, II, or III operations on a PTC route.

CSXT disagreed with FRA's interpretation of RSIA08, stating that the statute, on its face, does not exempt Class II and III railroads from the PTC requirements. To the contrary, asserted CSXT, the statute appears to contemplate that Class II and III railroads traveling on PTC lines would be subject to the PTC requirements since each PTCIP for those lines "must provide for interoperability of the system with movements of trains of *other railroad carriers,*" (emphasis original) which presumably includes Class II and III railroads. CSXT also questioned whether entities that carry a wide variety of commodities, including PIH traffic, but without the financial wherewithal to adopt PTC technologies, should be permitted to impose an arguably increased safety risk on the public and other railroads. In any event, stated CSXT, the Class II and III railroads would only be responsible for outfitting their locomotives, and not wayside units, with PTC technologies.

Moreover, according to CSXT, the exemption under proposed paragraph (b)(4)(B)(ii) was unclear as to its application This section allowed Class II and III railroads to operate on PTC operated track segments to the extent that any single railroad is allowed "less than four such unequipped trains" over any given track segment. CSXT questions whether the number of trains is limited per a common holding company or each railroad subsidiary. (The intent is that the limit will be applied to each separate railroad company, regardless of common ownership.)

Recognizing FRA's concerns with imposing the costs of PTC implementation on Class II and III railroads, AAR believes FRA is mixing up Congress' concern about the ability of Class II and III railroads to finance installation of PTC on their own routes with the ability of Class II and III railroads to operate locomotives equipped with PTC technology over Class I track. The AAR notes that FRA's own analysis shows that the cost of equipping locomotives with PTC technology amounts to less than a third of total PTC development and installation costs. According to AAR, a Class II or III railroad qualifying for the proposed exception likely would only need to equip only one or two locomotives with PTC technology by sometime after 2015.

In any event, AAR asserts that this proposed exemption for Class II and III railroads is inconsistent with the plain language of the statute, which does not distinguish between Class I, II, or III operations on a main line with PIH materials. Congress determined that PTC should be required on Class I routes meeting the statutory criteria regardless of any cost-benefit analysis. The AAR believes that it is inconceivable that Congress intended unequipped locomotives be permitted to operate routinely where PTC is required, thus undercutting the benefit of equipping a PTC route with PTC technology.

The AAR also challenges FRA's conclusion about the "marginal safety benefit," which seems premised on its analysis of train-to-train collisions, questioning whether FRA has concluded that a train operated by a Class II or III railroad poses less of a risk with respect to each of the core PTC functions than a train operated by a Class I railroad. Leaving aside AAR's objection to any exception permitting Class II and III railroads to conduct routine operations over PTC routes with unequipped locomotives, AAR does not agree with the proposal to wait until December 31, 2020, to impose the twenty-mile limitation. According to AAR, FRA has no factual basis for its concern that Class II and III railroads will be unable to obtain the technology as suppliers seek to equip their bigger Class I customers first. In fact, states AAR, it is more likely that Class I railroads will work with their Class II and III partners to prepare for the 2015 implementation deadline.

The Canadian Pacific Railway does not support the operation of unequipped locomotives on PTC equipped lines after December 31, 2015. It is CP's position that all trains operating on PTC territory after December 31, 2015, must be controlled by a locomotive equipped for PTC operation, regardless of whether or not the locomotive in the controlling position is considered "historic."

NYSMTA, the parent organization for the Long Island Rail Road and Metro-North Railroad, asserted that subpart I of this part should require all operators on the same trackage as commuter railroads to be fully equipped, as is the case in the existing FRA regulation, and that all trains (including those of all Class II and Class III tenant railroads) operating in cab signal/train control territory must have operative cab signal and ATC. Thus, NYSMTA suggested that subpart

I should not permit any trains to enter or operate in PTC territory that are not equipped with operative PTC systems except where en route failures occur within PTC territory. NYSMTA suggested that the definition of "equipped" for paragraphs (a) through (b)(3) be clarified to mean the onboard PTC system equipment has been fully commissioned, has passed all acceptance tests and has met reliability and availability demonstration tests. In the final rule, FRA continues to make clear that all trains operating on intercity/commuter passenger territory must be equipped.

FRA received a number of comments regarding the operation of historic locomotives over rail lines that will need to be equipped with a PTC system, from commenters such as the San Bernardino Railway Historical Society, the Pacific Southwest Railway Museum, the Railroad Passenger Car Alliance, and J.L. Patterson & Associates. These commenters requested that FRA provide clarification that a historic locomotive, as defined in 49 CFR 229.125(h), which is not equipped with PTC may be operated over rail lines equipped with PTC systems in limited excursion service, provided an excursion operating management plan is included in the PTC railroad's PTCIP that is consistent with the provisions of § 236.1029(b) of this part.

These locomotives might include steam locomotives many decades old. FRA notes that these operations are relatively infrequent, and they normally receive additional oversight by host railroads as a matter of course.

Final rule. The final rule provides exceptions for trains operated by Class II and III railroads, including tourist or excursion railroads. The exceptions are limited to lines not carrying intercity or commuter passenger service, except where the host railroad and the passenger railroad (if different entities) have requested an exception in the PTC Implementation Plan, as further discussed below, and FRA has approved that element of the plan. Examples of potentially acceptable instances concerning non-equipped operations on an intercity/commuter route might include a weekend excursion operation during periods scheduled passenger service is very light or in terminal areas under circumstances where all trains will be operated at reduced speed and risk is otherwise very limited.

FRA presumes for purposes of this final rule that there will be circumstances rooted in previously executed private agreements under which the Class I railroad would be entitled to require the small railroad to use a controlling locomotive equipped with PTC as a condition of operating onto the property. FRA wishes to emphasize that, in issuing this final rule, FRA does not intend to influence the exercise of private rights or to suggest that public policy would disfavor an otherwise legitimate restriction on the use of unequipped locomotives on PTC lines. FRA also notes that, in the absence of clear guidance on this issue, a substantial number of waiver requests could be expected that would have to be resolved without the benefit of decisional criteria previously examined and refined through the rulemaking process.

With respect to limited operations of Class II or III railroads on Class I PTC lines, FRA continues to believe that the risk in question is very small in relation to the direct and indirect costs of equipping locomotives with PTC and maintaining those locomotives over time (including configuration management). FRA has also considered the issues required applicable statutes concerning the affect of regulations on small entities. (*See also* discussion of *de minimis* exceptions in the preamble to § 236.1005.) Although FRA does expect that over time Class II and III railroads will participate more fully in the use of PTC technologies, both as tenants and hosts, the initial costs and logistical challenges of PTC system operation will be significantly greater than the costs and challenges after interoperable PTC systems have been demonstrated to be reliable and after the market for PTC equipment and services settles. Mandating that every locomotive leading a Class II or III train be PTC equipped during the initial roll out would create significant incentives to shed marginally profitable traffic with unpredictable societal effects. FRA does believe that, as the end of the initial implementation approaches, smaller railroads can begin the process of joining the PTC community by equipping locomotives used for longer hauls on PTC lines. FRA will also review the experience of Class I railroads as of that general time period (end of 2015, beginning of 2016) to evaluate what additional requirements might be appropriate and sustainable.

FRA has adopted final language sufficiently flexible to permit occasional tourist, historic and excursion service on PTC lines. Much of the subject equipment is used very lightly and in fact may spend the great majority of its time on static display. Ending the educational and recreational role of occasional excursion service is no part of what the Congress was addressing through the mandate underlying this rule.

Paragraph (b)(3) references the fact that operation of trains with failed onboard PTC apparatus is governed by the safeguards of § 236.1029, where applicable; and paragraph (c) applies the same principle to non-equipped trains operating on PTC territory.

Section 236.1007 Additional Requirements for High-Speed Service

Since the early 1990's, there has been an interest centered around designated high-speed corridors for the introduction of high-speed rail, and a number of states have made progress in preparing rail corridors through safety improvements at highway-rail grade crossings, investments in track structure, and other areas. FRA has administered limited programs of assistance using appropriated funds. With the passage of ARRA, which provides $8 billion in capital assistance for high-speed rail corridors and intercity passenger rail service, and the President's announcement in April 2009 of a *Vision for High-Speed Rail in America,* FRA expects those efforts to increase considerably. FRA believes that railroads conducting high-speed operations in the United States can provide a world class service as safe as, or better than, any high-speed operations conducted elsewhere. In anticipation of such service, and to ensure public safety, FRA proposed three tiers of requirements for PTC systems operating in high-speed service. The proposed performance thresholds were intended to increase safety performance targets as the maximum speed limits increase to compensate for increased risks, including the potential frequency and adverse consequences of a collision or derailment. These thresholds were supported by AASHTO and are adopted as proposed.

Section 236.1007 sets the intervals for the high-speed safety performance targets for operations with: maximum speeds at or greater than 60 and 50 miles per hour for passenger service and freight operations, respectively, under paragraph (a); maximum speeds greater than 90 miles per hour under paragraph (b); maximum speeds greater than 125 miles per hour under paragraph (c); and maximum speeds greater than 150 mph under paragraph (d). The reader should note that the requirements increase as speed rises. Thus, for instance, operations with trains moving above 125 miles per hour must, in addition to the requirements under paragraph (c), adhere to the requirements under paragraphs (a) and (b).

Paragraph (a) addresses the PTC system requirements for territories where speeds are greater than 59 miles per hour for passenger service and 49 miles per hour for freight service. Under 49 CFR 236.0 as it existed directly previous to the issuance of this final rule, block signal systems were required at these speeds (unless a manual block system was in place, an option that this final rule phases out). The final rule expects covered operations moving at these speeds to have implemented a PTC system that provides, either directly or with another technology, all of the statutory PTC system functions along with the safety-critical functions of a block signal system as defined in the existing standards of subparts A through F of part 236. The safety-critical functions of a block signal system include track circuits, which assist in broken rail detection and unintended track occupancies (equipment rolling out), and fouling circuits, which can identify equipment that is intruding on the clearance envelope and may prevent raking collisions. FRA recognizes that advances in technology may render current block signal, fouling, and broken rail detection systems obsolete and FRA does not want to preclude the introduction of suitable and appropriate advanced technologies. Accordingly, FRA believes that alternative mechanisms providing the same functionality are entirely acceptable and FRA encourages their development and use to the extent they do not have an adverse impact on the level of safety.

Paragraph (b) addresses system requirements for territories where operating speeds are greater than 90 miles per hour, which is currently the maximum allowable operating speed for passenger trains on Class 5 track. At these higher speeds, the implemented PTC system must not only comply with paragraph (a), but also be shown to be fail-safe (as defined in Appendix C) and at all times prevent unauthorized intrusion of rail traffic onto the higher speed line operating with a PTC system. FRA intends this concept of fail-safe application to be understood in its commonplace meaning; i.e., that insofar as feasible the system is designed to fail to a safe state, which normally means that each subject train will be brought to a stop. Further, FRA understands that there are aspects of current system design and operation that may create a remote opportunity for a "wrong-side" or unsafe failure and that these issues would be described in the PTCSP and mitigations would be provided. FRA recognizes that, as applied in the general freight system, this final rule could create a significant challenge related to interoperability of freight equipment operating over the same territory. Accordingly, FRA requested comment on whether, where operations do not exceed 125 miles per hour or some other value, the requirement for compliance with Appendix C safety assurance principles might be limited to the passenger trains involved, with "non-vital" onboard processing permitted for the intermingled freight trains. No comments were received on this issue, apart from the general concern of the RLO that very safe technology be employed in all PTC systems, and the restriction is adopted as proposed.

As speed increases, it also becomes more important that inadvertent incursions on the PTC-equipped track be prevented at switch locations. In this final rule, FRA expects that this be done by effective means that might include use of split-point derails properly placed, equipping of tracks providing entry with PTC, or arrangement of tracks and switches in such a way as to divert an approaching movement which is not authorized to enter onto the PTC line. The protection mechanism on the slower speed line must be integrated with the PTC system on the higher speed line in a manner to provide appropriate control of trains operating on the higher speed line if a violation is not prevented for whatever reason.

Paragraph (c) addresses high-speed rail operations exceeding 125 miles per hour, which is the maximum speed for Class 7 track under § 213.307. At these higher speeds, the consequences of a derailment or collision are significantly greater than at lower speeds due to the involved vehicle's increased kinetic energy. In such circumstances, in addition to meeting the requirements under paragraphs (a) and (b), including having a fail-safe PTC system, the entity operating above 125 miles per hour must provide an additional safety analysis (the HSR–125) providing suitable evidence to the Associate Administrator that the PTC system can support a level of safety equivalent to, or better than, the best level of safety of comparable rail service in either the United States or a foreign country over the 5 year period preceding the submission of the PTCSP. Additionally, PTC systems on these high-speed lines must provide the capability, as appropriate, to detect incursion from outside the right of way and provide warnings to trains. Each subject railroad is free to suggest in its HSR–125 any method to the Associate Administrator that ensures that the subject high-speed lines are corridors effectively sealed and protected from such incursions (see § 213.347 of this title), including such hazards as motor vehicles falling on the track structure from highway bridges.

Paragraph (d) addresses the highest speeds existing or currently contemplated for rail operations exceeding 150 miles per hour. FRA expects these operations to be governed by a Rule of Particular Applicability and the HSR–125 required by paragraph (c) shall be developed as part of an overall system safety plan approved by the Associate Administrator. The quantitative risk showing required for operations above 125 miles per hour is not required to include consideration of acts of deliberate violence. The reason for this exclusion is simply to remove speculative or extraordinary considerations from the analysis. However, FRA and the Department of Homeland Security will certainly expect that security considerations are taken into account in system planning.

AASHTO believed that the proposed rule appropriately addressed the PTC related safety levels for high-speed rail. According to AASHTO, the proposed rule text provided a clear position for the levels of safety required for high-speed rail at speeds that are achieved today, and for speeds that may be achieved in the future, allowing for benchmarking against precedent levels achieved in the U.S. and internationally. AASHTO also commented that, in PTC systems running over federally designated high-speed rail corridors, highway-rail grade crossings should either be eliminated or protected by hazard warning detection systems.

Amtrak notes that it currently operates safely above 90 miles per hour on the Northeast Corridor and on its Michigan line, with the full knowledge, approval, and authorization of the FRA, based on past and remaining safety procedures and equipment. Amtrak also states that it currently operates above 125 mph on portions of the Northeast Corridor. Accordingly, Amtrak asserts that services above 90 and 125 miles per hour that existed as of October 16, 2008, the date of RSIA08, should be exempted or "grandfathered" from the requirements of this section.

FRA agrees that Amtrak has been providing safe passenger service at speeds between 90 and 150 miles per hour on the Northeast Corridor as well as its Michigan line, and that the train control systems in use (ACSES with Cab Signals, and ITCS) have records of safe operations. Given the value of service experience and the extraordinary burden of review and decision making associated with this rule, FRA intends to give full credit to established safety

records in conducting these reviews, simplifying the task for all concerned.

Section 236.1009 Procedural Requirements

Section 236.1009 establishes the regulatory procedures that must be followed by each Class I railroad carrier and each entity providing regularly scheduled intercity or commuter rail passenger transportation to obtain the required FRA certification of PTC systems prior to operating the system or component in revenue service. FRA is implementing these requirements to support more rapid FRA review and decision making, while reducing the administrative burden on the railroads.

While the current subpart H of this part provides a technically sound procedure for obtaining FRA approval of various processor-based signal and train control systems, it was crafted with the presumption that PTC implementation was a strictly voluntary action on the part of railroads. Arguably FRA could have simply amended subpart H to include requirements relating to implementation plans and to modify the language to equate "approval" under subpart H with "certification" under the statute. However, FRA believes that such a resultant amended subpart H would still remain unsuitable to support the RSIA08 implementation schedule. Accordingly FRA has developed the new procedures of this section to avoid redundancy, provide sufficient flexibility to accompany the varying needs of those seeking certification, and to mitigate the financial risk associated with technological investment necessary to comply with the regulatory requirements.

Generally speaking, there are three documents associated with the new procedures of this section: the PTCIP, PTCDP, and PTCSP. The details of each document are set forth in §§ 236.1011, 236.1013, and 236.1015, respectively. To summarize these sections, the PTCIP is the written plan that defines the specific details of how and when the railroad will implement the PTC system. The PTCDP provides a detailed discussion of the proposed technology and product that will be implemented according to the PTCIP. The PTCSP provides the railroad-specific information demonstrating that the PTC system, as implemented by the railroad, meets the required safety performance objectives. Certification of a PTC system by FRA for revenue operations is based on the review and approval of the information provided in these documents.

Paragraph (a) requires that a PTCIP be filed by "host" railroads as defined in § 236.1003 that are required to install a PTC system on one or more main lines in accordance with § 236.1005(b). This generally is each Class I railroad and each entity providing regularly scheduled intercity or commuter rail passenger transportation as defined by statute. However, Class II and III railroads that host intercity or commuter rail service will also need to file implementation plans, whether or not they directly procure or manage installation of the PTC system.

Intercity and commuter railroads that are tenants on Class I, II, or III freight lines must also join with their host railroad in filing these plans. FRA believes that the railroad that maintains operational control over a particular track segment is generally in the best position to develop and submit the PTCIP, since that railroad is more knowledgeable of the conditions of, and operations over, its track. FRA recognizes that, in cases where a tenant passenger railroad operates over a Class II or III railroad, the passenger railroad may be required to take a more active role in planning the PTC system deployment by working with the host railroad. In the case of an intercity or commuter railroad providing service over a Class I railroad, it may be sufficient for the passenger railroad to file a letter associating itself with the Class I railroad's plan to the extent it impacts the passenger service. AAR also expressed some confusion whether the requirement to file joint plans was only required when freight and passenger railroads conduct operations over the same route. The final rule does not levy any requirement for joint filing in the case where another railroad has freight trackage rights over a Class I railroad's PTC line. FRA expects that the host Class I railroad will address these types of operations and discuss the issue of interoperability in its PTCIP as required by law.

The Class I railroads generally opposed the requirement for a host railroad and tenant passenger railroad to file a joint PTCIP as being excessively burdensome and unnecessary because it merely appears to be intended to address interoperability issues. Beyond possibly addressing the interoperability issue, the AAR maintained that nothing further would be gained by requiring the joint filing of a PTCIP.

FRA has taken note of these objections. However, FRA believes that the joint filing requirement provides motivation for the proactive involvement by both parties in the decision-making process, especially with regards to interoperable equipment requirements and operating procedures. This joint filing requirement reflects FRA's position that communication between all parties involved in establishing interoperability is absolutely essential to ensure the implementation of timely, cost effective solutions.

Some railroads have also expressed concern that they will be required to support installation of PTC over Class II and III railroads that would otherwise not be required to implement PTC, were it not for the passenger/commuter railroad presence. Amtrak noted that the requirement for joint filings would, as a practical manner, require Amtrak to take a dominant role in the development and preparation of the required documentation.

While FRA appreciates the difficulties that both the passenger/commuter railroad, as well as the Class II or III railroad may experience, FRA believes that this is essentially a commercial matter between the parties involved, which would be best resolved with government participation only as a last resort. This position is consistent with the underlying philosophy of sections 151 through 188 of title 45 of the United States Code.

Although FRA believes that the resolution of differences between host and tenant railroads is a commercial issue, provisions have been made if a host freight railroad and tenant passenger railroad cannot come to an agreement to jointly file a PTCIP by April 16, 2010. In this situation, each railroad must file an individual PTCIP, together with a notification to the Associate Administrator, indicating that a joint filing was not possible and an explanation of why the subject railroads could not agree upon a final PTCIP for joint filing.

Both the freight and passenger/commuter railroads have strenuously objected to the assessment of civil penalties in the event that agreement cannot be reached. Amtrak claimed that failure to come to agreement did not rise to the level of an act that warranted penalty. AAR asserted that imposition of penalties would not be an appropriate way to resolve good faith disputes over the implementation of PTC. Concern has also been raised that, in the event of a dispute, the resolution process does not appear to have any established milestones. NYSMTA expressed concern related to the ability of railroads to fairly and quickly resolve disputes related to the development of host/tenant interoperability agreements required by RSIA08. NYSMTA asserted that, even though FRA provides for dispute resolution in § 236.1009, there are no time limits or standards to ensure

that disputes are resolved fairly and in a manner that does not affect railroads' ability to comply with the statutory/mandatory implementation of PTC by December 31, 2015.

FRA has taken note of these objections and concerns. FRA believes that the milestones are self-evident. Railroads are required to file implementation plans by April 16, 2010. Thus, failure to file an implementation plan (either jointly or individually) by April 16, 2010, constitutes a violation of the RSIA08. Railroads are also required to complete implementation by December 31, 2015. FRA does not intend to set any specific deadline for completion of mediation or arbitration other than to state that the mediation or arbitration must be resolved in time to allow both parties to complete the timely submission of their PTCIP by April 16, 2010, and to complete PTC installation by December 31, 2015.

FRA will exercise its prosecutorial discretion if railroads have unresolved conflicts, but have filed individual implementation plans in accordance with paragraph (a)(4) of this section and are engaged in good faith mediation or arbitration.

Caltrain requested clarification of the meaning of the term "confer," as used in paragraph (a)(4)(iv) of this section. During the conference process, FRA will request that all parties to the dispute advise FRA of where their differences arise, so that FRA can evaluate the potential impact on completion of the statutorily-required build out and understand the nature and extent of their disagreement. FRA may propose alternative solutions for consideration by both parties in the dispute. FRA is not, however, obligated to act as either a mediator or arbitrator of essentially commercial disputes. FRA expects that the disputing parties will submit such issues to a mutually acceptable mediator or arbitrator. If the disputing parties are unable to find a mutually agreeable private mediator or arbitrator, FRA may agree to mediate the dispute as a last resort. Otherwise, the disputing parties will need to seek judicial resolution of their issues.

It was also commented that if a PTCIP or request for amendment (RFA), as provided in § 236.1021, is submitted after April 16, 2010, in accordance with this rule, paragraph (a) does not provide the subject railroads with an opportunity to file separately. FRA intends, in such a situation, that if a railroad wishes to use track that would require the installation of a PTC system, and the parties have difficulty reaching agreement, then such usage would be delayed until the parties jointly file a mutually acceptable PTCIP and the jointly-filed PTCIP is approved by FRA.

FRA notes that new passenger railroads are likely to begin operations during the period between issuance of this final rule and the end of the implementation period for PTC (December 31, 2015). Railroads that are required to install PTC, who intend to commence operations after April 16, 2010, but before December 31, 2015, would be expected to file a PTCIP that meets the requirements of paragraph (a) as soon as possible after the decision is made to commence operations. Any railroad commencing operations after December 31, 2015, that is required to install PTC, will not be authorized to commence revenue operations until the PTC installation is complete.

During review of the NPRM, AAR noted that paragraph (a)(2)(i) had not been updated to reflect an RSAC agreement. FRA agrees and has updated paragraph (a)(2)(i) to include the language, "[a] PTCIP if it becomes a host railroad of a main line track segment for which it is required to implement and operate a PTC system in accordance with § 236.1005(b)."

Paragraph (b) in the proposed rule required the submission of a PTCDP when the PTCIP is submitted to FRA for approval. Some railroads, primarily those owned or operated by government agencies, who submitted comments on this issue indicated that, while they would be able to identify the general functional requirements of the PTC system, they expected public procurement regulations would preclude contract award and identification of a particular vendor or supplier and the associated product details in time to meet the statutory submission deadline. They requested that FRA not require submission of the PTCDP at the same time (or before) the PTCIP.

NYSMTA submitted comments asserting that simultaneous submissions would be problematic for LIRR. In view of the complexities and unknown factors associated with developing PTC solutions for LIRR's dark and ABS territories, and in light of its unique signaling applications and operating rules, LIRR was identified as being at high risk of non-compliance with the April 16, 2010, PTCDP submission deadline, despite its best efforts. Inasmuch as the RSIA08 does not explicitly stipulate a timeframe for a PTCDP, NYSMTA requested that the regulation be modified to allow for submission of a PTCDP after the April 16, 2010, deadline, at least with regard to dark territory and ABS territories.

APTA submitted similar comments stating that the inclusion of the PTCDP or PTCSP in the April 2010 submission is problematic. Noting that submittal of these plans implies the selection of specific hardware and systems, APTA asserted that such submission is not possible given the current state of development of industry standards by the Railroad Electronics Standards Committee (RESC). Without available industry standards, APTA asserted that it would be impossible for the vast majority of public agencies that operate passenger rail systems to identify and contract with vendors or suppliers by the April 2010 deadline. Even though the freight railroads may have selected a proprietary technology as a basis for their PTC implementation, the competition standards for publicly funded contracts limit the ability of public agencies to follow a similar procurement strategy. Additionally, the lack of specific hardware and system standards to support interoperability further limits the ability of public agencies to enter into contracts by April 2010. Thus, if required to submit PTCDP and PTCSP documents by April 16, 2010, the documents would, of necessity, be incomplete and unacceptable.

APTA further claimed that the sole legislative requirement tied to April 2010 is for submission of the PTCIP. Thus, APTA believes FRA should allow submission of the PTCIP in a "product neutral" fashion to meet the statutory deadline and should defer submission of the PTCDP and PTCSP to allow flexibility and avoid incomplete submissions and the compilation and review of documents that cannot be approved.

Amtrak similarly expressed concern with the inadequate amount of time necessary to prepare the PTCIPs for its own NEC and Michigan Line and for the Class II and III railroads over which Amtrak operates (to the extent that those lines are not found to constitute other than "main lines") and to review those PTCIPs submitted by the Class I railroads and develop full PTCDPs. Because of the severe burden on Amtrak's resources, Amtrak recommended that the filing deadline for PTCDPs be extended at least 9 months beyond April 16, 2010.

As a government agency, FRA clearly understands the position faced by these railroads. However, FRA believes that a meaningful implementation plan cannot be created if a railroad has not identified and does not understand the technology it proposes to implement. Without this knowledge, it is not possible to have any informed discourse on system

interoperability and implementation scheduling between railroads, vendors or suppliers, and FRA. Therefore, in this final rule, FRA has provided several mechanisms that eliminate the need for each railroad to submit a PTCDP for a proposed PTC system, while still providing FRA sufficient information to carry out its regulatory responsibilities.

One such mechanism, as specified in paragraph (b) is through the use of a Type Approval. The Type Approval is a number assigned to a particular off-the-shelf or modified PTC system product—described in a PTCDP in accordance with § 236.1013—indicating FRA's belief that the product could fulfill the requirements of subpart I. FRA's issuance of a Type Approval does not mean that the product will meet the requirements of subpart I. The Type Approval applies to the technology designed and developed, but not yet implemented, and does not bestow any ownership or other similar interests or rights to any railroad. Each Type Approval number remains under the control of the FRA, and can be issued or revoked in accordance with this subpart.

FRA expects the Type Approval process to provide a variety of benefits to FRA and the industry. If a railroad submits a PTCDP describing a PTC system, and the PTC system receives a Type Approval, then other railroads intending to use the same PTC system without variances may, in accordance with paragraph (b)(1), simply rely on the Type Approval number without having to file a separate PTCDP. While the railroad filing the PTCDP must expend resources to develop and submit the PTCDP, all other railroads using the same PTC system would not. This should not only provide significant cost and time savings for a number of railroads, but should remove a significant level of redundancy from the approval process that is currently inherent in subpart H.

If, however, a railroad intends to use a modified version of a PTC system that has already received a Type Approval number, and the variances between the two systems are of a safety-critical nature, the railroad must submit a new PTCDP. The railroad may submit a new PTCDP that fully complies with the content requirements under § 236.1013 or supply a Type Approval number for the other PTC system upon which the modified PTC system will rely and a document that fulfills the content requirements under § 236.1013 with respect to the safety-critical variances between the system described within the original PTCDP and the system as modified.

This final rule does not preclude a railroad from submitting its PTCDP before its PTCIP for FRA review and approval. FRA encourages an earlier submission of the PTCDP to further reduce the required regulatory effort necessary to review the PTCIP and PTCDP if submitted together. More importantly, it would present an opportunity for FRA to issue a Type Approval for the proposed PTC system before April 16, 2010, thus providing other railroads intending to use the same or similar PTC system the opportunity to leverage off of the work already performed by simply submitting the Type Approval and—in the event of any variances—a much less burdensome PTCDP. FRA also believes this regulatory procedure may incentivize railroads using the same or similar PTC system to jointly develop and submit a PTCDP, thus further reducing the paperwork burden on FRA and the industry as a whole and increasing confidence in the interoperability between systems.

Vendors believe that FRA should type approve specific components, so the vendor may sell the type approved products. FRA believes that such a request may be based on the mistaken belief that FRA has adopted the FAA aviation model of type certifying aircraft frames, aircraft engines, and propellers (*see* 14 CFR part 21, subparts B–G). This is not, however, the case. FRA has adopted some elements of the FAA Airworthiness Certificate process (*see* 14 CFR part 21, subpart H), which addresses the suitability of an entire aircraft for a particular purpose. FRA will apply a similar standard and certify only complete PTC systems.

Another mechanism FRA is adding that will enable railroads to meet their statutory obligations in preparing and submitting a PTCIP, while providing enough information to FRA to facilitate FRA's evaluation of the technical feasibility of the PTCIP, can be found in the provisions of paragraph (c).

Paragraph (c) allows a railroad to file an abbreviated PTCDP, called a Notice of Product Intent (NPI), with their PTCIP. The NPI, detailed in § 236.1013(e), is handled in a manner similar to a full PTCDP, with certain key exceptions. First, a PTCIP may be submitted with a NPI in lieu of either a complete PTCDP (or reference to an approved Type Approval). Any PTCIP submitted with an NPI and approved by FRA will only receive "Provisional Approval." The Provisional Approval will only be valid for a maximum period of 270 days (approximately 9 months), by which time a railroad must resubmit its PTCIP with a complete PTCDP or reference to an approved Type Approval. If the railroad submits the updated PTCIP within that period, FRA will treat the updated filing in the same manner as FRA would have treated the original PTCIP submission. If the railroad fails to update the PTCIP before the end of that period, the Provisional Approval will automatically be revoked, and the revocation will be considered as retroactive to the original due date. FRA has no intention of extending any Provisional Approval beyond the 270 day period and will not entertain requests to that effect. Each railroad is expected to be capable of fully defining the product they intend to use within the 270 day period. Use of an NPI by a railroad allows for incremental, albeit limited, submission of the PTCDP.

Railroads would still be required to fully describe their plans for the use and completion of the PTCDP in their PTCIPs. Having the PTCDP development extend beyond the PTCIP due date may be beneficial to the entire industry, since it allows for practical development of PTC systems for railroads with unique technical requirements or financing restrictions while potentially increasing the number of viable suppliers, products, and systems. In addition to being practical, this approach would further the industry interests of having a more even distribution of the workload for commuter rail agencies and for FRA staff. Additionally, it enhances the ability of railroads to provide sufficient detail in the PTCDP, due to greater confidence in the overall design solution, thereby reducing the need for revision and the associated burden on FRA and railroad staff.

FRA clearly recognizes, regardless of the approach taken, that a vendor or supplier to the railroad may prepare part, if not all, of the required documentation. Notwithstanding that fact, the railroad remains responsible for the completeness and accuracy of any documentation submitted. For instance, FRA may find that the PTCDP does not adequately conform to this subpart or otherwise has insufficient information to justify approval. FRA may also determine that there are issues raised by the PTCDP that would adversely affect the ability of FRA to eventually certify the system. If such a situation were to arise, the railroad would need to address the issues and resubmit the documentation for FRA approval.

The third mechanism available to railroads is described in paragraph (d). This paragraph allows railroads the opportunity to file a Request for Expedited Certification (REC) in lieu of an approved PTCDP or a Type

Approval, and the subsequent PTCSP developed in accordance with § 236.1015 in order to receive PTC System Certification. A REC applies only to PTC systems that have already been in revenue service and meet the criteria of § 236.1031(a). If a PTC system is not eligible for expedited certification, the railroad will be limited to the options presented in paragraphs (b) and (c).

Paragraph (e) requires that each PTCIP, PTCDP, and PTCSP must comply with the content requirements in §§ 236.1011, 236.1013, and 236.1015, respectively. If the submissions do not comply with their respective regulatory requirements, then they may not be approved. Without approval, a PTC system may not receive a Type Approval or PTC System Certification. Ultimately, PTC System Certification is FRA's formal recognition that the PTC system, as described and implemented, meets the statutory requirements and the provisions of subpart I. It does not imply FRA endorsement or approval of the PTC system itself.

In the interest of an open market, FRA does not want to preclude the ability of PTC system suppliers outside of the United States from manufacturing PTC systems or selling them to the regulated railroads. However, in order to ensure the safety and reliability of those systems, FRA needs to be able to conduct an adequate review of the submitted plans. Accordingly, paragraph (e) requires that all materials submitted in accordance with this subpart be in the English language, or be translated into the English language and attested as true and correct.

Under subpart H of this part, a railroad may seek confidential treatment for what it deems to be trade secrets, commercial, or financial information that is privileged or confidential under Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(4), or the Trade Secrets Act, 18 U.S.C. 1905, and submit such requests in accordance with § 209.11. A railroad may request similar confidential treatment under subpart I. As with subpart H, should a FOIA request be made for information submitted under this rule for which the submitting party has requested confidential treatment, the submitting company will be notified of the request in accordance with the submitter consultation provisions of the Department's FOIA regulations (§ 7.17) and will be afforded the opportunity to submit detailed written objections to the release of information as provided for in § 7.17(a). FRA strongly encourages submitting parties to request confidential treatment only for those portions of documents that truly justify such treatment (i.e., trade secrets and security sensitive information).

While FRA continues to believe that there is no need at this time to substantially revise § 209.11, FRA will require an additional document to assist FRA in efficiently and correctly reviewing requests for confidentiality. Under § 209.11, a redacted and an unredacted copy of the same document must be submitted. When FRA review is required to determine whether confidentiality should be afforded, FRA personnel must painstakingly compare side-by-side the two versions to determine what information has been redacted. This process may result in information for which exemption from disclosure is being requested to be misidentified. To reduce this burden, and ensure that the intellectual property of the railroad and their suppliers is appropriately guarded, FRA requires that any material submitted for confidential treatment under subpart I and § 209.11 include a third version that would indicate, without fully obscuring, the redacted portions for which protection is requested. For instance, in order to indicate without obscuring the plan's redacted portions, the railroad may use the highlighting, underlining, or strikethrough functions of its word processing program. This document will also be treated as confidential under § 209.11. FRA could amend § 209.11 to include this requirement. However, FRA does not believe it to be necessary at this time.

FRA is allowing the submission of an adequate GIS shapefile to fulfill some of the PTCIP content requirements under § 236.1011. However, with respect to requesting confidential treatment of specific information contained in a GIS shapefile, which includes primarily map data, FRA recognizes that visually blocking out the information would defeat the purpose. For instance, a black dot over a particular map location, or a black line over a particular route, would actually reveal the location. Thus, FRA expects that a railroad seeking confidential treatment for portions of a GIS shapefile will submit three versions of the shapefile to comply with paragraph (e). Alternatively, a single shapefile can include three separate layers each representing the three levels of confidentiality, with specific instructions indicating which elements are being displayed and how to handle the file for confidentiality purposes. FRA also expects that the version for public consumption would not include the information for which the railroad is seeking confidential treatment.

NICTD strongly urged FRA to only accept PTCIPs that provided full public disclosure of all the information needed to obtain components from multiple suppliers, including message interface standards, functional allocation for each subsystem, and safety allocation for each subsystem (e.g., identifying which hazards and safety-critical assumptions are made for each subsystem). NICTD asserted that it was not requesting proprietary information for any subsystems, but merely the ability to utilize alternative sources to fulfill the subsystem requirements within the overall PTC system. According to NICTD, this would substantially improve the likelihood of commuter railroads being able to obtain components from the multiple suppliers that are currently more than willing to develop components that will safely operate with other systems. Moreover, NICTD stated that this would facilitate compliance with interoperability requirements, as the knowledge gained would simplify development of interoperable systems and reduce procurement delays. Amtrak agrees on the need for full public disclosure and asserts that it should be able to review and comment on the PTCIPs of the Class I railroads. FRA understands these positions, but FRA will not make any flat pronouncements about the confidentiality of information it has not yet received.

FRA expects that FRA-monitored laboratory or field testing or an independent third party assessment may be necessary to support conclusions made and included in a railroad's submitted PTCDP or PTCSP. This issue is addressed in paragraph (f). The procedural requirements to effectuate either of those requirements can be found in §§ 236.1035 and § 236.1017, respectively.

Paragraph (g) makes clear that FRA approval of a plan submitted under subpart I may be contingent upon any number of factors and that, once the plan is approved, FRA maintains the authority to modify or revoke the resulting Type Approval or PTC System Certification. Under paragraph (g)(1), FRA reserves the right to attach additional requirements as a condition for approval of a PTCIP, or issuance of a Type Approval or PTC System Certification. In the preparation of any of these plans, railroads may have inadvertently failed to fully address hazards and risks associated with all of these components.

FRA believes that paragraph (g)(1) will make the regulatory process more efficient and stable. Rather than reject a railroad's plan completely, and

consequently delay the railroad's implementation of its PTC system, FRA would prefer to add additional conditions during the approval process to address these oversights. When determining whether to attach conditions to plan approval, FRA will consider whether: (1) The plan includes a well-defined and discrete technical or security issue that affects system safety; (2) the risk or safety significance of an issue can be adequately determined; (3) the issue affects public health and safety; (4) the issue is not already being processed under an existing program or process; and (5) the issue cannot be readily addressed through other regulatory programs and processes, existing regulations, policies, guidance, or voluntary industry initiatives.

Paragraph (g)(2) provides FRA the right to reconsider an issued Type Approval or PTC System Certification as a consequence of the discovery of potential error, fraud or new information regarding system safety that was not previously identified. FRA issuance of each Type Approval or PTC System Certification under performance-based regulations assumes that the model of the train control system and its associated probabilistic data adequately accounts for the behavior of all design features of the system that could contribute to system risk. Different system design approaches may result in different levels of detail introducing different approximations or errors associated with the safety performance. There are some characteristics for which modeling methods may not fully capture the behavior of the system, or there may be elements of the system for which historical performance data may not be currently available. These potential inconsistencies in the failure analysis could introduce significant variations between the predicted and actual performances. Because of the design complexity associated with train control systems, FRA recognizes that these inconsistencies may not be the result of deliberate acts by any individuals or organizations, but simply reflect the level of analytical detail, the availability of comprehensive information, the qualification and experience of the analyst team, and the railroad's and FRA's resource limitations.

In paragraph (g)(3), FRA indicates that the railroad may be allowed to continue operations using the system, although such continued operations may have special conditions attached to mitigate any adverse consequences. It is FRA's intent, to the maximum extent possible and when consistent with safety, to assist railroads in keeping the systems in operation. FRA expects that, if it places a condition on PTC system operations, each railroad will have a predefined process and procedure in place that would allow continued railroad operations, albeit under reduced capability, until appropriate mitigations are in place, and the system can be restored to full operation. In certain dire situations, FRA may actually order the suspension or discontinuation of operations until the root cause of the situation is understood and adequate mitigations are in place. FRA believes that suspending a Type Approval or a PTC System Certification pending a more detailed analysis of the situation may be appropriate, and that any such suspension must be done without prejudice. FRA expects to take such an action only in the most extreme circumstances and after consultation with the affected parties.

After reconsidering its issuance of a Type Approval or PTC System Certification, under paragraph (g)(4), FRA may either dismiss its reconsideration and continue to recognize the existing FRA approved Type Approval or PTC System Certification, allow continued operations with certain conditions attached, or order the railroad to cease applicable operations by revoking its Type Approval or PTC System Certification. If FRA dismisses its reconsideration and continues to recognize the Type Approval, any conditions required during the reconsideration period would no longer be applicable. If FRA will allow continued operations, FRA may order the continuation of conditions that were required during the reconsideration period or impose additional conditions. FRA expects that revocation of a Type Approval or PTC System Certification would occur in very narrow circumstances, where the risks to safety appear insurmountable. Regrettably, there may be a few situations in which the inconsistencies are the result of deliberate fraudulent representations. In such situations, FRA may also seek criminal or civil penalties against the entities involved.

APTA submitted comments asserting that the NPRM offered minimal guidance on what criteria FRA will use in accepting or rejecting a railroad's plan. Therefore, APTA asserted that FRA should draft and vet criteria that accomplishes the basic purposes of PTC, while allowing for innovation in meeting the performance requirements envisioned in the proposed regulation. FRA believes that this concern arises from the fact that this regulation, like subpart H of this part, is a performance-based rule. While performance-based rules provide maximum flexibility to railroads and vendors or suppliers, they also introduce a degree of ambiguity.

FRA, in consultation with the RSAC PTC Working Group, has developed and vetted model templates for both the PTCIP and the risk prioritization scheme to provide some degree of specificity without unnecessary constraints. It should be carefully noted that these templates are, by necessity, general in nature and must be customized by the individual railroad to reflect its individual operations. What may be applicable for one railroad may not be applicable to another. FRA has also provided vetted guidance as to acceptable design, verification and validation, and human factors in the appendices to this part. Again, given the wide variety of potential solutions that may be adopted by various railroads, FRA is reluctant to provide more detailed guidance. However, if a PTCIP content requirement under § 236.1011 is fulfilled in a submitted GIS shapefile, then the written PTCIP should simply cross-reference appropriately.

Paragraph (h) relates to FRA's authority to conduct inspections to ensure that a railroad is in compliance with subpart I. FRA inspections may be required to determine whether a particular railroad has implemented a PTC system where necessary. For instance, FRA may need to confirm whether a track segment is subject to five million gross tons or more of annual railroad traffic, PIH materials, or passenger traffic. FRA may also need to inspect locomotives to determine whether they are equipped with a PTC onboard apparatus or to review locomotive logs to determine whether the locomotive has entered PTC territory. Paragraph (h) simply reiterates FRA's statutory authority to inspect the railroads and gather information necessary to enforce its regulations.

In order to maintain an open marketplace, this final rule has been drafted to allow domestic railroads to purchase PTC systems from outside of the United States. FRA recognizes that PTC systems have been used in revenue service across the globe and that acceptable products may be available in other countries. FRA also recognizes that such use may fall under the jurisdiction of a foreign regulatory entity much like FRA. Accordingly, under paragraph (i), in the event information relating to a particular PTC system has been certified under the auspices of a regulatory entity in a foreign government, FRA is willing to consider that information as independently Verified and Validated to support the

railroad's PTCSP development. The phrase "under the auspices" intends to reflect the possibility of certification contractually performed by a private entity on behalf of a foreign government agency. However, the foreign regulatory entity must be recognized by the Associate Administrator. A railroad seeking to enjoy the benefits of paragraph (i) must communicate that interest in its PTCSP, and is strongly encouraged to communicate such a desire well before submission of the PTCSP for approval.

Finally, the AAR noted that, unlike the precedent set by subpart H and the RSIA08, FRA did not include time frames for the agency to respond to the submissions of the PTCDP or PTCSP. The AAR urged FRA to include specific deadlines for these filings to ensure a common understanding of the time allotted to carry out the regulatory responsibilities. Accordingly, AAR proposed that FRA agree to respond within 60 and 120 days of the submission of a PTCDP and PTCSP, respectively. This 180-day approval period for both the development and safety plans is consistent with existing subpart H, which allows 180 days for approval of a product safety plan.

FRA agrees that the railroads need, for their planning purposes, an estimated amount of time within which FRA will provide a response regarding the acceptability of their PTCSP submission. FRA also believes that this information would be appropriately placed in § 236.1009. Accordingly, FRA is adding paragraph (j) to this section, which contains target deadlines for FRA review. FRA will acknowledge receipt of a PTCDP or PTCSP submission within 30 days. Depending upon the complexity of the system and the amount of participation by FRA in the PTCDP or PTCSP development process, FRA will endeavor to approve, approve with conditions, or deny approval of the PTCDP and PTCSP within 60 and 180 days, respectively. If FRA is unable to complete its review of the PTCDP or PTCSP within these estimated time periods, FRA will advise the submitter accordingly.

When reviewing the procedural requirements contained in the proposed rule, the RLO expressed concern that this streamlined process may result in degradation of safety and significant concern with the ability of FRA to adequately staff the oversight process with a sufficient number of people with the requisite skill sets. FRA appreciates these concerns, and is undertaking plans to ensure that this new process does not result in any degradation of safety. FRA will continue to apply the same technical standards as used in earlier PTC system approvals. FRA has also taken steps to ensure that it has sufficient people, with the appropriate skills, to ensure proper safety oversight of this new process. A task analysis to determine the desired skills, as well as appropriate placement within the agency of additional staff members has been completed The RSIA08 authorizes an additional 200 full time positions to FRA, and FRA is ready to recruit the necessary technical staff as appropriations permit.

Section 236.1011 PTC Implementation Plan Content Requirements

This section describes the minimum required contents of a PTC Implementation Plan. A PTCIP is a railroad's plan for complying with the installation of mandatory PTC systems required by RSIA08. The PTCIP consists of implementation schedules, narratives, rules, technical documentation, and relevant excerpts of agreements that an individual railroad will use to complete mandatory PTC implementation. FRA will measure the railroad's progress in meeting the required implementation date based on the schedule and other information in the PTCIP. While the final rule does not specify or mandate any specific organization for the PTCIP, it must at least clearly indicate which portions intend to address compliance with the various plan requirements under this section. The PTCIP must also clearly identify each referenced document and either include a copy of each document (or its applicable excerpt) or indicate where FRA and the public may view that document. Should FRA not be able to readily determine adequate response to the required information, FRA will assume that the information has not been submitted, and will handle the document accordingly. The lack of the required information may result in FRA's disapproval of a PTCIP. To facilitate timely and successful submittals, FRA, through assistance from a PTCIP Task Force drawn from the PTC Working Group, developed a template that can be used to format the documents that must be submitted. FRA, however, wishes to emphasize that the use of such a template is strictly voluntary, and encourages railroads to prepare and submit the documents in the structure most economical for the railroad. FRA does not believe it is necessary to require that the railroads expend their limited resources in reformatting documents when such an activity adds no real value. However, while the template may be a useful tool, in light of the various forms a PTCIP may be required to take and the type of system the railroad intends to implement, complete adherence to the template will not guarantee FRA approval of the submitted PTCIP.

FRA expects each PTCIP to include various highly specific and descriptive elements relating to each railroad's infrastructure and operations. FRA recognizes manual assembly of each piece of data into a PTCIP may be exceptionally onerous and time consuming and may make the PTCIP prone to errors. In light of the foregoing, and due to the statutory requirement that Congress be apprised on the progress of the railroad carriers in implementing their PTC systems, FRA believes that electronic submission of much of this information may be warranted and preferred. To facilitate collection of this data, FRA will accept the submission of this data in electronic format.

FRA believes that the preferred, least costly, and least error-prone method to comply with this section is for railroads to submit an electronic geographic digital system map containing the aforementioned segment attribute information in shapefile format, which is a data format structure compatible with most Geographic Information System (GIS) software packages. Using GIS provides an efficient means for organizing basic transportation-related geographic data to facilitate the input, analysis, and display of transport networks. Railways around the world rely on GIS to manage key information for rail operations, maintenance, asset management, and decision support systems. FRA believes that the railroads may have already identified track segments, and their physical and operational characteristics, in shapefile format. Accordingly, each shapefile document must provide the following identifiable information for each track segment: Owning railroad(s); distance; signal system; track class; subdivision; number and location of sidings; maximum allowable speed; number and location of mainline tracks; annual volume of gross tonnage; annual number of cars carrying hazmat; annual number of cars carrying PIH; passenger traffic volume; average daily through trains; WIUs; switches; and at-grade rail-to-rail crossings.

Paragraph (a) cites the minimum requirements that must be addressed in the PTCIP. However, given the wide diversity of railroads and their operating environments, FRA recognizes that additional factors may arise that reflect the unique operational characteristics of a particular railroad. It is beholden to each railroad to carefully analyze the

circumstances associated with its operations and address any of these elements that may affect implementation planning. During its review of a PTCIP, FRA will carefully evaluate the plan to determine if the submitting railroad(s) have indeed addressed unique railroad issues. FRA wishes to make clear that in those situations, where additional factors that are unique to a railroad have not been addressed, FRA will return the PTCIP unapproved.

Paragraph (a)(1) requires that the railroad describe the functional requirements that the technology will employ in its PTC system. Here, FRA broadly defines the term "technology" to include all applicable tools, machines, methods, and techniques.

Paragraph (a)(2) requires that the railroad describe how it will address fulfilling the requirements associated with the submittal of an NPI (*see* 49 CFR 236.1009(c)) temporarily in lieu of a PTCDP and the requirements associated with a PTCSP (*see* 49 CFR 236.1009(d)).

In RSIA08, § 20157(a)(2) requires that a railroad describe how it will "provide for interoperability of the system with movements of trains of other railroad carriers over its lines."

Practically speaking, this means that each locomotive operating within PTC territory must be able to communicate with, and respond to, the PTC systems installed on each PTC territory's track and signal system, except in those limited situations established elsewhere in this final rule. For this reason, paragraph (a)(3) requires that the PTCIP describe how the PTC system will provide for interoperability of the system between the host and all tenant railroads on the lines required to be equipped with PTC systems under this subpart.

Interoperability means the ability of diverse systems and organizations to work together (inter-operate), taking into account the technical, operational, and organizational factors that may impact system-to-system performance. FRA expects each PTC system required by subpart I to exhibit syntactic interoperability—so that it may successfully communicate and exchange data with other PTC systems—and semantic interoperability—so that it may automatically, accurately, and meaningfully interpret the exchanged information to prove useful to the end user of each communicating PTC system. To achieve semantic interoperability, both sides must defer to a common information exchange reference model. In other words, the content of the information sent must be the same as what is received and understood. Taking syntactic and semantic interoperability together, FRA expects each PTC system to provide services to, and accept services from, other PTC systems and to use those services exchanged to enable the PTC systems to operate effectively together and to provide the intended results. The degree of interoperability should be defined in the PTCIP when referring to specific cases.

Interoperability is achieved through four interrelated means: Product testing, industry and community partnership, common technology and intellectual property, and standard implementation.

Product testing includes conformance testing and product comparison. Conformance testing ensures that the product complies with an appropriate standard. FRA recognizes that certain standards attempt to create a framework that would result in the development of the same end product. However, many standards apply only to core elements and allow developers to enhance or otherwise modify products as long as they adhere to those core elements. Thus, if an end product is developed in different ways to conform to the same standard, there may still be discrepancies between each instantiation of the end product due to the existence of variables outside of the core elements. Accordingly, FRA believes that comparison testing must also occur to ensure that each instantiation of the same product, regardless of the means upon which it is created to meet the same standard, is ultimately identical. In regards to PTC systems, such comparison testing must occur on all portions that relate to each system's interoperability with other systems. Thus, it is also important that the PTC system be formally tested in a production scenario—as they will be finally implemented—to ensure that it will actually intercommunicate and interoperate with other PTC systems as advertised and intended.

To reach interoperability between the various applicable PTC systems, each PTCDP must also show that the systems share common product engineering. Product engineering refers to the common standard, or a sub-profile thereof, as defined by the industry and community partnerships, specifically intended to achieve interoperability. Without common product engineering, the systems will be unable to intercommunicate or otherwise interact as necessary to comply with the proposed rule.

FRA expects that each interoperability standard for PTC systems will be developed by a partnership between various industry participants. Industry and community partnerships, either domestic or international, usually sponsor standard workgroups to define a common standard to provide system intercommunications for a specific purpose. At times, an industry or community will sub-profile an existing standard produced by another organization to reduce options and thus making interoperability more achievable. Thus, in each PTCDP, the railroad must discuss how it developed or adopted a standard commonly accepted by that partnership.

In the proposed rule, FRA noted that means of achieving interoperability include having the various entities involved using the same PTC system product or obtaining its components from the same developer. In its comments, NICTD expressed its belief that this conclusion does not meet RSIA08's interoperability requirements. According to NICTD, while the freight railroads are free to choose their own supplier, their essential monopoly power has the potential to force commuter railroads to use the same supplier and thereby prevent commuter railroads from meeting the requirement to use open competitive bids from multiple suppliers for a system. Since the quantity of units required from the commuter railroads is substantially less than those required for the freight railroads, NICTD asserts this greatly reduces the ability of the commuter railroads to obtain system components that meet their specific operating needs, as the single supplier will not have the resources available to support those needs. NICTD also believes that this is in direct contrast with the FRA statement relating to performance standards: "FRA intends the proposed rule to accelerate the promotion of, and not hinder, cost effective technological innovation by encouraging an efficient utilization of resources, an increased level of competition, and more innovative user applications and technological developments."

Safetran also believes that each railroad should be free to choose a supplier. According to Safetran, the freight railroads through their implementation and development plans could specify a specific product or supplier preventing other railroads from using open competitive bids from multiple suppliers for a system and achieving the cost savings of competitive bidding. Safetran urges FRA to accept PTCIPs and PTCDPs that require public disclosure of all information needed to enable development of PTC components from multiple suppliers. This does not require disclosure of proprietary

information, but does require disclosure of interface specifications as well as required functional attributes, assigned safety attributes and stimulus/response attributes.

While FRA does not necessarily require this approach—since the agency seeks to maintain an open and competitive marketplace—FRA believes that this is a suitable means to achieve interoperability. This technique may provide similar technical results when using PTC system products from different vendors or suppliers relying on the same intellectual property. FRA recognizes that certain developers with an intellectual property interest in a particular technology may provide a non-exclusive license of its intellectual property to another entity so that the licensee may introduce into the marketplace a substantially similar product reliant on that intellectual property. In such a case, FRA foresees that the use of a common PTC system technology—even if it is proprietary to a single or multiple entities and licensed to railroads—could reduce the variability between components, thus providing for a more efficient means to achieve interoperability.

In order for interoperability to actually occur between multiple entities' PTC systems, there must be some standard to which they all adhere. Thus, FRA also expects that each PTCDP will provide assurances of a common interoperability standard agreed to between all entities using PTC systems that must interoperate.

Since each of these interrelated means has an important role in reducing variability in intercommunication, each railroad's PTCIP must clearly describe the elements required under paragraph (a)(1)–(3).

During review of the NPRM, AAR noted paragraph (a)(3)(i) had not been updated to reflect an RSAC agreement. FRA agrees and has revised paragraph (a)(3)(i) to include the language: "include relevant provisions of agreements, executed by all applicable railroads, in place to achieve interoperability."

Much of the remaining information required in a PTCIP under this final rule relies on the location, length, and characteristics of each track segment. Therefore, a common understanding of a track segment is necessary. A track is the main designation for describing a physical linear portion of the network. Each line of railroad has a station location referencing system, which serves to locate inventory features and defects along the length of the track. Because some tracks can be very long, track or line segments are established to divide the track into smaller "management units." Typically, segment's boundaries are established at point of switch (POS) locations, but may also be located at mile markers, grade crossings, or other readily identifiable locations. Inspection, condition assessment, and maintenance planning is performed individually on each segment. After the track network hierarchy is established, the attribute information associated with each track is defined. This attribute information describes the track layout (e.g., curves and grades), the track structure (e.g., rail weights and tie specifications), track clearance issues, and other track related items such as turnouts, rail-to-rail at-grade crossings, highway-rail grade crossings, drainage culverts, and bridges. Inventory information about these track attributes can be quite detailed. The benefits of a complete and accurate track inventory provides a record of the track network's properties and information about the existing track materials at the specific locations when maintenance or repair is necessary.

Paragraphs (a)(4) and (a)(5) require the railroad to put its entire implementation plan into an understandable context, primarily as it relates to the sequence and schedule of track segment implementation events. Under RSIA08, 49 U.S.C. 20157(a)(2), Congress requires each subject railroad to describe in its PTCIP how it shall, to the extent practical, implement the PTC system in a manner that addresses areas of greater risk before areas of lesser risk. Accordingly, under paragraph (a)(4), the PTCIP must discuss the railroad's areas of risk and the criteria by which these risks were evaluated and prioritized for PTC system implementation. To this end, the railroad must clearly identify all track segments that must be equipped, the basis for that decision for each segment (which might be done by categories of segments), and, as provided in paragraph (a)(5), the dates that implementation of each segment will be completed, taking into account the time necessary to fulfill the procedural requirements related to PTCSP submission, review, and approval. At a minimum, the deployment decisions must be based on segment traffic characteristics such as passenger and freight traffic volumes, the quantity of PIH and other hazardous materials, current methods of operations, existence of block signals and other traditional train control technologies, the number and class of tracks, authorized and allowable speeds for each segment, and other unusual characteristics that may adversely impact safety, such as unusual ruling grades and other track geometries. In cases where deployment of the PTC system cannot be accomplished in order of areas with the greatest risk to areas with the least risk, paragraph (a)(9) requires that the railroad explain why such a deployment was not practical and the steps that will be taken to minimize adverse consequences to the public until the track segment can be equipped.

Paragraphs (a)(6) and (a)(7) require the PTCIP to include information regarding the rolling stock and wayside devices that will be equipped with the appropriate PTC technology. For a PTC system to work as intended, PTC system components must be installed and operated in all applicable offices and on all applicable onboard and wayside subsystems. Accordingly, the PTCIP must identify which technologies will be installed on each subsystem and when they are scheduled to be installed.

Under paragraph (a)(6), each host railroad filing the PTCIP must include a comprehensive list of all rolling stock upon which a PTC onboard apparatus must be operative. FRA understands that, in most situations, the rolling stock referenced in paragraph (a)(6) may only apply to controlling locomotives. However, in the interest of not hindering creative technological innovations, FRA presumes the possibility that PTC system technology may also be attached to additional rolling stock to provide other functions, including determining train capacity and length or providing certain acceptable and novel train controls. To be kept apprised of these possibilities, FRA is requiring in paragraph (a)(6) that each PTCIP include a list of all rolling stock equipped with PTC technology. FRA believes that the PTCIP should also identify any risks associated with trains operated by tenant railroads and not equipped with PTC system technology and the efforts that the host railroad has made to establish the extent of that risk. FRA understands that a host railroad may not receive cooperation from a tenant railroad in collecting the necessary rolling stock information. Nevertheless, FRA expects each host railroad to make a good faith effort. Identification of those tenant railroads from whom the host railroad attempted to obtain the requisite and applicable information from, but failed to address a host railroad's written request, may establish a good faith effort by the host railroad.

One railroad has requested that FRA eliminate the requirement for a power (locomotive) equipage plan in the PTCIP to avoid the need for updates to the

PTCIP. Instead of requiring such a plan, the railroad recommends that FRA rely on railroad scheduling and good faith effort to drive installations during the period 2012 through 2015. FRA carefully considered this proposal, but has rejected it. Without an understanding of what portion of the locomotive fleet has been equipped and what portion remains to be equipped, FRA cannot accurately assess the extent to which PTC could be used in revenue service. FRA is required to make regular reports to Congress on the status of industry compliance and the operational capability of existing PTC systems. Since PTC is an integrated system, which requires both wayside and onboard equipment to be installed and operational, evaluation of the state of system deployment requires knowledge of the state of both subsystems.

Furthermore, the elimination of the equipage plan does not appear to provide any significant advantages to the railroad. Regardless of whether the railroad is required to maintain an equipage schedule for the PTCIP, or rely on railroad scheduling and good faith efforts, the railroad will still need to maintain some type of schedule to ensure the completion of required PTC installations by 2015. FRA believes that formalizing the schedule provides a planning tool that should facilitate completion of the installation process. If the equipage plan were unalterable, FRA could understand the railroad's concerns about being locked into an unrealistic and unobtainable schedule. However, FRA believes these concerns are unfounded because any plan in the PTCIP, including the equipage plan, can be adjusted to reflect changing circumstances.

Paragraph (a)(7) requires the railroad to provide the number of wayside devices required for each track segment in its PTCIP and an installation schedule for the completion of wayside equipment installation by December 31, 2015. The selection and identification of a technology discussed in the PTCIP will also, to a great extent, determine the distribution of the functional behaviors of each of the PTC subsystems (e.g., office, wayside, communications, and back office). The WIU is a type of remote terminal unit (RTU) that is part of a larger PTC system, which is a type of SCADA. As a whole, the safe and efficient operation of a SCADA—a centralized system that covers large areas, monitors and control systems, and passes status information from, and operational commands to, RTUs—is largely dependent on the ability of each of its RTUs to accurately receive and distribute the required information. As such, a PTC system cannot properly operate without properly functioning WIUs to provide and receive status information and react appropriately to control information.

It is commonly understood that a WIU device is capable of communicating directly to the office, train, or other wayside unit. FRA recognizes that there may not be the same number of WIUs and devices that they monitor. Depending on the architecture and technology used, a single WIU may communicate the necessary information as it relates to multiple devices. FRA is comfortable with this type of consolidation provided that, in the event of a failure of any one of the devices being monitored, the most restrictive condition will be transmitted to the train or office, except where the system may uniquely identify the failed device in a manner that will provide safe movement of the train when it reaches the subject location.

Because of the critical role that WIU's play in the proper and safe operation of PTC systems, paragraph (a)(7) requires that the railroad identify the number of WIU's required to be installed on any given track segment and the schedule for installing the WIU's associated with that segment. This information is necessary to fully and meaningfully fulfill the RSIA08 requirement that by December 31, 2012, Congress shall receive a report on the progress of the railroad carriers in implementing PTC systems. *See* 49 U.S.C. 20157(d). To comply with this statutory requirement, each railroad must determine the number of WIUs it will need to procure and the location—as defined by the applicable subdivision—where each WIU will be installed. FRA believes that, if a railroad does not perform these traditional engineering tasks, it will risk exceeding the statutory implementation deadline of December 31, 2015. FRA considers this information an integral part of the PTCIP that must be submitted to FRA for approval.

NYSMTA asserts that the requirement in paragraph (a)(7) to include the quantities of devices for each track segment in the PTCIP requires prior completion of the full design of the PTC system. However, NYSMTA asserts that it is not feasible to complete all of the survey and design necessary to meet this requirement by April 2010. Therefore, NYSMTA suggested that the requirement be reworded to read as follows: "Identification of each PTC subsystem and major assembly, and an estimated number of each required for each line segment."

FRA recognizes the potential for technological improvements that may modify the number and types of WIUs required. FRA also recognizes that during testing and installation, it may be discovered that additional WIU installations may be necessary. In either case, the railroad will be required to submit an RFA in accordance with § 236.1021 indicating how the railroad intends to appropriately revise its schedule to reflect the resulting necessary changes. Nevertheless, regardless of whether FRA approves or disapproves the RFA, if a railroad is required to submit its PTCIP by April 16, 2010, implementation must still be completed by the statutory deadline of December 31, 2015.

One railroad recommended that paragraph (a)(7) should be revised to require railroads to identify each PTC subsystem and assembly and the estimated number of each subsystem required for each track segment. However, FRA does not believe that this change is required. First, FRA believes that the discussion of WIU requirements in paragraph (a)(7) is already generalized and implementation independent. Second, this final rule already provides for corrections in inventory count by submission of an RFA with the revised count. Therefore, FRA has not adopted this recommendation.

Under paragraph (a)(8), each railroad must also identify in its PTCIP which of its track segments are either main line or not main line. This list must be made based solely on the statutory and regulatory definitions regardless of whether FRA may later deem a track segment as other than main line. If a railroad has a main line that it believes should be considered not main line, it may file with the PTCIP a main line track exception addendum (MTEA) in accordance with § 236.1019, as further discussed below. Each track segment included in the MTEA should be indicated on the list required under paragraph (a)(8), so that the PTCIP accounts for each track segment with an appropriate cross-reference to the subject MTEA.

Paragraph (a)(9) requires that the plan call out the basis for a railroad's determination that risk-based prioritization required by paragraph (a)(4) of this section is not practical. FRA recognizes that there may be situations where risk is somewhat evenly distributed and where other factors related to practical considerations—such as the need to establish reliable operation of the system in less complex environments before installation in more complex

environments—may be the prudent course. However, the burden of establishing the reasonableness of this approach would be on the railroad, starting with a showing that risk does not vary substantially among the track segments in question.

As mentioned elsewhere in this document, various railroads incorrectly asserted that they would not have to "turn on" their respective PTC systems until December 31, 2015. FRA recognizes that, although an approved PTCIP will include a progressive roll-out schedule, a PTC system cannot be operated in revenue service until it receives PTC System Certification. To avoid the possibility of a delayed plan submission that would frustrate the schedule, FRA has added paragraph (a)(10), which requires the railroad(s) to set its own due dates for such submissions. The ultimate due date, of course, is subject to FRA's approval of the PTCIP.

Paragraph (b) of § 236.1011 contains provisions related to further PTC deployment by the Class I railroads. As noted in the NPRM, the specific characteristics of the PTC route structure, with the focus on PIH traffic as an indicator of risk, was a late addition to the bill that would become RSIA08, not having appeared in either the House or Senate bills until the final package was assembled using consultations between the committee staffs in lieu of a formal committee of conference. Although the statutory construct (Class I rail line with 5 million gross tons and some PIH materials) adequately defines most of the core of the national freight rail system, it is a construct that will introduce distortions at both ends of the spectrum of risk.

On one hand, a line with a maximum speed limit of 25 miles per hour ending at a grain elevator that receives a few cars of anhydrous ammonia per year is a "main line" if it has at least 5 million gross tons of traffic (a very low threshold for a Class I railroad). This is not a line without risk, particularly if it lacks wayside signals, but FRA analysis shows that the potential for a catastrophic release from a pressure tank car is very low at an operating speed of 25 miles per hour, and the low tonnage is likely associated with relatively infrequent train movements—limiting the chance of a collision.

On the other end of the spectrum, lines with greater risk may go unaddressed. For instance, a line carrying perhaps a much higher level of train traffic and significant volumes of other hazardous materials at higher speeds, without any PIH or passenger traffic, would not be equipped. This example is not likely to be present to any significant extent under current conditions. However, should the Class I railroads raise freight rates making rail transportation prohibitively expensive and accordingly eliminating PIH traffic, the issue would be presented as a substantial one. Most of the transportation risk—including hazards to train crews and roadway workers and exposure to other hazardous materials if released—would remain, but not the few carloads of PIH. FRA believes that the intent of Congress with respect to deployment of PTC might be defeated, even though the minimum requirements related to passenger and PIH traffic would be satisfied. Other lines carrying very heavy volumes of bulk commodities such as coal and intermodal traffic may or may not include PIH traffic. Putting aside the risk associated with PIH materials, significant risk exists to train crews and persons in the immediate vicinity of the right-of-way if a collision or other PTC-preventable accident occurs. Any place on the national rail system is a potential roadway work zone, but special challenges are presented in providing for on-track safety where train movements are very frequent or operations are conducted on adjacent tracks.

Risk on the larger Class II and III railroads' lines is also a matter of concern, and the presence of significant numbers of Class I railroad trains on some of those properties presents the opportunity for further risk reduction, since over the coming years virtually all Class I railroad locomotives will be equipped with PTC onboard apparatus'. Examples include trackage and haulage rights retained over Class II and III railroads following asset sales in which the Class I railroads divested the subject lines. Other prominent examples involve switching and terminal railroads, the largest of which are owned and controlled by two or more Class I railroads and function, in effect, as extensions of their systems. Conrail Shared Assets, a large regional switching railroad that is owned by NS and CSXT and is comprised of major segments of the former Conrail, then a Class I railroad, is perhaps the classic example.

FRA notes that there has also been a trend, only recently and temporarily abated by the downturn in the economy, toward higher train counts on some non-signaled lines of the Class I railroads. On a train-mile basis, these operations present about twice the risk as similar operations on signalized lines. These safety gaps need to be filled; and, while most will be filled due to the presence of PIH traffic, FRA cannot verify that this is the case in every instance.

FRA concludes that the mandated deployment of PTC will leave some substantial gaps in the Class I route structure, including gaps in some major urban areas. FRA believes that these gaps will, over time, be "filled in" by voluntary actions of the Class I railroads as they establish the reliability of their PTC systems, verify effective interoperability, and begin to enjoy the safety and other business benefits from use of these systems. FRA fully understands both the desire of the labor stakeholders in the PTC Working Group to see a broader build-out of PTC systems than that "minimally" required by RSIA08 and the concerns of the Class I railroads' representatives who noted the extreme challenge associated with equipping tends of thousands of wayside units, some 20,000 locomotives, and their dispatching centers' back offices within the statutory implementation period.

The Congress recognized that all of these issues are legitimate concerns and so mandated the establishment of Risk Reduction Programs under the same legislation. Section 103 of RSIA08 specifically requires, within the Risk Reduction Program, a Technology Implementation Plan to address technology alternatives, including PTC. Accordingly, the PTC and Risk Reduction provisions in RSIA08 are clearly aligned in purpose; and there are also references in the technology plan elements of the Risk Reduction language that address installation of PTC by other railroads. Further, FRA has been charged with a separate rulemaking under section 406 of RSIA08 regarding risk in non-signaled (dark) territory that significantly overlaps the issue set in this rulemaking and the Risk Reduction section. Use of technologies that are integral to PTC systems constitute the best response to hazards associated with non-signaled lines. Switch position monitoring systems, track integrity circuits, digital data links and other technology used to address dark territory issues should be and, as presently conceived, are forward-compatible with PTC. In paragraph (b), FRA intends to dovetail these requirements by requiring that each Class I railroad include in its PTCIP deployment strategies indicating how it will approach the further build-out of full PTC, or partial implementation of PTC (e.g., using PTC technology to prevent train-to-train collisions but perhaps not monitoring all switches in the territory; or using PTC to protect movements of the Class I over a

switching or terminal railroad without initially requiring all controlling locomotives of the switching or terminal railroad to be equipped). These railroads would then be required to include in the technology elements of their initial Risk Reduction plans a specification of which lines will be equipped and with what PTC system elements. Paragraph (b) makes clear that there would be no expectation regarding additional lines being equipped until those mandated by subpart I have been addressed. FRA shares the view of the Class I railroads and the passenger railroads that the December 31, 2015, deadline already presents a substantial challenge for railroads, suppliers, and the employees affected.

One railroad objected to the requirement to describe the strategy and plan for complete build out and characterized it as premature, unwarranted, and inconsistent with the RSIA08. FRA strongly disagrees for the reasons previously set forth and has retained the requirement specified in paragraph (b).

Paragraph (c) codifies in regulation the statutory mandate that FRA review the PTCIP and determine, within 90 days upon receipt of the plan, whether to provide its approval or disapproval. FRA believes that it is also important to provide procedural rules to communicate approval or disapproval. Thus, under paragraph (c), any approval or disapproval of a PTCIP by FRA will be communicated by written notice. In the event that FRA disapproves of the PTCIP, the notice will also include a narrative explaining the reasons for disapproval. Once the railroad receives notification that its PTCIP has been disapproved by FRA, it will have 30 days to resubmit its PTCIP for review and approval. While FRA may provide assistance to remedy a faulty PTCIP, it is ultimately the railroad's responsibility and burden to develop and submit a PTCIP worthy of FRA approval. FRA understands the railroads' desire to extend the period of time for corrections of any issues in the PTCIP, especially in circumstances that the railroad believes are out of its control. However, the 30-day period is a statutory requirement. FRA has little leeway in this regard. FRA will try to work, within the limits of available FRA resources, with railroads in reviewing draft versions of the PTCIP before April 16, 2010. Early identification of potential issues should reduce, and possibly eliminate, rework that a railroad might need to address during the 30-day correction period. However, regardless of any early FRA participation in the document review cycle, the railroad is expected to submit a plan that requires little to no rework.

A number of comments were submitted objecting to the potential assessment of civil penalties based on a railroad's failure to timely file a PTCIP. While FRA is unwilling to revise its position on this issue, FRA will exercise prosecutorial discretion in the assessment of civil penalties.

APTA submitted comments suggesting that the language in paragraph (c) of this section be amended to allow at least 90 days—the time allotted for FRA plan review—for railroads to correct deficiencies and re-submit their plans. In a similar vein, NYSMTA submitted comments asserting that the amount of time allotted to correct deficiencies should be based on to the extent of the needed correction. On the other hand, NYSMTA proposed that penalties could be involved if railroads submit plans deemed to be superfluous. Again, the law requires that both the railroads and FRA work quickly to get plans in place. As the entity at the receiving end of multiple filings, FRA will no doubt have every reason to handle these matters with a spirit of cooperation where best efforts have been made to fulfill the statutory requirements.

As noted previously, subpart I applies to each railroad that has been mandated by Congress and FRA to install a PTC system. A railroad that is not required to install a PTC system may still do so under its own volition. In such a case, it may either seek approval of its system under either subpart H or I. Paragraph (d) intends to make this choice clear.

Paragraph (e) responds to comments by labor organizations in the PTC Working Group. These employee representatives sought the opportunity to comment on major PTC filings. Paragraph (e) provides that, upon receipt of a PTCIP, NPI, PTCDP, or PTCSP, FRA will post on its public Web site notice of receipt and reference to the public docket in which a copy of the filing has been placed. FRA may consider any public comment on these documents to the extent practicable within the time allowed by law and without delaying implementation of PTC systems. The version of any filing initially placed in the public docket, for which confidential treatment has been requested in accordance with § 209.11, would be the redacted copy as filed by the railroad. If FRA later determined that additional material was not deserving of confidential treatment, that material would be subsequently added to the docket.

Paragraph (f) has been added to this section in the final rule to require railroads to maintain their most recent PTC deployment plans in their PTCIPs until all PTC system deployments required under the RSIA08 have been completed.

Section 236.1013 PTC Development Plan Content Requirements and Type Approval

As noted in the discussion above regarding § 236.1009, each PTCSP must be submitted with a Type Approval number identifying a PTC system that FRA believes could fulfill the requirements of subpart I. Under § 236.1009, a railroad may submit an existing Type Approval number in lieu of a PTCDP if the PTC system it intends to implement and operate is identical to the one described in that Type Approval's associated PTCDP. In the event, however, that a railroad intends to install a system for which a Type Approval number has not yet been assigned, or to use a system with an assigned Type Approval number that may have certain variances to its safety-critical functions, then the railroad must submit a PTCDP to obtain a new Type Approval number.

The PTCDP is the core document that provides the Associate Administrator sufficient information to determine whether the PTC system proposed for installation by the railroad could meet the statutory requirements for PTC systems specified by RSIA08 and the regulatory requirements under subpart I. Issuance of a system Type Approval number is contingent upon the approval of the PTCDP by the Associate Administrator. While filing of a PTCDP is optional in the sense that the railroad may proceed directly to submission of the PTCSP by the April 16, 2010, deadline (*see* § 236.1009), FRA encourages railroads engaged in joint operations to file a PTCDP. Approval of the PTCDP, and issuance of a Type Approval, presents the opportunity for other railroads to reduce the effort required to obtain a PTC System Certification. If a Type Approval for a PTC system exists, another railroad may also use that Type Approval provided there are no variances in the system as described in the Type Approval's PTCDP. In such cases, the other railroad may avoid submitting its own PTCDP by simply incorporating by reference the supporting information in the Type Approval's PTCDP and certifying that no variances in the PTC system have been made.

This section describes the contents of the PTCDP required to obtain FRA approval in the form of issuance of a Type Approval number. This section requires each PTCDP to include all the

elements and practices listed in this section to provide reasonable assurance that the subject PTC system will meet the statutory requirements and are developed consistent with generally-accepted principles and risk-oriented proof of safety methods surrounding this technology. FRA believes that it is necessary to include the provisions contained in this section in order to provide reasonable assurance that the PTC system, when developed and deployed, will have no adverse impact on the safety of railroad employees, the public, and the movement of trains.

FRA recognizes that much of the information required by § 236.1013 normally resides with the PTC system's developer or supplier and not the client railroad. While FRA expects that each railroad and its PTC system supplier may jointly draft a PTCDP, the railroad has the primary responsibility for the safety of its operations and for submitting to FRA the information required under this section. Accordingly, each railroad required to submit a PTCDP under subpart I should make the necessary arrangements to ensure that the requisite information is readily available from the supplier for submission to the agency. FRA believes that suppliers and railroads will develop a PTCDP for most products that adequately address the requirements of the new subpart without substantial additional expense. As part of the design and evaluation process, it is essential to ensure that an adequate analysis of the features and capabilities is made to minimize the possibility of conflicts resulting from any use or feature, including a software fault. Since this analysis is a normal cost of software engineering development, FRA does not believe this requirement imposes any additional significant costs beyond what should already be done when developing safety-critical software.

The passenger and public commuter railroads who submitted comments expressed significant concern that the Class I railroads' choice of a single vendor or supplier for the onboard components of the PTC systems, coupled with the RSIA08 requirement for interoperability, creates a de-facto monopoly, with associated adverse impacts on costs and schedule. These commenters recommended that FRA take positive steps to ensure that sufficient information is made available to allow the railroads to source components from multiple vendors or suppliers. The suggested actions ranged from disapproving any PTCIP/PTCDP that is not based on open standards to expediting Interoperable Train Control (ITC) specification documentation.

FRA appreciates the concerns expressed regarding a de-facto monopoly and the possible adverse consequences on system deployments. FRA, however, must defer to the Departments of Justice and Commerce regarding issues of alleged monopolistic behavior.

In subparts H and I, FRA has encouraged the use of publicly available standards in the design, implementation, and testing of PTC systems. FRA does not mandate the use of any particular standard by a railroad, vendor, or supplier, but rather has adopted a policy of allowing the marketplace to decide what standard(s) should be used, provided the end result—a suitable safe product—is obtained. Specification of government standards is only appropriate where there has been a failure of the marketplace. It has not yet been established that such marketplace failure has occurred. Even if such a marketplace failure were deemed to have occurred, it is extremely unlikely that FRA would be able to complete the development of appropriate standards before current industry efforts with the ITC specifications are finalized and made publicly available. FRA understands the railroads' concerns and will monitor the situation.

FRA hastens to add that, since the publication of the NPRM, it has become clear that ITC standards may not be completed and validated prior to the end of 2010. FRA has requested that the ITC railroads accelerate this process in the interest of compliance with the law, and has added the Notice of Product Intent as a means of bridging to the point where standards are available. Looking forward to mid-2010, FRA will assess the situation with respect to delivery of open standards and their adoption by the AAR. Should it appear that a timely delivery will not be made, FRA reserves the right to take further regulatory action. That action could include a proposal for adoption of mandatory interoperability standards, likely in the form of existing American Railway Engineering and Maintenance Association standards that have already been developed through the leadership of the major international signal suppliers. FRA believes that such action should not be necessary and looks forward to the timely completion of ITC standards.

One vendor pointed out that a significant portion of the work associated with PTC system is commercially sensitive. FRA is committed to appropriate protection of both railroad and vendor intellectual property. Its development is recognized as representing the expenditure of significant resources by the vendor, the railroad, or both. However, interoperability requirements between railroads require some disclosure of information between railroads and vendors or suppliers. This should not require disclosure of proprietary information, but does require disclosure of interface specifications, as well as required functional attributes, assigned safety attributes and stimulus/response attributes. FRA believes such disclosure of the latter is in the best interest of the railroad, vendor, and supplier communities and strongly encourages the free exchange of this information.

In §§ 236.1013 and 236.1015, various adjectives precede several of the requirements. For instance, certain paragraphs require "a complete description," "a detailed description," or simply a "description." These phrases are inherited from subpart H of this part. Their inclusion in subpart I are similarly not to imply that any description should be more or less detailed or complete than any other description required. By contrast, they are included merely for the purposes of emphasis.

Paragraph (a)(1) requires that the PTCDP include system specifications that describe the overall product and identify each component and its physical relationship in the system. FRA will not dictate specific product architectures, but will examine each PTC system to fully understand how its various parts interrelate. Safety-critical functions in particular will be reviewed to determine whether they are designed to be fail-safe. FRA would like to emphasize that the PTCDP information provided in accordance with the requirements of this paragraph should be as railroad independent as possible. This will allow the product's PTCDP, and any associated Type Approval, to be shared by multiple railroads to the maximum extent possible. FRA believes that the PTCDP information provided in accordance with this provision will play an important role in FRA's determination as to whether safety will be maximized and if regulatory compliance of the system is obtainable.

Paragraph (a)(2) requires a description of the operation where the product will be used. Upon receipt of this information within a PTCDP, FRA will have better contextual knowledge of the product as it applies to the type of operation on which it is designed to be used. Where operational behaviors are not applicable to a particular railroad, or the product design is not intended to address a particular operational behavior, FRA would expect a short

statement indicating which operational characteristics do not apply and why they are not applicable.

Paragraph (a)(3) requires that the PTCDP include a concept of operations, a list of the product's functional characteristics, and a description explaining how various components within the system are controlled. FRA expects that the information provided under paragraphs (a)(2) and (a)(3) will together provide a thorough understanding of the PTC system. FRA will review this information—primarily by comparing the subject PTC system's functionalities with those underlying principles contained in standards for existing signal and train control systems—to determine whether the PTC system is designed to account for all relevant safety issues. While FRA does not intend to prescribe PTC system design standards, FRA does expect that each applicant will compare the concepts contained in existing standards to the operational concepts, functionalities, and controls contemplated for the PTC system in order to determine whether a sufficient level of safety will be achieved. For example, existing requirements prescribe that where a track relay is de-energized, a switch or derail is improperly lined, a rail is removed, or a control circuit is opened, each signal governing movements into the subject block occupied by a train, locomotive, or car must display its most restrictive aspect for the safety of train operations. The principle behind the requirement is that, when a condition exists in the operating environment, or with respect to the functioning of the system, that entails a potential hazard, the system will assume its most restrictive state to protect the safety of train operations.

Paragraph (a)(4) requires that each PTCDP include a document that identifies and describes each safety-critical function of the subject PTC system. The product architecture includes both hardware and software aspects that identify the protection developed against random hardware faults and systematic errors. Further, the document should identify the extent to which the architecture is fault tolerant. FRA intends to use this information to determine whether appropriate safety concepts have been incorporated into the proposed PTC system. For example, existing regulations require that when a route has been cleared for a train movement, it cannot be changed until the governing signal has been caused to display its most restrictive indication and a predetermined time interval has expired, in those scenarios where time locking is used or where a train is in approach to the location where approach locking is used. FRA intends to use this information to determine whether all the safety-critical functions have been included. Where such functionalities are not clearly determined to exist as a result of technology development, FRA will expect the reasoning to be stated and a justification provided describing how that technology provides the required level of safety. Where FRA identifies a void in safety-critical functions, FRA may not approve the PTCDP until remedial action is taken to rectify the concern.

FRA recognizes that the information required under paragraph (a)(4) may have already been provided pursuant to paragraph (a)(1). In such a case, the railroad shall cross reference where both paragraphs (a)(1) and (a)(4) have been jointly satisfied in the PTCDP.

Paragraph (a)(4) requires that each PTCDP address the minimum requirements under § 236.1005 for development of safety-critical PTC systems. FRA expects the information provided under paragraph (a)(4) to cover: identification of all safety requirements that govern the operation of a system; evaluation of the total system to identify known or potential safety hazards that may arise over the life-cycle of the system; identification of all safety issues during the design phase of the process; elimination or reduction of the risks posed by the hazards identified; resolution of safety issues presented; development of a process to track progress; and development of a program of testing and analysis to demonstrate that safety requirements are met.

FRA has considered the railroads' concerns, and agrees that the selection of the safety assurance concepts that any particular railroad may impose on its vendor or supplier might possibly differ, based on the railroad's operational philosophy and tolerance for risk. Accordingly, FRA removed proposed paragraph (a)(5) from the final rule as an element of the PTCDP, and has made the requirement to describe the safety assurance concepts an element of the PTCSP (*see* § 236.1015(d)(2)).

Paragraph (a)(5) requires a submission of a preliminary human factors analysis that addresses each applicable human-machine interface (HMI) and all proposed product functions to be performed by humans to enhance or preserve safety. FRA expects this analysis to place special emphasis on proposed human factors responses—and the result of any failure to perform such a response—to safety-critical hazards, including the consequences of human failure to perform. For each HMI, the PTCDP should address the proposed basis of assumptions used for selecting each such interface, its potential effect upon safety, and all potential hazards associated with each interface. Where more than one employee is expected to perform duties dependent upon HMI input or output, the analysis must address the consequences of failure by one or multiple employees. FRA intends to use this information to determine the proposed HMI's effect upon the safety of railroad operations. The preliminary human factors analysis must propose how the railroad or its PTC system supplier plans to address the HMI criteria listed in Appendix E to this part or any alternatives proposed by the railroad and deemed acceptable by the Associate Administrator. The design criteria for Appendix E were first developed and subsequently adopted by FRA as an element of subpart H of this part. As the criteria in Appendix E are generally technology neutral, FRA has adopted them with minor changes, for use with both subpart H of this part and these proceedings.

Paragraph (a)(5) also requires that the PTCDP explain how the proposed HMI will affect interoperability. RSIA08 requires that each subject railroad explain how it intends to obtain system interoperability. The ability of a train crew member to operate another railroad's PTC system significantly depends upon a commonly understood HMI. The HMI provides the end user with a method of interacting with the underlying system and accessing the PTC functionality. FRA expects that each railroad will adopt an HMI standard that will ensure ease of use of the PTC system both within, and between, railroads.

Paragraph (a)(6) requires an analysis regarding how subparts A through G of part 236 apply, or no longer apply, to the subject PTC system. FRA recognizes that, while a PTC system may be designed in accordance with the underlying safety concepts of subparts A through G, the specific existing requirements contained in those subparts are not necessarily applicable. In any event, the PTCDP must identify each pertinent requirement considered to be inapplicable, fully describe the alternative method used to fulfill that underlying safety concept, and explain how the proposed PTC system supports the underlying safety principle. FRA notes that certain sections in subparts A though G of this part may always be applicable to PTC systems certified under subpart I.

FRA is concerned about all dimensions of system security. Thus,

paragraph (a)(7) requires the PTCDP to include a description of the security measures necessary to meet the specifications for each PTC system and the prioritized restoration and mitigation plan as required under § 236.1033. Security is an important element in the design and development of PTC systems and covers issues such as developing measures to prevent hackers from gaining access to software and to preclude sudden system shutdown, mechanisms to provide message integrity, and means to authenticate the communicating parties. Safety and security are two closely related topics. Both are elements for ensuring that a subject is protected and without risk of harm. In the industrial marketplace, the goals of safety and security are to create an environment protecting assets from hazards or harm. While activities to ensure safety usually relate to the possibility of accidental harm, activities to ensure security usually relate to protecting a subject from intentional malicious acts such as espionage, theft, or attack. Since system performance may be affected by either inadvertent or deliberate hazards or harms, the safety and security involved in the implementation and operation of a PTC system must both be considered.

Integrated security recognizes that optimum protection comes from three mutually supporting elements: Physical security measures, operational procedures, and procedural security measures. Today, the convergence of information and physical security is being driven by several powerful forces, including: interdependency, efficiency and organizational simplification, security awareness, regulations, directives, standards, and the evolving global communications infrastructure. Physical security describes measures that prevent or deter attackers from accessing a facility, resource, or information stored on physical media and guidance on how to design structures to resist various hostile acts. Communications security describes measures and controls taken to deny unauthorized persons information derived from telecommunications and ensure the authenticity of such telecommunications. Because of the integrated nature of security, FRA expects that each PTCDP will address security as a holistic concept, and not be restricted to limited or specific aspects.

Paragraph (a)(8) requires documentation of assumptions concerning reliability and availability targets of mechanical, electrical, and electronic components. When building a PTC system, designers may make numerous assumptions that will directly impact specific implementation decisions. These fundamental assumptions usually come in the form of data (e.g., facts collected as the result of experience, observation or experiment, or processes, or premises) that can be randomly sampled. FRA does not expect to audit all of the fundamental assumptions on which a PTC system has been developed. Instead, FRA envisions sampling and reviewing fundamental assumptions prior to product implementation and after operation for some time. FRA expects that the data sampled may vary, depending upon the PTC system. It is not possible to provide a single set of quantitative numbers applicable to all systems, especially when systems have yet to be designed and for which the fundamental assumptions are yet to be determined. Quantification is part of the risk management process for each project. FRA believes that the actual performance of the system observed during the pre-operational testing and post-implementation phases will provide indications of the validity of the fundamental assumptions. FRA requires that this review process occur for the life of the PTC system (i.e., as long as the product is kept in operation). The depth of details required will depend upon what FRA observes. The range of difference between a PTC system's predicted and actual performance may indicate to FRA the validity of the underlying fundamental assumptions. Generally, if the actual performance matches the predicted performance, FRA believes that it will not have to extensively review the fundamental assumptions. If the actual performance does not match predicted performance, FRA may need to more extensively review the fundamental assumptions.

FRA expects each subject railroad to confirm the validity of initial assumptions by comparing them to actual in-service data. FRA is aware that mechanical and electronic component failure rates and times to repair are easily quantified data, and usually are kept as part of the logistical tracking and maintenance management of a railroad. FRA believes that this criterion will enhance the quality of risk assessments conducted pursuant to this subpart by forcing PTC system designers and users to consider the long-term effects of operation over the course of the PTC system's projected life-cycle. If a PTC system can be used beyond its design life-cycle, FRA expects that any continued use would only occur pursuant to a waiver provided in accordance with 49 CFR part 211 or a PTCDP or PTCSP amended in accordance with § 236.1021. In its request for waiver or request for amendment, the railroad should address any new risks associated with the life-cycle extension.

Paragraph (a)(8) also requires specification of the target safety levels. This includes the identity of each potential hazard and how the events leading to a hazard will be identified for each safety-critical subsystem; the proposed safety integrity level of each safety-critical subsystem, and the proposed means that accomplishment of these targets will be evaluated. This paragraph also requires identification of the proposed backup methods of operation and safety-critical assumptions regarding availability of the product. FRA believes this information is essential for making determinations about the safety of a product and both the immediate and long-term effect of its failure. FRA contends that availability is directly related to safety to the extent the backup means of controlling operations involves greater risk (either inherently or because it is infrequently practiced).

Paragraph (a)(9) requires a complete description of how the PTC system will enforce all pertinent authorities and block signal, cab signal, or other signal related indications. FRA appreciates that not all PTC system architectures will seek to enforce the speed restrictions associated with intermediate signals directly, but nevertheless a clear description of these functions is necessary for clarity and evaluation.

Paragraph (a)(10) requires that, if the railroad is seeking to deviate from the requirements of section 236.1029 with respect to movement of trains with onboard equipment that has failed en route using the flexibility provided by paragraph (c) of that section, a justification must be provided in the PTCDP. As proposed, paragraph (c) of § 236.1029 provided that, in order for a PTC train that operates at a speed above 90 miles per hour to deviate from the operating limitations contained in paragraph (b) of that section, the deviation must be described and justified in the FRA approved PTCDP or PTCSP, or by reference to an Order of Particular Applicability, as applicable. For instance, if Amtrak wished to continue to operate at up to 125 miles per hour with cab signals and automatic train control in the case of failure of onboard ACSES equipment, Amtrak would request to do so based on the applicable language of the Order of Particular Applicability that required installation of that system on portions of the Northeast Corridor. Similarly, a railroad wishing more liberal

requirements for a high-speed rail system on a dedicated right-of-way could request that latitude by explaining how the safety of all affected train movements would be maintained. During the comment period and PTC Working Group discussion, Amtrak continued to press its case for greater flexibility, noting the long routes prevalent on its intercity network and the trip time penalty that could be incurred with failed equipment. Paragraph (a)(10) has been revised in the final rule to reflect the fact that the development plan would contain justification for any requested deviation from the requirements of § 236.1029, and that section has been further revised to permit the agency to receive and consider specific requests and supporting information regarding latitude such as that sought by Amtrak without regard to speed. Instead, paragraph (a)(10) requires the railroad to include a justification in its PTCDP, if the railroad is seeking to deviate from the requirements of § 236.1029 with respect to movement of trains with onboard equipment that has failed en route.

Paragraph (a)(11) requires a complete description of how the PTC system will appropriately and timely enforce all hazard detectors that are interconnected with the PTC system in accordance with § 236.1005(c)(3), as may be applicable.

Paragraph (b) specifies the approval standard that will be employed by the Associate Administrator. APTA asserted that the NPRM offered minimal guidance on the criteria FRA will use to accept or reject a system. Thus, APTA suggested that FRA should draft and vet criteria that accomplishes the basic purposes of PTC while allowing for innovation in meeting the performance requirements envisioned in the regulation.

The PTCDP is not expected to provide absolute assurance to the Associate Administrator that every potential hazard will be eliminated with complete certainty. It only needs to establish that the PTC system meets the appropriate statutory and regulatory requirements for a PTC system required under this subpart, and that there is a reasonable chance that once built, it will meet the required safety standards for its intended use. FRA emphasizes that approval of a PTCDP and issuance of a Type Approval does not constitute final approval to operate the product in revenue service. Such approval only comes when the Associate Administrator issues an applicable PTC System Certification.

Paragraph (c) establishes a time limit on the validity of a Type Approval. Provided that at least one product is certified within the 5 year period after issuance of the Type Approval, the Type Approval remains valid until final retirement of the system. The main purpose of this requirement is to incentivize installation, not just creation, of a PTC system. This paragraph would also allow FRA to periodically clean out its records relating to Type Approvals and PTCDPs for obsolete PTC systems.

Former paragraphs (d) and (e) in this section have been moved to § 236.1015 in the final rule. Therefore, former paragraph (f) has been redesignated as paragraph (d) in the final rule. Paragraph (d) discusses the Associate Administrator's ability to impose any conditions necessary to ensure the safety of the public, train crews, and train operations when approving the PTCDP and issuing a Type Approval. While FRA expects that adherence to the remainder of this section's requirements should justify issuance of a Type Approval, FRA also recognizes that there may be situations where other unaccounted for variables may reduce the Associate Administrator's confidence in the PTC system, its manufacturer, supplier, vendor, or operator.

The required contents of the NPI are specified in paragraph (e). As stated earlier, FRA expects submission of an NPI temporarily in lieu of a PTCDP only when the railroad is unable to obtain all of the information required for a PTCDP. This will enable railroads to submit a PTCIP on or before the statutory deadline of April 16, 2010. FRA believes that, given the various options available to the railroads, there are few, if any, valid reasons for not meeting the April 16, 2010, deadline for submission.

The elements that make up the NPI were carefully chosen to strike a balance between the ability of a railroad that is unable to complete a full PTCDP and FRA's need to fully understand the railroad's proposed system and the reasonableness of the PTCIP contents. FRA believes that the NPI information would be required to have been identified by the railroad in order to develop requests for proposal from the vendor or supplier community. Paragraph (e)(1) requires a description of the proposed operating environment. Paragraph (e)(2) requires a description of the concept of operations for any PTC system that will be procured by the railroad. Paragraph (e)(3) requires a description of the target safety levels that the railroad expects the PTC system to meet, while paragraphs (e)(4) and (e)(5) require an explanation of how the proposed system will integrate with the existing signal and train control system.

Section 236.1015 PTC Safety Plan Content Requirements and PTC System Certification

The PTCSP is the core document that provides the Associate Administrator the information necessary to certify that the as-built PTC system fulfills the required statutory PTC functions and is in compliance with the requirements of this subpart. Issuance of a PTC System Certification is contingent upon the approval of the PTCSP by the Associate Administrator. Under this final rule, the filing and approval of the PTCSP and issuance of a PTC System Certification is a mandatory prerequisite for PTC system operation in revenue service. Each PTCSP is unique to each railroad and must addresses railroad-specific implementation issues associated with the PTC system identified by the submitted Type Approval. Paragraph (a) provides language explaining these meanings and limits.

Paragraph (b), which reflects the contents of proposed paragraphs (d) and (e) in proposed § 236.1013, establishes the conditions under which a Type Approval may be used by another railroad. Paragraph (b)(1) requires the railroad to maintain a continually updated PTC Product Vendor List (PTCPVL) pursuant to § 236.1023 to enable the railroad and FRA to determine the appropriate vendor to contact in the unlikely event of a safety critical failure.

The safety critical nature of PTC systems imposes strict quality control requirements on the design and manufacturer of the system. While FRA believes that in the vast majority of cases, the vendor or supplier community from whom the railroads will procure PTC system components have established the appropriate quality control systems, there will be a very small minority who have not. Paragraph (b)(2) is intended to mitigate against any such occurrence, to ensure that PTC system components meet the same, uniformly high, standards. FRA is requiring that the railroad ensure that any vendor from whom they purchase PTC system or components has an acceptable quality assurance program for both design and manufacturing processes.

FRA has considered comments submitted by GE, in which GE suggested language to further clarify paragraph (b)(2) that the vendor quality control processes for PTC systems must include the process for the product supplier to promptly report any safety relevant failure and previously unidentified

hazards to each railroad using the product. FRA believes that this suggested language clearly specifies the importance of this requirement to suppliers who may not already have the appropriate quality control processes in place. Accordingly, FRA has added the recommended language.

Paragraph (b)(3) requires the railroad to provide licensing information. The list should include all applicable vendors or suppliers. Through the requirements set forth in paragraph (b)(3), FRA intends to ensure implementation of the proper technology, as opposed to implementation of an orphan product that uses similar, yet different, technology. When a railroad submits a previously approved Type Approval for its PTC system, FRA expects that all the proper licensing agreements will provide for continued use and maintenance of the PTC system in place. To bolster FRA's confidence in this area, FRA will require each Type Approval submission to include the relevant licensing information. FRA recognizes that there may be various licensing arrangements available relating to the exclusivity and sublicensing of manufacturing or vending of a particular PTC system. There may be other intellectual property variables that may make arrangements even more complex. To adequately capture all applicable arrangements, FRA is requiring the submission of "licensing information." A more specific request may preclude FRA's ability to collect information necessary to fulfill its intent. If any of this information were to change, either through any type of sale, transfer, or sublicense of any right or ownership, then FRA would expect the railroad to submit a request for amendment of its PTCDP in accordance with § 236.1021. FRA recognizes that this may be difficult for a railroad to accomplish, given the fact that the railroad may not be privy to any intellectual property transactions that may occur outside its control. In any event, FRA would expect that a railroad will ensure, either through contractual obligation or otherwise, that its vendor or supplier will provide it with updated licensing information on a continuing basis.

When filing a PTCSP, paragraph (c) requires each railroad to include the applicable and approved PTCDP or, if applicable, the FRA issued Type Approval. In addition, the railroad must describe any changes subsequently made to the PTC system that would require amendment of the PTCDP or assure FRA that the PTC system built is the same PTC system described in the PTCDP and PTCSP. Some elements of the PTCSP are the same elements as the PTCDP (and are described more fully in the section-by-section analysis of § 236.1013). If the railroad has already submitted, and FRA has already approved, the PTCDP, then attachment of the PTCDP to the PTCSP should fulfill this requirement.

FRA recognizes the possibility that between PTCIP or PTCDP approval, and prior to PTCSP submission, there may be changes to the former two documents. While such changes may only be made in accordance with § 236.1021, documentation of those changes may not be readily apparent to the reader of the PTCSP. Further, changes in the PTCIP may impact the contents of the PTCDP and vice versa. Accordingly, paragraph (c)(1) requires the railroad to submit the approved PTCDP (or Type Approval) with the corresponding PTCSP.

AAR asserted that the main purpose of the PTCIP is to document the deployment plan and that the PTCIP will be of little value once the implementation is complete. Accordingly, AAR asserts that there is no need to include the PTCIP when filing either a PTCDP or PTCSP. The AAR also asserted that since the PTCSP justifies that the PTC system was built in accordance with the PTCDP, submission of the PTCIP information should not be required.

FRA agrees with AAR that the main purpose of the PTCIP is to document the deployment plan and that the PTCIP will essentially become a historical document when the railroad has completed its PTC implementation. Therefore, until all PTC system installations have been completed, FRA will require the PTCIP to be kept current with the railroad's deployment plan. However, in response to the AAR's comments, FRA has revised paragraph (c) by removing the proposed requirement to submit the PTCIP with the PTCDP and PTCSP.

FRA expects that each PTCSP shall include a clear and complete description of any such changes by specifically and rigorously documenting each variance. Paragraph (c)(2) also requires that the PTCSP include an explanation of each variance's significance. To ensure that there are no other existing variances not documented in the PTCSP, the railroad must attest that there are no further variances. For the same reason, paragraph (c)(3) requires that, if there have been no changes to the plans or to the PTC system as intended, the railroad must attest that there are no such variances.

The additional required railroad specific elements are as follows:

Paragraph (d)(1) requires that the PTCSP include a hazard log comprehensively describing all hazards to be addressed during the life-cycle of the product, including maximum threshold limits for each hazard. For unidentified hazards, the threshold shall be exceeded at one occurrence. In other words, if the hazard has not been predicted, then any single occurrence of that hazard is unacceptable. The hazard log addresses safety-relevant hazards, or incidents or failures that affect the safety and risk assumptions of the PTC system. Safety relevant hazards include events such as false proceed signal indications and false restrictive signal indications. If false restrictive signal indications occur with any type of frequency, they could influence train crew members, roadway workers, dispatchers, or other users to develop an apathetic attitude towards complying with signal indications or instructions from the PTC system, creating human factors problems.

Incidents in which stop indications are inappropriately displayed may also necessitate sudden brake applications that may involve risk of derailment due to in-train forces. Other unsafe or wrong-side failures that affect the safety of the product will be recorded on the hazard log. The intent of this paragraph is to identify all possible safety-relevant hazards that would have a negative effect on the safety of the product. Right-side failures, or product failures that have no adverse effect on the safety of the product (i.e., do not result in a hazard) would not be required to be recorded on the hazard log.

Paragraph (d)(2), which has been added to the final rule, requires that each railroad identify the PTC system's safety assurance concepts. When identifying the safety assurance concepts used, FRA expects the information provided pursuant to paragraph (d)(2) will reflect the safety requirements that govern the operation of a system; the identify of known or potential safety hazards that may arise over the life-cycle of the system; safety issues that may arise during the design phase of the process; elimination or reduction of the risks posed by the hazards identified; resolution of safety issues presented; development of a process to track progress; and development of a program of testing and analysis to demonstrate that safety requirements are being met.

In the proposed rule, this information was required as part of the PTCDP. One railroad recommended that this information requirement be completely eliminated as redundant because it is covered as part of the product safety

requirements. FRA agrees that this information should not be a required element of the PTCDP; this information should be provided as an element of the railroad specific PTCSP, since individual railroads may elect to require different safety assurance concepts from their vendors or suppliers. This very same information is an integral element of the railroad specific Product Safety Plan required by subpart H of this part. Accordingly, FRA has revised this requirement. However, FRA does not believe that this information is redundant. The safety assurance concepts imposed on the vendor or supplier are procedural requirements that drive vendor or supplier system design and mitigation strategies. FRA believes that the importance of the safety assurance concepts merits clear identification.

Paragraph (d)(3) requires that a risk assessment be included in the PTCSP. FRA will use this information as a basis to confirm compliance with the appropriate performance standard. A performance standard specifies the outcome required, but leaves the specific measures to achieve that outcome up to the discretion of the regulated entity. In contrast to a design standard or a technology-based standard that specifies exactly how to achieve compliance, a performance standard sets a goal and lets each regulated entity decide how to meet that goal. An appropriate performance standard should provide reasonable assurance of safe and effective performance by making provision for: (1) Considering the construction, components, ingredients, and properties of the device and its compatibility with other systems and connections to such systems; (2) testing of the product on a sample basis or, if necessary, on an individual basis; (3) measurement of the performance characteristics; and (4) requiring that the results of each or of certain of the tests required show that the device is in conformity with the portions of the standard for which the test or tests were required. Typically, the specific process used to design, verify and validate the product is specified in a private or public standard. The Associate Administrator may recognize all or part of an appropriate standard established by a nationally or internationally recognized standard development organization.

Labor expressed concern during this rulemaking regarding FRA's position on the treatment of wrong side failures. Wrong side failures, which occur when a PTC system fails to properly identify the track occupied by a train, should not be considered an acceptable risk. Such failures, which are completely avoidable using current technology, can result in unnecessary and risky penalty brake applications.

FRA agrees that wrong side failures introduce an element of risk in the operation of a system. Therefore, the extent of that risk and the consequences of the failure must be identified and carefully analyzed. It is for that very reason that FRA is requiring that the hazard log identify all such potential failures. The hazard mitigation analysis required in paragraph (d)(4) must identify how each hazard in the hazard log will be mitigated. While FRA agrees the majority of wrong side failures can be eliminated through the application of technology, FRA believes that the generalization that all wrong side failures can be eliminated is not valid.

Paragraph (d)(4) requires that the PTCSP include a hazard mitigation analysis. The hazard mitigation analysis must identify the techniques used to investigate the consequences of various hazards and list all hazards addressed in the system hardware and software including failure mode, possible cause, effect of failure, and remedial actions. A safety-critical system must satisfy certain specific safety requirements specified by the system designer or procuring entity. To determine whether these requirements are satisfied, the safety assessor must determine that: (1) Hazards associated with the system have been comprehensively identified; (2) hazards have been appropriately categorized according to risk (likelihood and severity); (3) appropriate techniques for mitigating the hazards have been identified; and (4) hazard mitigation techniques have been effectively applied. *See* Leveson, Nancy G., *Safeware: System Safety and Computers,* (Addison-Wesley Publishing Company, 1995).

FRA does not expect that the safety assessment will prove that a product is absolutely safe. However, the safety assessment should provide evidence that risks associated with the product have been carefully considered and that steps have been taken to eliminate or mitigate them. Hazards associated with product use need to be identified, with particular focus on those hazards found to have significant safety effects. The risk assessment provided under paragraph (d)(4) must include each hazard that cannot be mitigated by system designs (*e.g.,* human over-reliance of the automated systems) no matter how low its probability may be. After the risk assessment, the designer must take steps to remove them or mitigate their effects. Hazard analysis methods are employed to identify, eliminate, and mitigate hazards. Under certain circumstances, FRA may require an independent third party assessment in accordance with proposed § 236.1017 to review these methods as a prerequisite to FRA approval.

Paragraph (d)(5) also requires that the PTCSP address safety Verification and Validation procedures as defined under part 236. FRA believes that Verification and Validation for safety are vital parts of the PTC system development process. Verification and Validation require forward planning. Consequently, the PTCSP should identify the testing to be performed at each stage of development and the levels of rigor applied during the testing process. FRA will use this information to ensure that the adequacy and coverage of the tests are appropriate.

Paragraph (d)(6) requires the railroad to include in its PTCSP the training, qualification, and designation program for workers regardless of whether those railroad employees will perform inspection, testing, and maintenance tasks involving the PTC system. FRA believes many benefits accrue from the investment in comprehensive training programs and are fundamental to creating a safe workforce. Effective training programs can result in fewer instances of human casualties and defective equipment, leading to increased operating efficiencies, less troubleshooting, and decreased costs. FRA expects any training program will include employees, supervisors, and contractors engaged in railroad operations, installation, repair, modification, testing, or maintenance of equipment and structures associated with the product.

Paragraph (d)(7) requires the railroad to identify specific procedures and test equipment necessary to ensure the safe operation, installation, repair, modification and testing of the product in its PTCSP. Requirements for operation of the system must be succinct in every respect. The procedures must be specific about the methodology to be employed for each test to be performed that is required for installation, repair, or modification and the results thereof must be documented. FRA will review and compare the repair and test procedures for adequacy against existing similar requirements prescribed for signal and train control systems. FRA intends to use this information to ascertain whether the product will be properly installed, maintained, tested, and repaired.

Paragraph (d)(8) requires that each railroad develop a manual covering the requirements for the installation, periodic maintenance and testing,

modification, and repair for its PTC system. The railroad's Operations and Maintenance Manual must address the issuance of warnings and describe the warning labels to be placed on each piece of PTC system equipment as necessary. Such warnings include, but are not limited to: Means to prevent unauthorized access to the system; warnings of electrical shock hazards; cautionary notices about improper usage, testing, or operation; and configuration management of memory and databases. The PTCSP should provide an explanation justifying each such warning and an explanation of why there are no alternatives that would mitigate or eliminate the hazard for which the warning will be given.

Paragraph (d)(9) requires that the PTCSP identify the various configurable applications of the product, since this rule mandates use of the product only in the manner described in its PTCDP. Given the importance of proper configuration management in safety-critical systems, FRA believes it is essential that railroads learn of and take appropriate configuration control of hardware and software. FRA believes that a requirement for configuration management control will enhance the safety of these systems and ultimately provide other benefits to the railroad as well. Pursuant to this paragraph, railroads will be responsible—through its applicable Operations and Maintenance Plan and other supporting documentation maintained throughout the system's life-cycle—for all changes to configuration of their products in use, including both changes resulting from maintenance and engineering control changes, which result from manufacturer modifications to the product. Since not all railroads may experience the same software faults or hardware failures, the configuration management and fault reporting tracking system play a crucial role in the ability of the railroad and the FRA to determine and fully understand the risks and their implications. Without an effective configuration management tracking system in place, it is difficult, if not impossible, to fairly evaluate risks associated with a product over its life-cycle.

Paragraph (d)(10) requires the railroad to develop comprehensive plans and procedures for product implementation. Implementation (field validation or cutover) procedures must be prepared in detail and identify the processes necessary to verify that the PTC system is properly installed and documented, including measures to provide for the safety of train operations during installation. FRA will use this information to ascertain whether the product will be properly installed, maintained, and tested. FRA also believes that configuration management should reduce disarrangement issues. Further, configuration management will reduce the cost of troubleshooting by reducing the number of variables and will be more effective in promoting safety.

Paragraph (d)(11) requires the railroad to provide a complete description of the particulars concerning measures required to assure that the PTC system, once implemented, continues to provide the expected safety level without degradation or variation over its life-cycle. The measures specifically provide the prescribed intervals and criteria for the following: testing; scheduled preventive maintenance requirements; procedures for configuration management; and procedures for modifications, repair, replacement and adjustment of equipment. FRA intends to use this information, among other data, to monitor the PTC system to assure it continually functions as intended.

Paragraph (d)(12) requires that each PTCSP include a description of each record concerning safe operation. Recordkeeping requirements for each product are discussed in § 236.1037 of this part.

Paragraph (d)(13) requires a safety analysis of unintended incursions into a work zone. Measuring incursion risks is a key safety risk assumption. Failing to identify incursion risk can have the effect of making a system seem safer on paper than it actually is. The requirements set forth in this paragraph attempt to mandate design consideration of incursion protection at an early stage in the system development process. The totality of the arrangements made to prevent unintended incursions or operation at higher than authorized speed within the work zone must be analyzed. That is, in addition to the functions of the PTC system, the required actions for dispatchers, train crews, and roadway workers in charge must be evaluated. Regardless of whether a PTC system has been previously approved or recognized, FRA will not accept a system that allows a single point human failure to defeat the essential protection intended by the Congress. *See* NTSB Recommendations R–08–05 and R–08–06. FRA believes that exposure should be identified because increases in risk due to increased exposure could be easily distinguished from increases in risk due solely to implementation and use of the proposed PTC system.

In the past, little attention was given to formalizing incursion protection procedures. Training for crews has also not been uniform among organizations, and has frequently received inadequate attention. As a result, a variety of procedures and techniques evolved based on what has been observed or what just seemed correct at the time. This lack of structure, standardization, and formal training is inconsistent with the goal of increasing safety and regulatory efficiency.

As proposed, paragraph (d)(14) would have required a more detailed description of any alternative arrangements provided under § 236.1011(a)(10), pertaining to at grade rail-to-rail crossings. APTA noted that the reference in this paragraph should be revised, as section 236.1011(a)(10) does not exist. The correct reference is § 236.1005(a)(1)(i).

As previously mentioned, § 236.1005(a) requires each applicable PTC system to be designed to prevent train-to-train collisions. Under that section, FRA has established various requirements that would apply to at-grade rail-to-rail crossings, also known as diamond crossings. While the final rule text includes certain specific technical requirements, it also provides the opportunity for each subject railroad to submit an alternative arrangement providing an equivalent level of safety as specified in an FRA approved PTCSP. Accordingly, under paragraph (d)(14), if the railroad intends to utilize alternative arrangements providing an equivalent level of safety to that of the table provided under § 236.1005(a)(1)(i), each PTCSP must identify those alternative arrangements and methods, with any associated risk reduction measures, in its PTCSP.

Paragraph (d)(15) requires a complete description of how the PTC system will enforce mandatory directives and signal indications, unless already addressed in the PTCDP. Paragraph (d)(16) refers to the requirement of § 236.1019(f) that the PTCSP is aligned with the PTCIP, including any amendments.

Under § 236.1007, FRA requires certain limitations on PTC trains operating over 90 miles per hour, including compliance with § 236.1029(c). Under § 236.1029(c), FRA provides railroads with an opportunity to deviate from those limitations if the railroad describes and justifies the deviation in its PTCDP, PTCSP, or by reference to an Order of Particular Applicability, as applicable. Thus, paragraph (d)(17) reminds railroads that this is one of the optional elements that may be included in a PTCSP. This need

may also be addressed through review of the PTCDP.

Railroads are required under § 236.1005(c) to submit a complete description of their compliance regarding hazard detector integration and under §§ 236.1005(g)–(k) to submit a temporary rerouting plan in the event of emergencies and planned maintenance. Sections 236.1007 and 236.1033 also require the submission of certain documents and information. Paragraphs (d)(18), (d)(19), and (d)(20) remind railroads that such requirements must be fulfilled with the submission of the PTCSP. For example, under paragraph (d)(19), FRA expects each temporary rerouting plan to explain the host railroad's procedure relating to detouring the applicable traffic. In other words, FRA expects that each temporary rerouting plan address how the host railroad will choose the track that traffic will be rerouted onto. The plan should explain the factors that will be considered in determining whether and how the railroad should take advantage of temporary rerouting. FRA remains concerned about the unnecessary commingling of PTC and non-PTC traffic on the same track and expects each temporary rerouting plan to address this possibility. More specifically, each plan should describe how the railroad expects to make decisions to reroute non-PTC train traffic onto a PTC line, especially where another non-PTC line may be available. While FRA recognizes each railroad may seek to use the most cost effective route, FRA expects the railroad to also consider the level of risk associated with that route.

In paragraph (e), FRA states the criteria to which FRA will refer when evaluating the PTCSP, depending upon the underlying technical approach. Whereas in subpart H of this part, the safety case is evaluated to determine whether it demonstrates, with a high degree of confidence, that relevant risk will be no greater under the new product than previously, the statutory mandate for PTC calls for a different approach. In crafting this approach, FRA has attempted to limit requirements for quantitative risk assessment to those situations where the technique is truly needed. Regardless of the type of PTC system, the safety case for the system must demonstrate that it will reliably execute all of the functions required by this subpart (particularly those provided under proposed §§ 236.1005 and 236.1007). With this foundation, the additional criteria that must be met depend upon the type of PTC technology to be employed.

It is FRA's understanding that PTC systems may be categorized as one of the following four system types: non-vital overlay; vital overlay; stand-alone; and mixed. Initially, however, all PTC systems will have some features that are not fully fail-safe in nature, even if onboard processing and certain wayside functions are fully fail-safe. Common causes include surveying errors of the track database, errors in consist weight or makeup from the railroad information technology systems, and the crew input errors of critical operational data. To the extent computer-aided dispatching systems are the only check on potential dispatcher error in the creation or inappropriate cancellation of mandatory directives, some room for undetected wrong-side failure will continue to exist in this function as well.

Paragraph (e)(1) specifies the required behavior for non-vital overlay systems. Based on previous experience with non-vital systems, FRA believes it is well within the technical capability of the railroads to reduce the level of risk on any particular track segment to a level of risk 80% lower than the level of risk prior to installation of PTC on that segment. For subsequent PTC system installations on the same track segment, FRA recognizes that requiring an additional 80% improvement may not be technically or economically practical. Therefore, FRA is only requiring that an entity installing or a modifying an existing PTC system demonstrate that the level of safety is equal to, and preferably greater than, the level of safety of the prior PTC system. The risk that must be reduced is the risk against which the PTC functionalities are directed, assuming a high level of availability. Note that the required functionalities themselves do not call for elimination of all risk of mishaps. It is scope of risk reduction that the functionalities describe that becomes the 100% universe which is the basis of comparison. Although it is understood that the system will endeavor to eliminate 100% of this risk—meaning that if the system worked as intended every time and was always available, 100% of the target risk would be eliminated—the analysis will need to account for cases where wrong side failure of the technology is coincident with a human failure potentially induced by reliance on the technology. Since, within an appropriate conservative engineering analysis (i.e., pro forma analysis), non-vital processing has the theoretical potential to result in more failures than will typically be experienced, a 20% margin is provided. In preparing the PTCSP, the railroad should affirmatively address how training and oversight—including programs of operational testing under 49 CFR 217.9—will reduce the potential for inappropriate reliance by those charged with functioning in accordance with the underlying method of operation.

The 80% reduction in risk for PTC preventable accidents must be demonstrated by an appropriate risk analysis acceptable to the Associate Administrator and must address all intended track segments upon which the system will be installed. Again, FRA does not expect, or require, that these types of systems will prevent all wrong side failures. However, FRA expects that the systems will be designed to be robust, all pertinent risk factors (including human factors) will be fully addressed, and that no corners will be cut to "take advantage" of the nominal allowance provided for non-vital approaches. FRA also encourages those using non-vital approaches to preserve as much as possible the potential for a transition to vital processing.

The Rail Labor Organizations believe that FRA's position is inconsistent with safety. Wrong side failures occur when a PTC system fails to properly identify the track occupied by a train. According to the RLO, such failures, which are completely avoidable using current technology, can result in unnecessary penalty braking applications that risk causing train handling derailments due to in-train forces and may also cause a PTC system to fail to enforce a necessary stop. As such, the RLO believe that wrong side failures should not be considered an acceptable risk. Again, FRA is sympathetic in principle to the RLO concern. However, no signal or train control system is wholly without the potential for a wrong side failure; and the key to limiting their occurrence is identifying the potential and crafting mitigations where possible. Built on the foundation of existing methods of operation, PTC systems will drastically reduce unsafe events by providing a safety net for occasional human errors. It would be unwise to defer the promise of PTC technologies by demanding perfection and thereby permit accidents and casualties to continue.

Paragraph (e)(2) addresses vital overlays. Unlike a non-vital system, the vital system must be designed to address, at a minimum, the factors delineated in Appendix C. The railroad and their vendors or suppliers are encouraged to carry out a more thorough design analysis addressing any other potential product specific hazards. FRA cannot overemphasize that vital overlay system designs must be fully designed to address the factors contained in

Appendix C. The associated risk analysis supporting this design analysis demonstrating compliance may be accomplished using any of the risk analysis approaches in subpart H, including abbreviated risk analysis.

Paragraph (e)(3) addresses stand-alone PTC systems that are used to replace existing methods of operations. The PTCSP design and risk analysis submitted to the Associate Administrator must show that the system does not introduce any new hazards that have not been acceptably mitigated, based upon all proposed changes in railroad operation. GE proffered the suggestion that when the stand-alone system is created using proven principles of vital signaling, assessing the system risk is straightforward and not significantly different than with the vital overlay system. The importance of system availability and risk under operations in contingent mode become more significant factors. FRA agrees, but believes that the one of the fundamental issues that the agency must reconcile is the value of appropriately capturing these principles in new systems and with new technologies without artificially restricting their use. FRA must accordingly exercise great care when evaluating the safety cases presented to it, regardless of the type (overlay, stand-alone, or mixed).

While FRA believes that a comprehensive safety analysis will be required for all systems, since it must provide sufficient information to the Associate Administrator to make a decision with a high degree of confidence, the required analysis for stand-alone systems is much more comprehensive than that required for vital overlay systems because it must provide sufficient information to the Associate Administrator to make a decision with a high degree of confidence. FRA will therefore exercise greater oversight when it uniquely and separately considers each request for stand-alone operations, and will render decisions in the context of the proposed operation and the associated risks. FRA recognizes that application of this standard to a new rail system for which there is no clear North American antecedent could present a conceptual challenge.

Paragraph (e)(4) addresses mixed systems (i.e., systems that include a combination of the systems identified in paragraphs (e)(1) through (e)(3). Because of the inherent complexity of these systems, FRA will determine an appropriate approach for demonstrating compliance after consultation with the railroad. Any approach will, of course, require that the system perform the PTC requirements set forth in §§ 236.1005 and 236.1007.

Paragraph (f) discusses the factors that the Associate Administrator will consider in reviewing the PTCSP. In general, PTC systems will have some features that are not fail-safe in nature. Examples include surveys of the track database, errors in consist data from the railroad such as weight and makeup, and crew input errors. FRA participation in the design and testing of the PTC system product helps FRA to better understand the strengths and weaknesses of the product for which approval is requested, and facilitates the approval process.

The railroad must establish through safety analysis that its assertions are true. This standard places the burden on the railroad to demonstrate that the safety analysis is accurate and sufficiently supports certification of the PTC system. The FRA Associate Administrator will determine whether the railroad's case has been made. As provided in subpart H, FRA believes that final agency determinations under this new subpart I should also be made at the technical level, rather than the policy level, due to the complex and sometimes esoteric subject matters associated with risk analysis and evaluation. This is particularly appropriate in light of the RSIA08's designation of the Associate Administrator for Railroad Safety as the Chief Safety Officer of FRA. When considering the PTC system's compliance with recognized standards in product development, FRA will weigh appropriate factors, including: the use of recognized standards in system design and safety analyses; the acceptable methods in risk estimates; the proven safety records for proposed components; and the overall complexity and novelty of the product design. In those cases where the submission lacks information the Associate Administrator deems necessary to make an informed safety decision, FRA will solicit the data from the railroad. If the railroad does not provide the requested information, FRA may determine that a safety hazard exists. Depending upon the amount and scope of the missing data, PTCSP approval, and the subsequent system certification, may be denied.

While paragraph (f) summarizes how FRA intends to evaluate the risk analysis, paragraph (g) applies specifically to cases where a PTC system has already been installed and the railroad subsequently wants to install in a new PTC system. Paragraph (g) re-emphasizes that FRA policy regarding the safety of PTC systems is not, and cannot expect to be, static. Rather, FRA policy may evolve as railroad operations evolve, operating rules are refined, related hazards are addressed (e.g., broken rails), and other readily available options for risk reduction emerge and become more affordable. FRA embraces the concept of progressive improvement and expects that when new systems are installed to replace existing systems that actual safety outcomes equal or exceed those for the existing systems.

Finally, paragraph (h) emphasizes the need for the PTCSP to carefully document all potential sources of error that can be introduced into the system and their corresponding mitigation strategies. FRA reserves the right to require quantitative, as opposed to qualitative risk assessments, especially in cases where there is significant residual risk or changes to the method of operations.

Section 236.1017 Independent Third Party Review of Verification and Validation

As previously noted in the discussion regarding § 236.1009(e), FRA may require a railroad to engage in an independent assessment of its PTC system. In the event an independent assessment is required, this section describes the applicable rules and procedures.

Paragraph (a) establishes factors considered by FRA when requiring a third-party assessment. FRA will attempt to make a determination of the necessary level of third party assessment as early as possible in the approval process. However, based on issues that may arise during the development and testing processes, or during the detailed technical reviews of the PTCDP and PTCSP, FRA may deem it necessary to require a third party assessment at any time during the review process.

Paragraph (b) is intended to make it clear that it is FRA that will make the determination of the acceptability of the independence of the third party to avoid any potential issues downstream regarding the acceptability of the assessor's independence. If a third party assessment is required, then each railroad is encouraged to identify in writing what entity it proposes to utilize as its third party assessor. Compliance with paragraph (b) is not mandatory. However, if FRA determines that the railroad's choice of a third party does not meet the level of independence contemplated under paragraph (c), then the railroad will be obligated to have the assessment repeated, at its expense, until it has been completed by a third party suitable to FRA.

Paragraph (c) provides a definition of the term "independent third party" as used in this section. It limits independent third parties to those that are compensated by the railroad or an association on behalf of one or more railroads that is independent of the PTC system supplier. FRA believes that requiring the railroad to compensate a third party will heighten the railroad's interest in obtaining a quality analysis and will avoid ambiguous relationships between suppliers and third parties that could indicate possible conflicts of interest.

Paragraph (d) explains that the minimum requirements of a third party audit are outlined in Appendix F and that FRA has discretion to the limit the extent of the third party assessment. As the criteria in Appendix F are, for the most part, technology neutral, FRA has adopted them with minor changes, for use with both subparts H and I of this part. FRA intends to limit the scope of the assessment to areas of the safety Verification and Validation as much as possible, within the bounds of FRA's regulatory obligations. This will allow reviewers to focus on areas of greatest safety concern and eliminate any unnecessary expense to the railroad. In order to limit the number of third-party assessments, FRA first strives to inform the railroad as to what portions of a submittal could be amended to avoid the necessity and expense of a third-party assessment altogether. However, FRA wishes to make it clear that Appendix F represents minimum requirements and that, if circumstances warrant, FRA may expand upon the Appendix F requirements as necessary to enable FRA to render a decision that is in the public interest (i.e., if FRA is unable to certify the system without the additional information).

Section 236.1019 Main Line Track Exceptions

The RSIA08 generally defines "main line" as "a segment of railroad tracks over which 5,000,000 or more gross tons of railroad traffic is transported annually. *See* 49 U.S.C. 20157(i)(2). However, FRA may also define "main line" by regulation "for intercity rail passenger transportation or commuter rail passenger transportation routes or segments over which limited or no freight railroad operations occur." *See* 49 U.S.C. 20157(i)(2)(B); 49 CFR 1.49(oo). FRA recognizes that there may be circumstances where certain statutory PTC system implementation and operation requirements are not practical and provide no significant safety benefits. In those circumstances, FRA will exercise its statutory discretion provided under 49 U.S.C. 20157(i)(2)(B).

In accordance with the authority provided by the statute and with carefully considered recommendations from the RSAC, FRA will consider requests for designation of track over which rail operations are conducted as "other than main line track" for passenger and commuter railroads, or freight railroads operating jointly with passenger or commuter railroads. Such relief may be granted only after request by the railroad or railroads filing a PTCIP and approval by the Associate Administrator.

Paragraph (a), therefore, requires the submittal of a main line track exclusion addendum (MTEA) to any PTCIP filed by a railroad that seeks to have any particular track segment deemed as other than main line. Since the statute only provides for such regulatory flexibility as it applies to passenger transportation routes or segments where limited or no freight railroad operations occur, only a passenger railroad may file an MTEA as part of its PTCIP. This may include a PTCIP jointly filed by freight and passenger railroads. In fact, FRA expects that in the case of joint operations, only one MTEA should be agreed upon and submitted by the railroads filing the PTCIP. After reviewing a submitted MTEA, FRA may provide full or conditional approval for the requested exemptions.

Each MTEA must clearly identify and define the physical boundaries, use, and characterization of the trackage for which exclusion is requested. When describing each track's use and characterization, FRA expects the requesting railroad or railroads to include copies of the applicable track and signal charts. Ultimately, FRA expects each MTEA to include information sufficiently specific to enable easy segregation between main line track and non-main line track. In the event the railroad subsequently requests additional track to be considered for exclusion, a well-defined MTEA should reduce the amount of future information required to be submitted to FRA. Moreover, if FRA decides to grant only certain requests in an MTEA, the portions of track for which FRA has determined should remain considered as main line track can be easily severed from the MTEA. Otherwise, the entire MTEA, and thus its concomitant PTCIP, may be entirely disapproved by FRA, increasing the risk of the railroad or railroads not meeting its statutory deadline for PTC implementation and operation.

For each particular track segment, the MTEA must also provide a justification for such designation in accordance with paragraphs (b) or (c) of this section.

Paragraph (b) specifically addresses the conditions for relief for passenger and commuter railroads with respect to passenger-only terminal areas. As noted previously in the analysis of § 236.1005(b), any track within a yard used exclusively by freight operations moving at restricted speed is excepted from the definition of main line. In those situations, operations are usually limited to preparing trains for transportation and do not usually include actual transportation. This automatic exclusion does not extend to yard or terminal tracks that include passenger operations. Such operations may also include the boarding and disembarking of passengers, heightening FRA's sensitivity to safety. Moreover, while FRA could not expend its limited resources to review whether a freight-only yard should be deemed other than main line track, FRA believes that the relatively lower number of passenger yards and terminals would allow for such review. Accordingly, FRA believes that it is appropriate to review these circumstances on a case-by-case basis.

During the PTC Working Group discussions, the major passenger railroads requested an exception for tracks in passenger terminal areas because of the impracticability of installing PTC. These are locations where signal systems govern movements over very complex special track work divided into short signal blocks. Operating speeds are low (not to exceed 20 miles per hour), and locomotive engineers moving in this environment expect conflicting traffic and restrictive signals. Although low-speed collisions do occasionally occur in these environments, the consequences are low; and the rate of occurrence is very low in relation to the exposure. It is the nature of current-generation PTC systems to use conservative braking algorithms. Requiring PTC to govern short blocks in congested terminals would add to congestion and frustrate efficient passenger service, in the judgment of those who operate these railroads. The density of wayside infrastructure required to effect PTC functions in these terminal areas would also be exceptionally costly in relation to the benefits obtained. FRA agrees that technical solutions to address these concerns are not presently available. FRA does believe that the appropriate role for PTC in this context is to enforce the maximum allowable speed (which is presently accomplished in cab signal territory through use of automatic speed control, a practice which could continue where already in place).

If FRA grants relief, the conditions of paragraphs (b)(1), (b)(2), or (b)(3), as applicable, as well as conditions attached to the approval, must be strictly adhered to.

Under paragraph (b)(1), relief under paragraph (b) is limited to operations that do not exceed 20 miles per hour. The PTC Working Group agreed upon the 20 miles per hour limitation, instead of requiring restricted speed, because the operations in question will be by signal indication in congested and complex terminals with short block lengths and numerous turnouts. FRA agrees with the PTC Working Group that the use of restricted speed in this environment would unnecessarily exacerbate congestion, delay trains, and diminish the quality of rail passenger service.

Moreover, when trains on the excluded track are controlled by a locomotive with an operative PTC onboard apparatus that PTC system component must enforce the regulatory speed limit or actual maximum authorized speed, whichever is less. While the actual track may not be outfitted with a PTC system in light of an MTEA approval, FRA believes it is nevertheless prudent to require such enforcement when the technology is available on the operating locomotives. This can be accomplished in cab signal territory using existing automatic train stop technology and outside of cab signal territory by mapping the terminal and causing the onboard computer to enforce the maximum speed allowed.

FRA also limits relief under paragraph (b)(2) to operations that enforce interlocking rules. Under interlocking rules, trains are prohibited from moving in reverse directions without dispatcher permission on track where there are no signal indications. FRA believes that such a restriction will minimize the potential for a head-on impact.

Also, under paragraph (b)(3), such operations are only allowed in yard or terminal areas where no freight operations are permitted. While the definition of main line may not include yard tracks used solely by freight operations, FRA is not extending any relief or exception to tracks within yards or terminals shared by freight and passenger operations. The collision of a passenger train with a freight consist is typically a more severe condition because of the greater mass of the freight equipment. However, FRA did receive a comment suggesting some latitude within terminals when passenger trains are moving without passengers (e.g., to access repair and servicing areas). FRA agrees that low-speed operations under those conditions should be acceptable as trains are prepared for transportation. FRA has not included a request by Amtrak (discussed below) to allow movements within major terminals at up to 30 miles per hour in mixed passenger and freight service, which appears in FRA's judgment to fall outside of the authority to provide exclusions conferred on FRA by the law.

Paragraph (c) provides the conditions under which joint limited passenger and freight operations may occur on defined track segments without the requirement for installation of PTC. Under § 236.1003 (Definitions), "limited operations" is defined as "operations on main line track that have limited or no freight operations and are approved to be excepted from this subpart's PTC system implementation and operation requirements in accordance with § 236.1019(c). This paragraph provides five alternative paths to the main line exception, three of which were contained in the proposed rule and a fourth and fifth that responds to comments on the proposed rule.

The three alternatives derived from the NPRM are set forth in paragraph (c)(1). First, under paragraph (c)(1), an exception may be available where both the freight and passenger trains are limited to restricted speed. Such operations are feasible only for short distances, and FRA will examine the circumstances involved to ensure that the exposure is limited and that appropriate operating rules and training are in place.

Second, under paragraph (c)(1)(ii), FRA will consider an exception where temporal separation of the freight and passenger operations can be ensured. A more complete definition of temporal separation is provided in paragraph (e). Temporal separation of passenger and freight services reduces risk because the likelihood of a collision is reduced (e.g., due to freight cars engaged in switching that are not properly secured) and the possibility of a relatively more severe collision between a passenger train and much heavier freight consist is obviated.

Third, under paragraph (c)(1)(iii), FRA will consider commingled freight and passenger operations provided that a jointly agreed risk analysis is provided by the passenger and freight railroads, and the level of safety is the same as that which would be provided under one of the two prior options selected as the base case. FRA requested comments on whether FRA or the subject railroad should determine the appropriate base case, but received none. FRA recognizes that there may be situations where temporal separation may not be possible. In such situations, FRA may allow commingled operations provided the risk to the passenger operation is no greater than if the passenger and freight trains were operating under temporal separation or with all trains limited to restricted speed. For an exception to be made under paragraph (c)(3), FRA requires a risk analysis jointly agreed to and submitted by the applicable freight and passenger services. This ensures that the risks and consequences to both parties have been fully analyzed, understood, and mitigated to the extent practical. FRA would expect that the moving party would elect a base case offering the greatest clarity and justify the selection.

Comments on the proposed rule generally supported the aforementioned exclusions or were silent.

In its comments on the NPRM, Amtrak requested further relief relating to lines requiring the implementation and operation of a PTC system due solely to the presence of light-density passenger traffic. According to Amtrak, the defining characteristic of light-density lines is the nature of the train traffic; light-density patterns on these lines lead to a correspondingly low risk of collision. Amtrak also asserted that, due to relatively limited wear and tear from lower traffic densities, these lines often have fewer track workers on site, further reducing the chance of collisions and incursions into work zones. Thus, states Amtrak, one of the principal reasons for installing PTC—collision avoidance—is a relatively low risk on many light density lines. With only marginal safety benefits anticipated from PTC use in such applications, Amtrak believed that there may be minimal justification for installing PTC on certain light-density lines.

Amtrak further noted that FRA itself had concluded that the costs of PTC generally exceed its benefits, and Amtrak urged that this may be even more so on light-density lines. Amtrak believed that Congress understood this issue and thus created the regulatory flexibility for the definition of "main line" for passenger routes found at 49 U.S.C. 20157(i)(2)(B) as a means to allow the Secretary to exempt certain routes from the PTC mandate. According to Amtrak, this provision essentially allows the Secretary to define certain passenger routes with limited or no freight traffic as other than "main line," thereby effectively exempting such lines from the reach of the PTC mandate because the mandate only applies to railroad operations over "main line[s]." Said another way, urged Amtrak, the provision allows the Secretary the freedom to decide in what circumstances such routes should be considered "main lines" and thus be

required to install PTC–pursuant to whatever factors the Secretary deems appropriate through the rulemaking process.

Amtrak urged that the Secretary should use this flexibility to limit which passenger routes it defines as "main lines" to those deemed to warrant the use of PTC using the FRA's usual risk-based approach to safety regulation and traditional measures of reasonableness, costs, and benefits. Amtrak posited that such a risk-based analysis by FRA would likely lead to the conclusion that PTC is simply not needed on many light-density lines over which passenger trains currently operate. Amtrak therefore asked that FRA exercise this authority by working with Amtrak and the rail industry to exempt certain light density freight lines which host passenger traffic from the obligation to install PTC where operating and safety conditions do not warrant an advanced signal system.

Should FRA choose not to exempt some of these light density freight lines over which passenger trains operate, Amtrak felt that the high costs of full PTC systems will be passed on to the passenger and freight operators of these routes. According to Amtrak, this obligation could threaten the continuation of intercity passenger rail service on several routes, including lines in California, Colorado, Kansas, Maine, Massachusetts, Michigan, Missouri, New Hampshire, New Mexico, North Dakota, Vermont, and Virginia, on what are potentially light density lines. Additionally, states Amtrak, this obligation, where it can be financed, could force the diversion of significant capital dollars away from essential safety investments in track and other infrastructure improvements, which are typically the leading safety risks for such light-density operations. According to Amtrak, the cost of PTC installation on these lines may be so out of proportion to the benefit that Amtrak's service will need to be rerouted onto a different line (e.g., to a Class I line with PIH materials) if a reroute option exists, or eliminated entirely because there is no feasible alternate route and no party is willing or able to bear the cost of installing PTC on the existing route. The defining characteristic of light-density lines is the nature of the train traffic: Low density patterns on these lines lead to a correspondingly low risk of collision.

According to the Amtrak testimony, the "limited operations exception" in subsection 236.1019(c) of the NPRM did not provide a practical solution to the problem created by defining all light-density routes and terminal areas with passenger service as "main lines." Amtrak stated that this subsection would arguably require installation of PTC on most of the trackage and locomotives of the Terminal Railroad Association of St. Louis (TRRA) unless: (1) The entire terminal operates at restricted speed (which TRRA is unlikely to agree to); (2) passenger and freight trains are temporally separated (which would not be practical on TRRA, and is unlikely to be practical on any of the light-density lines over which Amtrak operates, due to the 24/7 nature of railroad operations); or (3) a risk mitigation plan can be effected that would achieve a level of safety not less than would pertain if all operations on TRRA were at restricted speed or subject to temporal separation. Accordingly, Amtrak recommended: (a) That the FRA adopt a risk analysis-based definition of "main line" passenger routes that excludes light-density lines on which the installation of PTC is not warranted; and (b) with respect to freight terminal areas in which passenger trains operate, that the FRA modify the limited operations exception in subsection 236.1019(c) to require that all trains be limited to 30 miles per hour rather than to restricted speed, or that non-PTC equipped freight terminals be deemed as other than "main lines" so long as all passenger operations are pursuant to signal indication and at speeds not greater than 30 miles per hour (with speeds reduced to not greater than restricted speed on unsignaled trackage or if the signals should fail).

FRA believes that Amtrak's request is much broader than contemplated by the law. FRA notes that TRRA is a very busy terminal operation. FRA does not believe that the "limited freight operations" concept is in any way applicable under those circumstances. Nor is there any indication in law that FRA was expected to fall back to traditional cost-benefit principles in relation to PTC and scheduled passenger service. However, there are a number of Amtrak routes with limited freight operations that will not otherwise be equipped with PTC because they are operated by other than Class I railroads. Further, there are some Class I lines with less than 5 million gross tons, or no PIH, that also warrant individualized review to the extent Amtrak and the host railroad might elect to propose it.

Accordingly, in response to the Amtrak comments, paragraphs (c)(2) and (c)(3) have been added to the final rule to provide an option by which certain additional types of limited passenger train operations may qualify for a main line track exception where freight operations are also suitably limited and the circumstances could lead to significant hardship and cost that might overwhelm the value of the passenger service provided. Paragraph (c)(2) deals with lines where the host is not a Class I freight railroad, describing characteristics of track segments that might warrant relief from the requirement to install PTC. Paragraph (c)(2)(i) pertains to passenger service involving up to four regularly scheduled passenger trains during a calendar day over a segment of unsignaled track on which less than 15 million gross tons of freight traffic is transported annually. Paragraph (c)(2)(ii) pertains to passenger service involving up to twelve regularly scheduled passenger trains during a calendar day over a segment of signaled track on which less than 15 million gross tons of freight traffic is transported annually. In FRA's experience, four trains per day in unsignaled territory and twelve trains per day in signaled territory can be expected to be handled safely in combination with 15 million gross tons of freight traffic if the operations are carefully scrutinized and appropriate mitigation measures are taken to accommodate the particular operating environment in question. Paragraph (c)(2) derived indirectly from discussions in the RSAC in response to comments by Amtrak set forth above. The PTC Working Group proposed an exception that might have been available anywhere an intercity or commuter railroad operated over a line with 5 million gross tons of freight traffic, including Class I lines and the lines of the intercity or commuter railroad. This would have opened the potential for a considerable exception for lines with very light freight density under circumstances not thoroughly explored in the short time available to the working group (e.g., on commuter rail branch lines, low density track segments on Class I railroads, etc.).

Subsequent to the RSAC activities, Amtrak notified FRA that its conversations with Class II and III railroads, whose lines have been at the root of the Amtrak comments, revealed that some of the situations involved freight traffic exceeding 5 million gross tons, potentially rendering the exception ineffective for this purpose. At the same time, FRA noted that the policy rationale behind the proposed additional exception was related as much to the inherent difficulty associated with PTC installation during the initial period defined by law, given that the railroads identified by Amtrak were for the most part very small operations with limited technical

capacity and limited safety exposure. It was clear that in these cases care would need to be taken to analyze collision risk and potentially require mitigations.[7] Accordingly, FRA has endeavored to address the concern brought forward by Amtrak with a provision that is broad enough to permit consideration of actual circumstances, limit this particular exception to operations over railroads that would not otherwise need to install PTC (e.g., Class II and III freight railroads), provide for a thorough review process, and make explicit reference to the potential requirement for safety mitigations. In this regard, FRA has chosen 15 million gross tons as a threshold that should accommodate situations where Amtrak trains will, in actuality, face few conflicts with freight movements (i.e., requiring trains to clear the main line for meets and passes or to wait at junctions) and where mitigations are in place or could be put in place to establish a high sense of confidence that operations will continue to be conducted safely. FRA believes that less than 15 million gross tons represents a fair test of "limited freight operations" for these purposes, with the further caveat that specific operating arrangements will be examined in each case. FRA emphasizes that this is not an entitlement, but an exclusion for which the affected railroads will need to make a suitable case.

Amtrak also provided to FRA a spreadsheet identifying each of its route segments with attributes such as route length, freight tonnage, number of Amtrak trains, and numbers of commuter trains. FRA further reviewed this information in light of Amtrak's request for main track exceptions. FRA noted a number of segments of the Amtrak system on Class I railroads where the number of Amtrak trains was low and the freight tonnage was also low (less than 15 million gross tons). Each of these lines, with the exception of one 33-mile segment, is signalized. FRA further noted that, with both Amtrak and Class I railroad locomotives equipped for PTC, use of partial PTC technology (e.g., monitoring of switches where trains frequently clear) should be available as a mitigation for collision risk. Accordingly, in paragraph (c)(3), FRA has provided a further narrow exception for Class I lines carrying no more than four intercity or commuter passenger trains per day and cumulative annual tonnage of less than 15 million gross tons, subject to FRA review. The limit of four trains takes into consideration that it is much less burdensome to equip the wayside of a Class I rail line than to install a full PTC system on a railroad that would not otherwise require one. Again, the exception is not automatic, and FRA's approval of a particular line segment would be discretionary. Any Class I line carrying both 5 million gross tons and PIH traffic would, of course, not be eligible for consideration.[8]

The new paragraph (d) makes clear that FRA will carefully review each proposed main track exception and may require that it be supported by appropriate hazard analysis and mitigations. FRA has previously vetted through the RSAC a Collision Hazard Analysis Guide that can be useful for this purpose. If FRA determines that freight operations are not "limited" as a matter of safety exposure or that proposed safety mitigations are inadequate, FRA will deny the exception.

Paragraph (e) (formerly paragraph (d) in the proposed rule) provides the definition of temporal separation with respect to paragraph (c)(2). The temporal separation approach is currently used under the FRA–Federal Transit Administration Joint Policy on Shared Use, which permits co-existence of light rail passenger services (during the day) and local freight service (during the nighttime). *See Joint Statement of Agency Policy Concerning Shared Use of the Tracks of the General Railroad System by Conventional Railroads and Light Rail Transit Systems*, 65 FR 42,526 (July 10, 2000); *FRA Statement of Agency Policy Concerning Jurisdiction Over the Safety of Railroad Passenger Operations and Waivers Related to Shared Use of the Tracks of the General Railroad System by Light Rail and Conventional Equipment*, 65 FR 42,529 (July 10, 2000). Conventional rail technology and secure procedures are used to ensure that these services do not commingle. Amtrak representatives in the PTC Working Group were confident that more refined temporal separation strategies could be employed on smaller railroads that carry light freight volumes and few Amtrak trains (e.g., one train per day or one train per day in each direction). The Passenger Task Force agreed. The UTA also supported the temporal separation exception under former paragraph (d), having stated that temporal separation is important in the operations of many commuter and intercity passenger railroad carriers.

Paragraph (f) (paragraph (e) in the proposed rule) ensures that by the time the railroad submits its PTCSP, no unapproved changes have been made to the MTEA and that the PTC system, as implemented, reflects the PTCIP and its MTEA. Under this final rule, the PTCSP must reflect the PTCIP, including its MTEA, as it was approved or how it has been modified in accordance with § 236.1021. FRA believes that it is also important that the railroad attest that no other changes to the documents or to the PTC system, as implemented, have been made.

FRA understands that, as a railroad implements its PTC system in accordance with its PTCIP or even after it receives PTC System Certification, the railroad may decide to modify the scope of which tracks it believes to be other than main line. To effectuate such changes, paragraph (g) requires FRA review. In the case that the railroad believes that such relief is warranted, the railroad may file in accordance with § 236.1021 a request for amendment of the PTCIP, which will eventually be incorporated into or referenced by the PTCSP upon PTCSP submission. Each request, however, must be fully justified to and approved by the Associate Administrator before the requested change can be made to the PTCIP. If such a RFA is submitted simultaneously with the PTCSP, the RFA may not be approved, even if the PTCSP is otherwise acceptable. A change made to an MTEA subsequent to FRA approval of its associated PTCIP that involves removal or reduction in functionality of the PTC system will be treated as a material modification. In keeping with traditional signaling principles, such requests must be formally submitted for review and approval by FRA.

Section 236.1021 Discontinuances, Material Modifications, and Amendments

FRA recognizes that, after submittal of a plan or implementation of a train control system, the subject railroad may have legitimate reasons for making changes in the system design and the locations where the system is installed. In light of the statutory and regulatory mandates, however, FRA believes that the railroad should be required to request FRA approval prior to effectuating certain changes. Section 236.1021 provides the scope and

[7] An example of an existing mitigation, which is provided to support service quality but also supports safety, is the practice of one Class III Amtrak host and its connecting freight partner to hold out fleeted empty coal trains off the Class III property during the period that Amtrak is running. While not constituting strict "temporal separation," it does significantly reduce collision risk over the route.

[8] Freight tonnage on Amtrak lines varies from zero on two segments to over 150 million gross tons. On a per-mile basis, 15 million gross tons falls into the twenty-first percentile of Amtrak track miles. The candidate lines on the Class I system comprise about 6% of Amtrak's route structure.

procedure for requesting and approving those changes. For example, all requests for covered changes must be made in a request for amendment (RFA) of the subject PTC system or plan. While § 236.1021 includes lengthy descriptions of what changes may, or may not, require FRA approval, there are various places elsewhere in subpart I that also require the filing of a RFA.

Paragraph (a) requires FRA approval prior to certain PTC system changes. FRA expects that if a railroad wants to make a PTC system change covered by subpart I, then any such change would result in noncompliance with one of the railroad's plans approved under this subpart. For instance, if a railroad seeks to modify the geographical limits of its PTC implementation, such changes would not be reflected in the PTCIP. Accordingly, under paragraph (a), after a plan is approved by FRA and before any change is made to the PTC system's development, implementation, or operation, the railroad must file a RFA to the subject plan.

FRA considers an amendment to be a formal or official change made to the PTC system or its associated PTCIP, PTCDP, or PTCSP. Amendments can add, remove, or update parts of these documents, which may reflect proposed changes to the development, implementation, or operation of its PTC system. FRA believes that an amending procedure provides a simpler and cleaner option than requiring the railroad to file an entirely new plan.

While the railroad may develop a RFA without FRA input or involvement, FRA believes that it is more advantageous for the railroad to informally confer with FRA before formally submitting its RFA. If FRA is not involved in the drafting process, FRA may not have a complete understanding of the system, making it difficult for FRA to evaluate the impact of the proposed changes on public safety. After RFA submission, all applicable correspondence between FRA and the railroad must be made formally in the associated docket, as further discussed below. In such a situation, FRA's review may take a significantly longer time than usual. If FRA continues to not understand the impact, it may request a third party audit, which would only further delay a decision on the request. Accordingly, FRA believes it is more advantageous for the railroad drafting an RFA to informally confer with FRA before its formal submission of the change request. The railroad would then be provided an opportunity to discuss the details of the change and to assure FRA's understanding of what the railroad wishes to change and of the change's potential impact.

Under paragraph (b), once the RFA is approved, the railroad shall adopt those changes into the subject plan and immediately ensure that its PTC complies with the plan, as amended. FRA expects that each PTC system accurately reflects the information in its associated approved plans. FRA believes that this requirement will also incentivize railroads to make approved changes as quickly as possible. Otherwise, if a railroad delays in implementing the changes reflected in an approved RFA, FRA may find it difficult to enforce its regulations until implementation is completed, since the plans and PTC system do not accurately and adequately reflect each other. In such circumstances, a railroad may be assessed a civil penalty for violating its plan or for falsifying records.

Any change to a PTCIP, PTCDP, or PTCSP, which may include removal or discontinuance of any signal system, may not take effect until after FRA has approved the corresponding submitted or amended PTCIP, PTCDP, or PTCSP. FRA may provide partial or conditional approval. Until FRA has granted appropriate relief or approval, the railroad may not make the change, and once a requested change has been made, the railroad must comply with requested change.

FRA recognizes that a railroad may wish to remove an existing train control system due to new and appropriate PTC system implementation. For train control systems existing prior to promulgation of subpart I, any request for a material modification or discontinuance must be made pursuant to part 235. Paragraph (c), however, provides the railroads with an opportunity to instead request such changes in accordance with proposed § 236.1021. FRA believes that this requirement will reduce the number of required filings and would otherwise simplify the process requesting material modifications or discontinuances.

Paragraph (d) provides the minimum information required to be submitted to FRA when requesting an amendment. While the procedural rules here are different than those in part 235, FRA expects that the same or similar information be provided. Accordingly, under paragraph (d)(1), the RFA must contain the information required in 235.10. Paragraph (d)(1) also requires the railroad to submit, upon FRA request, certain additional information, including the information referenced in § 235.12. Paragraphs (d)(2) through (d)(7) provide further examples of such information. While such information may only be required upon request, FRA urges each railroad to include this information in its RFA to help expedite the review process.

FRA believes that paragraphs (d)(2) through (d)(6) are self-explanatory. However, according to paragraph (d)(7), FRA may require with each RFA an explanation of whether each change to the PTCSP is planned or unplanned. Planned changes are those that the system developer and the railroad have included in the safety analysis associated with the PTC system, but have not yet implemented. These changes provide enhanced functionality to the system, and FRA strongly encourages railroads to include PTC system improvements that further increase safety. A planned change may require FRA approved regression testing to demonstrate that its implementation has not had an adverse affect on the system it is augmenting. Each planned change must be clearly identified as part of the PTCSP, and the PTCSP safety analysis must show the affect that its implementation will have on safety.

Unplanned changes are those either not foreseen by the railroad or developer, but nevertheless necessary to ensure system safety, or are unplanned functional enhancements from the original core system. The scope of any additional work necessary to ensure safety may depend upon when in the development cycle phase the changes are introduced. For instance, if the PTCDP has not yet been submitted to FRA, no FRA involvement is required. However, if the PTCDP has been submitted to FRA, or if the change impacts the safety functionality of the system once a Type Approval has been issued, and a PTCSP has not yet been submitted, the railroad must submit a RFA requesting and documenting that change. Once FRA approves that RFA, FRA expects the subsequently filed PTCSP to account for the change in analysis.

If the change is made after approval of the PTCSP and the system has been certified by FRA, a RFA must be submitted to FRA for approval. Because this requires significant effort by FRA and the railroad, FRA expects that every effort will be made to eliminate the need for unplanned changes. If the railroad and the vendor or supplier submit unplanned safety related changes that FRA believes are a significant amount or inordinately complex, FRA may revoke any approvals previously granted and disallow the use of the product until such time the railroad demonstrates the product is sufficiently mature.

Paragraph (e) provides that if a RFA is submitted for a discontinuance or a

material modification to a portion or all of its PTC system, a notice of its submission shall be published in the Federal Register. Interested parties will be provided an opportunity to comment on the RFA, which will be located in an identified docket.

Paragraph (f) makes it clear that FRA will consider all impacts on public safety prior to approval or disapproval of any request for discontinuance, modification, or amendment of a PTC system and any associated changes in the existing signal system that may have been concurrently submitted. While the economic impact to the affected parties may be considered by FRA, the primary and final deciding factor on any FRA decision is safety. FRA will consider not only how safety is affected by installation of the system, but how safety is impacted by the failure modes of the system.

The Southern California Regional Rail Authority submitted comments requesting "easy streamlined approval" of incremental changes and additions to the plans based on procurement and type approval of vendor or supplier products. However, FRA would like to point out that, where lines change during or subsequent to the railroad's submission of its PTCIP, the railroad merely needs to identify its plan for implementation on such lines in its RFA. This does not appear to be an overly burdensome task.

The purpose of paragraph (g) is to emphasize the right of FRA to unilaterally issue a new Type Approval, with whatever conditions are necessary to ensure safety based on the impact of the proposed changes.

In paragraph (h), FRA makes clear that it considers any implemented PTC system to be a safety device. Accordingly, the discontinuance, modification, or other change of the implemented system or its geographical limits will not be authorized without prior FRA approval. While this requirement primarily applies to safety critical changes, FRA believes that they should also apply to all changes that will affect interoperability. The principles expressed in the paragraph parallel those embodied in part 235, which implements 49 U.S.C. 20502(a). Railroads may need to review § 236.1005(b)(4) and supply the required information in an RFA submission.

That said, FRA recognizes that there are a limited number of situations where changes of the PTC system may not have an adverse impact upon public safety. Specific situations where prior FRA approval is required are provided in paragraphs (h)(1) through (h)(4).

Paragraph (i) provides the exceptions from the requirement for prior approval in cases where the discontinuance of a system or system element will be treated as pre-approved, as when a line of railroad is abandoned.

Paragraph (j) provides exceptions for certain lesser changes that are not expected to materially affect system risk, such as removal of an electric lock from a switch where speed is low and trains are not allowed to clear.

The AAR submitted comment that paragraphs (j)(2) and (j)(3) should be revised to recognize the allowance for removal of a signal used in lieu of an electric or mechanical lock in the same manner as removal of the electric or mechanical lock. These two paragraphs are intended to recognize that where train speed over the switch does not exceed 20 miles per hour, or where trains are not permitted to clear the main track at the switch, removal of the devices intended to provide the necessary protection should not require the submission of a filing for FRA approval.

The regulation requiring the installation of an electric or mechanical lock identifies the allowance for a signal used in lieu thereof (*see* § 236.410). FRA agrees with the AAR that when the requirement for an electric or mechanical lock, or a signal used in lieu thereof, are eliminated, the removal of any of these devices in their entirety without filing for approval is appropriate. FRA has therefore revised paragraphs (j)(2) and (j)(3) to clarify these allowances.

Paragraph (k) provides additional exceptions consisting of modifications associated with changes in the track structure or temporary construction. FRA notes that only temporary removal of the PTC system without prior FRA approval is allowed to support highway rail separation construction or damage to the PTC system by catastrophic events. In both cases, the PTC system must be restored to operation no later than 6 months after completion of the event.

Caltrain submitted comments stating that proposed paragraph (k)(6) and § 236.1009(a)(2)(ii)(B) appear to address the installation of new track in an inconsistent manner. While proposed paragraph (k)(6) states that it will not be necessary to file an RFA for the installation of new track, § 236.1009(a)(2)(ii)(B) states that an RFA must be filed if railroad intends to add, subtract, or otherwise materially modify one or more lines of railroad for which installation of a PTC system is required.

FRA agrees that there appears to have been a conflict between the provisions contained in paragraph (k)(6) and § 236.1009(a)(2)(ii)(B). In light of the fact that FRA considers it necessary to file an RFA if the railroad intends to install new track for which installation of a PTC system is required, FRA has not included proposed paragraph (k)(6) in the final rule.

Section 236.1023 Errors and Malfunctions

Often it is only after the product has been placed in field service for an extended period of time before the accuracy of the assumptions regarding errors and malfunctions can be validated. Accordingly, the reporting and recording of errors and malfunctions takes on critical importance. If the number of errors and malfunctions exceeds those originally anticipated in the design, or errors and malfunctions that were not predicted are observed to occur, the validity of the system design assumptions and the accuracy of the performance predictions becomes suspect. The requirements of this section provide the process and procedures for tracking, reporting, and correction of errors and malfunctions. The final rule reflects the requirements of the NPRM, but has been reorganized for greater clarity.

Paragraph (a) of this section contains the requirement for all railroads operating a PTC system to establish and maintain a PTCPVL. The PTCPVL list ensures that the railroad can quickly determine the vendor of the product that has experienced an error or malfunctioned, and then be able to report the occurrence of the error or malfunction in a timely and accurate manner to the appropriate entity responsible for the design and manufacture of the product. FRA access to the PTCPVL of each railroad enables FRA to quickly identify all railroads that may potentially be affected by the error malfunction, thereby allowing FRA to better understand the implications of the condition on the industry. Not all railroads using the same product or processes may experience the same software errors or hardware failures, even if the cause of the error or failure is systemic to the design, and an individual railroad may not have the resources to determine if there are any industry-wide implications. The requirement for creating and maintaining the PTCPVL was originally proposed in paragraph (c) of the NPRM.

Paragraph (b)(1) establishes a requirement that the railroad specify in its PTCSP all contractual arrangements with their vendors or suppliers for immediate notification of safety-critical upgrades made to the product by the

vendors or suppliers. FRA is not interested in the commercial terms of any such contractual arrangement, only that the contractual arrangement is in place for notification and provision of safety-critical changes from a vendor or supplier to the railroad. Paragraph (b)(2) levies the requirement on the vendor or supplier to report to all railroads using the product any safety-critical failures reported. Paragraph (b)(3) levies a requirement on the vendor or supplier to provide accurate and adequate information of the circumstances surrounding the reported failure to any potentially affected railroad, as well as recommended mitigating actions that should be taken until the situation is resolved. The text of paragraph (b) has been modified slightly from that of the NPRM to more accurately reflect FRA's expectation in this regard.

Paragraph (c)(1) levies the requirement on the railroad to specify in its PTCSP the process and procedures the railroad will implement when a safety-critical upgrade or failure notification is received from the vendor or supplier. This requirement is necessary regardless of whether the railroad itself discovers the problem or the vendor or supplier notifies the railroad of the problem. Paragraph (c)(2) requires the railroads to identify the associated configuration management process they will use to identify safety-critical failures and mitigations. FRA believes it to be essential, given the potential impact on safety of a safety-critical failure, that the railroads have the necessary planning and mechanisms in place to promptly address the situation. Each railroad's and vendor's or supplier's development processes, configuration management programs, and fault reporting tracking systems play a crucial role in the ability of both parties and the FRA to determine and fully understand the risks and implications. Without an effective configuration management tracking system in place, it is difficult, if not impossible, to fairly evaluate PTC system risks during the system's life-cycle.

Paragraph (d) requires that the railroad provide to its vendor or supplier the railroad's processes and procedures for addressing safety-critical failure, malfunction, and fault issues. FRA believes that by providing this information to the vendor or supplier, the vendor or supplier will be able to more efficiently and effectively provide notification to the appropriate railroad personnel. The net result FRA is seeking is that potential delays in identifying or correcting safety-critical faults will be minimized.

Paragraph (e) requires the railroad to maintain a database of all safety-relevant hazards identified in its PTCSP, as well as all safety-relevant hazards that were not previously identified. FRA believes that the requirement to report any safety-relevant hazard that was not previously identified in the PTCSP is self evident, in that it clearly represents an unknown and unplanned failure mode. Without this database, a railroad will be unable to determine if the number of particular failures has risen to a level above the thresholds set forth in the PTCSP. If the frequency of the safety-relevant hazards exceeds the thresholds set forth in the PTCSP, the railroads shall take the following specific actions as prescribed in this section: Notify the applicable vendor or supplier and the FRA; keep the applicable vendor or supplier and the FRA apprised of the status of any and all subsequent failures; and, take prompt countermeasures to eliminate or reduce the frequency below the threshold identified. Until the corrective action is complete, the railroad is required to take measures to ensure the safety of train operations, roadway workers, on track equipment, and the general public.

While the preceding paragraphs dealt with the establishment of a framework to address errors and malfunctions, paragraphs (f) through (g) deal with the actual handling and reporting of errors and malfunctions within that framework. Paragraph (f) establishes time limits for reporting failures and malfunctions to the product vendor or supplier and the FRA as well as minimum reporting requirements. The period for notification has been lengthened from that proposed in the NPRM to 15 days. FRA wishes to emphasize that it is more interested in timely notifications, and accordingly, has not established a specific format for the reports. FRA will accept any report format, provided it contains at least the minimal information required by this section. FRA will accept delivery of these reports by commercial courier, fax, and e-mail. However, with respect to information that is not immediately available, paragraph (f) has been amended to require railroads to submit supplemental reports with the previously unavailable information. FRA requires this information to determine the full impact of the problem, and to determine if any additional restrictions or limitations on the use of the PTC system may be warranted to ensure the safety of the general public and the railroad personnel. If the correcting or mitigating action were to take a significant amount of time, FRA would expect the railroad to provide FRA with periodic frequent progress reports.

Paragraph (g) establishes a reporting requirement for railroads and vendors or suppliers to provide to the Associate Administrator on request the results of any investigation of an accident or service difficulty report that shows the PTC system, subsystem, or component is unsafe because of a manufacturing or design defect. In addition, the railroad and its vendor or supplier may be required to report on any action taken or proposed to correct the defect.

Paragraph (h) imposes a direct obligation on suppliers to report safety-relevant failures or defective conditions, previously unidentified hazards, and recommended mitigation actions in their PTC system, subsystem, or component to each railroad using its product. Each applicable supplier is also required to notify FRA of the safety-relevant failure, defective condition, or previously unidentified hazard discovered by the vendor or supplier and the identity of each affected and notified railroad. FRA believes that it should be informed to ensure public safety in any case where a commercial dispute (e.g., over liability) might disrupt communication between a railroad and supplier.

GE submitted a comment on this section, in which it raised an objection to the direct imposition by FRA of a reporting obligation on PTC suppliers. GE believes this requirement is unwarranted for three reasons. First, the railroad is the primary entity having knowledge of such a failure and already has the obligation to report a failure within strict guidelines. Second, even if the PTC supplier becomes aware of a failure, the PTC supplier may not have sufficient understanding of the failure to determine whether it is truly safety-related in nature without talking to the railroad. Third, there already exist sufficient legal incentives for a supplier to quickly resolve any safety-related failure that might occur. GE believes that railroads' regulatory compliance responsibilities should not be delegated to suppliers. Ultimately, GE asserts that this requirement unnecessarily complicates the task of deploying PTC and is unwarranted.

GE proposed alternative language at the RSAC PTC Working Group meeting held August 31–September 2, 2009, that removed the supplier's obligation to directly report to FRA by deleting proposed paragraphs (a) and (f) of this section and adding language to § 236.1015(b)(2). In this proposed alternative language, GE recommended

that FRA require suppliers to include a process for promptly reporting any safety relevant failure and previously unidentified hazard to each railroad using the product in the quality control systems maintained by suppliers for PTC system design and manufacturing.

FRA carefully considered GE's recommendation. In § 236.907(d), FRA has previously established for PTC systems that are voluntarily implemented by railroads, under the provisions of subpart H of this part, a requirement that the vendor/supplier and railroads establish mutual reporting relationships for promptly reporting any safety-relevant failures and previously unidentified hazards. FRA seeks to continue this relationship requirement for mandatory PTC system installations under the provisions of this subpart.

As noted in the preamble discussion of § 236.907(d), FRA clearly indicated that if there was "a breakdown in communications that could adversely affect public safety", FRA would take appropriate action as necessary. *See* 70 FR 11,052, 11,074. FRA also noted that the language of § 236.907 "place[d] a direct obligation on suppliers to report safety-relevant failures, which would include 'wrong-side failures' and failures significantly impacting on availability where the Product Safety Plan indicates availability to be a material issue in the safety performance of the larger railroad system." 70 FR 11,052, 11,074. This provision was necessary to ensure public safety in the event where a commercial dispute (e.g., over liability) might disrupt communications between a railroad and its supplier.

FRA believes that the requirement that a product supplier notify FRA, in addition to the affected railroads, of safety-relevant failures of the PTC product discovered by the supplier does not add to the complexity or cost of PTC system deployment. The addition of FRA to the list of entities that must be notified in the unlikely event of a product failure that has been identified by the product supplier adds only marginally to the level of effort required of the product supplier. As a condition of providing PTC systems pursuant to subpart H of this part, the product supplier must already maintain a list of parties that require such notification. As GE noted, even if there were no regulatory requirement for a mutual reporting relationship between product suppliers and railroads, there are already legal incentives for a supplier to quickly resolve any safety related failure. FRA believes that these legal incentives should motivate the product supplier to promptly notify product users of safety-related issues and, therefore, to maintain a list of product users.

FRA has also considered GE's argument that the railroad is the primary entity having knowledge of safety-related failures and already has an obligation to report the failure within strict guidelines. Thus, even if the PTC supplier becomes aware of the failure, the supplier may not have sufficient understanding of the failure to determine whether it is safety-related in nature without talking to the railroad. GE's assertion that the supplier may not recognize that a failure is safety related without talking to the railroad also applies equally to the converse situation. A railroad may report a failure to the vendor or supplier that the railroad may not recognize as safety critical, and it is only the vendor's or supplier's detailed knowledge of the product that enables recognition of the failure as safety critical.

FRA is consequently unmoved by the assertion that the imposition of a requirement that a vendor or supplier notify FRA upon discovery of a safety critical problem would be unduly burdensome.

In view of the preceding, FRA has left this paragraph unchanged in principle. FRA has, however, made editorial changes to more clearly define the responsibilities of the parties involved and to clearly indicate the acceptability of incremental reporting as more information becomes available.

RSI made many statements similar to those of GE and also asserts that the notification requirement on suppliers would not enhance safety, but would create the potential for redundant, premature, potentially misleading, and burdensome reports to FRA. RSI cites various statutes and regulations, including RSIA08 and the existing part 236, that apply "exclusively" to "railroads" and "railroad carriers." However, according to 49 U.S.C. 20103, which continues to be referenced in part 236's Authorities section:

> (a) Regulations and orders.—The Secretary of Transportation, as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970. When prescribing a security regulation or issuing a security order that affects the safety of railroad operations, the Secretary of Homeland Security shall consult with the Secretary.

Thus, FRA has jurisdiction "for every area of railroad safety." Subpart I supplements the laws and regulations in effect on October 16, 1970. Moreover, while the U.S.C. provisions cited by RSI apply to railroads and railroad carriers, there is nothing in those provisions restricting FRA's jurisdiction over other entities or persons.

FRA has previously applied its jurisdiction over suppliers. Under § 236.907(d), suppliers must perform certain notification responsibilities. While that paragraph concerns notification by the supplier to the railroad, there is nothing preventing FRA from requiring the supplier to also notify FRA. In fact, as a practical matter, FRA believes that reporting failures directly to FRA is necessary here. Under subpart H, the absence of direct and timely access to product notices has continued to be an issue for FRA. This concern will only become greater as the subject technology becomes more complex.

RSI also noted that, "the scope of the signal and train control provision at Part 236 explains that this entire part, which will include the proposed regulations for § 236.1023, applies only to the railroads." Indeed, § 236.0(a) currently states, "Except as provided in paragraph (b) of this section, this part applies to all railroads." While that paragraph indicates that the part applies to all railroads, it does not limit application to "only" railroads, as misstated by RSI. In any event, to avoid confusion, FRA is modifying § 236.0(a) to apply to all railroads and persons as indicated in this part. For instance, "person" is defined in § 236.0(f) when referencing 1 U.S.C. 1 (which includes manufacturers and independent contractors) and railroad is defined in subpart G of part 236.

Paragraph (i) addresses situations which are clearly not the result of a design or manufacturing issue, and limits unnecessary reporting. If the failure, malfunction, or defective condition was the result of improper operation of the PTC system outside of the design parameters or of non-compliance with the applicable operating instructions, FRA believes that compliance with paragraph (e) is not necessary. Instead, FRA expects and requires the railroad to engage in more narrow remedial measures, including remedial training by the railroad in the proper operation of the PTC system. Similarly, once a problem has been identified to all stakeholders, FRA does not believe it is necessary for a manufacturer to repeatedly submit a formal report in accordance with paragraph (h). In either situation, however, FRA expects that all users of the equipment will be proactively and timely notified of the misuse that occurred and the corrective actions taken.

Such reports, however, do not have to be made within fifteen days of occurrence, as required for other notifications under paragraph (f), but within a reasonable time appropriate to the nature and extent of the problem.

Paragraph (j) has been added to the final rule to require that, when any safety-critical PTC system, subsystem, or component fails to perform its intended function, the railroad is required to determine the cause and perform necessary adjustment, repair, or replacement of any faulty product without undue delay. Paragraph (j) also reminds railroads that, until corrective action has been completed, a railroad is required to take appropriate action to ensure safety and reliability as specified within its PTCSP.

In paragraph (k) of the final rule, FRA intends to make it absolutely clear that the reporting requirements of part 233 are not a substitute for the reporting requirements of this subpart, nor are the reporting requirements of this subpart considered to be a substitute for the reporting requirements of part 233. Both sets of reporting requirements apply. FRA would like to clarify that both requirements apply. In the case of a failure meeting the criteria described in § 233.7, FRA would not expect the railroad to wait for the frequency of such occurrences to exceed the threshold reporting level assigned in the hazard log of the PTCSP, but will expect the railroad to report the occurrence as required by § 233.7.

Section 236.1027 PTC System Exclusions

This section retains similarities to, but also establishes contrasts with, § 236.911, which deals with exclusions from subpart H. In particular, § 236.911(c) offers reassurance that a stand-alone computer aided dispatching (CAD) system would not be considered a safety-critical processor-based system within the purview of subpart H. CADs have long been used by large and small railroads to assist dispatchers in managing their workload, tracking information required to be kept by regulation, and—most importantly—providing a conflict checking function designed to alert dispatchers to incipient errors before authorities are delivered. Even § 236.911, however, states that "a subsystem or component of an office system must comply with the requirements of this subpart if it performs safety-critical functions within, or affects the safety performance of, a new or next-generation train control system." FRA continues to work with a vendor or supplier on a simple CAD that provides authorities in an automated fashion, without the direct involvement of a dispatcher.

For subpart I, FRA intends to retain the exception referred to in § 236.911 for CAD systems not associated with a PTC system. Many smaller railroads use CAD systems to good effect, and there is no reason to impose additional regulations where dispatchers contemporaneously retain the function of issuing mandatory directives. However, in the present context, it is necessary to recognize that PTC systems utilize CAD systems as the "front end" of the logic chain that defines authorities enforced by the PTC system, particularly in non-signaled territory.

Accordingly, paragraph (a) provides for the potential exclusion of certain office systems technologies from subpart I compliance. These existing systems have been implemented voluntarily to enhance productivity and have proven to provide a reasonably high level of safety, reliability, and functionality. FRA recognizes that full application of subpart I to these systems would present the rail industry with a tremendous burden. The burdens of subpart I may discourage voluntary PTC implementation and operation by the smaller railroads.

However, subpart I applies to those subsystems or components that perform safety critical functions or affect the safety performance of the associated PTC system. The level and extent of safety analysis and review of the office systems will vary depending upon the type of PTC system with which the office system interfaces. For example, to prevent the issuance of overlapping and inconsistent authorities, FRA expects that each PTC system demonstrate sufficient credible evidence that the requisite safety-critical, conflict resolution (although not necessarily vital) hardware and software functions of the system will work as intended. FRA also expects that the applicable PTCDP's and PTCSP's risk analysis will identify the associated hazards and describe how they have been mitigated. Particularly where mandatory directives and work authorities are evaluated for use in a PTC system without separate oral transmission from the dispatcher to the train crew or employee in charge—with the opportunity for receiving personnel to evaluate and confirm the integrity of the directive or authority received and the potential for others overhearing the transmission to note conflicting actions by the dispatching center—FRA will insist on explanations sufficient to provide reasonable confidence that additional errors will not be introduced.

Paragraph (b) provides requirements for modifications of excluded PTC systems. At some point when a change results in degradation of safety or in a material increase in safety-critical functionality, changes to excluded PTC systems or subsystems may be significant enough to require application of subpart I's safety assurance processes. FRA believes that all modifications caused by unforeseen implementation factors will not necessarily cause the product to become subject to subpart I. These types of implementation modifications will be minor in nature and be the result of site specific physical constraints. However, FRA expects that implementation modifications that will result in a degradation of safety or a material increase in safety-critical functionality, such as a change in executive software, will cause the PTC system or subsystem to be subject to subpart I and its requirements. FRA is concerned, however, that a series of incremental changes, while each individually not meeting the threshold for compliance with this subpart, may when aggregated result in a product which differs sufficiently so as to be considered a new product. Therefore, FRA reserves the right to require products that have been incrementally changed in this manner to comply with the requirements of this subpart. Prior to FRA making such a determination, the affected railroad will be allowed to present detailed technical evidence why such a determination should not be made. This provision mirrors paragraph (d) of existing § 236.911.

Paragraph (c) addresses the integration of train control systems with other locomotive electronic control systems. The earliest train control systems were electro-mechanical systems that were independent of the discrete pneumatic and mechanical control systems used by the locomotive engineer for normal throttle and braking functions. Examples of these train control systems included cab signals and ACS/ATC appliances. These systems included a separate antenna for interfacing with the track circuit or inductive devices on the wayside. Their power supply and control logic were separate from other locomotive functions, and the cab signals were displayed from a separate special-purpose unit. Penalty brake applications by the train control system bypassed the locomotive pneumatic and mechanical control systems to directly operate a valve that accomplished a service reduction of brake pipe pressure and application of the brakes as well as

reduction in locomotive tractive power. In keeping with this physical and functional separation, train control equipment on board a locomotive came under part 236, rather than the locomotive inspection requirements of part 229.

Advances in hardware and software technology have allowed the various PTC systems' and components' original equipment manufacturers (OEMs) to repackage individual components, eliminating parts and system function control points access. Access to control functions became increasingly restricted to the processor interfaces using proprietary software. While this resulted in significant simplification of the previously complex discrete pneumatic and mechanical control train and locomotive control systems into fewer, more compact and reliable devices, it also creates significant challenges with respect to compatibility of the application programs and configuration management.

FRA encourages such enhancements, and believes that, if properly done, they can result in significant safety, as well as operational, improvements. Locomotive manufacturers can certainly provide secure locomotive and train controls, and it is important that they do so if locomotives are to function safely in their normal service environment. FRA highly encourages the long-term goal of common platform integration. However, when such integration occurs, it must not be done at the expense of decreasing the safe and reliable operation of the train control system. Accordingly, FRA expects that the complete integrated system will be shown to have been designed to fail-safe principles, and then demonstrated that the system operates in a fail-safe mode. Any commingled system must have a manual fail-safe fall back up that allows the engineer to be brought to be a safe stop in the event of an electronic system failure. This analysis must be provided to FRA for approval in the PTCDP and PTCSP as appropriate. This provision mirrors the heightened scrutiny called for by § 236.913(c) of subpart H for commingled systems, but is more explicit with respect to FRA's expectations. The provision in general accords with the requirements for locomotive systems that are currently under development in the RSAC's Locomotive Safety Standards Working Group.

GE generally agreed with the preceding discussion about separate regulatory treatment of PTC and the locomotive control systems. However, they strongly disagree with any implication, if the two systems were interfaced or commingled, that PTC requirements could be extended into the locomotive control system. They assert non-safety-critical data can be passed between the systems using appropriate interfaces without any impact on safety and without triggering a need to extend PTC requirements into the control system.

FRA agrees that there are implementation techniques that allow for locomotive control systems to passively receive information from a train control system, and the train control and locomotive control systems are not tightly coupled. FRA expects that in such situations the safety case for the train control system clearly and unequivocally demonstrates that the train control system is not tightly coupled with the locomotive control system, and that failures in the locomotive control system have absolutely no adverse consequences on the safe operation of the train control system. Likewise, FRA expects that the safety analysis for the locomotive control system clearly and unequivocally demonstrates that the train control system is not tightly coupled with the locomotive control system, and that failures in the train control system have absolutely no adverse consequences on the safe operation of the locomotive control system. If the safety analysis cannot convincingly demonstrate to FRA that the train control and locomotive control systems are loosely coupled, then FRA will require that the safety analysis for the PTC system include the applicable elements of the locomotive control system, and vice versa.

Finally, paragraph (d) clarifies the application of subparts A through H to products excluded from compliance with subpart I. These products are excluded from the requirements of subpart I, but FRA expects that the developing activity demonstrates compliance of products with subparts A through H. FRA believes that railroads not mandated to implement PTC, or that are implementing other non-PTC related processor based products, should be given the option to have those products approved under subpart H by submitting a PSP and otherwise complying with subpart H or by voluntarily complying with subpart I. This provision mirrors § 236.911(e) of subpart H.

Section 236.1029 PTC System Use and En Route Failures

This section provides minimum requirements, in addition to those found in the PTC system's plans, for each PTC system with a PTC System Certification. Railroads are allowed, and encouraged, to adopt more restrictive rules that increase safety.

Paragraph (a) requires that, in the event of the failure of a component essential to the safety of a PTC system to perform as intended, the cause be identified and corrective action taken without undue delay. The paragraph also states that until the corrective action is completed, the railroad is required, at a minimum, to take appropriate measures, including those specified in the PTCSP, to ensure the safety of train movements, roadway workers, and on-track equipment. This requirement mirrors the current requirements of § 236.11, which applies to all signal and train control system components. Under paragraph (a), FRA intends to apply to PTC systems provided PTC System Certification under subpart I the same standard in current § 236.11.

Paragraph (b) provides the circumstance where a PTC onboard apparatus on a controlling locomotive that is operating in or is to be operated within a PTC system fails or is otherwise cut-out while en route. Under paragraph (b), the subject train may only continue such operations in accordance with specific limitations. An en route failure is applicable only in instances after the subject train has departed its initial terminal, having had a successful initialization, and subsequently rendering it no longer responsive to the PTC system. For example, FRA believes that an en route failure may occur when the PTC onboard apparatus incurs an onboard fault or is otherwise cut out.

Under subpart H, existing § 236.567 provides specific limitations on each train failing en route in relation to its applicable automatic cab signal, train stop, and train control system. FRA believes that it would be desirable to impose somewhat more restrictive conditions given the statutory mandate and the desire to have an appropriate incentive to properly maintain the equipment and to timely respond to en route failures. For instance, FRA recognizes that the limitations of § 236.567 do not account for the statutory mandates of the core PTC safety functions.

During the PTC Working Group meetings prior to issuance of the NPRM, no consensus was reached on how to regulate en route failures on PTC territory. However, FRA subsequently received several comments that the en route failure requirements and the restrictive operational conditions imposed by paragraph (b) are burdensome and overly restrictive. When the PTC Working Group was

reconvened following the Public Hearing and the NPRM comment period, the PTC Working Group formed three separate task forces for the purpose of discussing and resolving several specific issues. One such task force, deemed the Operational Conditions Task Force, was assigned the task of resolving the issues associated with operational limitations presented in the proposed rule associated with temporary rerouting within § 236.1005, unequipped trains operating within a PTC system within § 236.1006, and en route failures within § 236.1029.

The proposed rule provided allowances for deviations from the restrictions of operations exceeding 90 miles per hour if such deviations were presented and justified in an FRA approved plan. At the PTC Working Group meeting, it was recommended that the procedure allowing for such deviations equally apply to all other operations, regardless of the speed of the operations.

Upon presentation of these recommended revisions to the PTC Working Group, Amtrak and NJ Transit withheld consensus, requesting rather to state on the record that they believed the requirement for the establishment of an absolute block was overly burdensome and unnecessary, and the operational limitations were too restrictive in areas where an underlying block signal system and/or cab signal system with train stop/train control functions remained in place. They further suggested that the operational restrictions for en route failures should be solely presented and described within a railroad's PTCDP and PTCSP, which would then be applicable to a particular PTC system.

FRA appreciates the concerns presented. However, FRA remains convinced that the rule text must provide a "baseline" for operational restrictions associated with en route failures within all PTC systems, with the recognition of the allowance for a railroad to submit a request for deviation from those requirements, with justification, within their PTCDP and PTCSP for FRA approval. Accordingly, FRA has substantially adopted into paragraphs (b) and (c) the text proposed at the PTC Working Group meeting.

Section 236.1029, and in particular paragraph (b), purposefully parallels the limitations contained in § 236.567. In other words, FRA intends that § 236.567 and paragraph (b) of this section will share the common purpose of maintaining a level of safety generally in accord with that expected with the train control system fully functional. This is accomplished by requiring supplementary procedures to heighten awareness and provide operational control (limiting the frequency of unsafe events) and by restricting the speed of the failed train (reducing the potential severity of any unsafe event).

Paragraph (b)(1) allows the subject train to proceed at restricted speed—or at medium speed if a block signal system is in operation according to signal indication—to the next available point where communication of a report can be made to a designated railroad officer of the host railroad. The intent of this requirement is to ensure that the occurrence of an en route failure may be appropriately recorded and that the necessary alternative protection of absolute block is established.

NYSMTA provided comments recommending that paragraph (b)(1) of this section cite 40 miles per hour as the maximum permissible speed within a failed PTC system where a block signal system is in operation because some railroads, such as the LIRR and Metro-North, have defined medium speed lower than what the FRA regulation would permit. FRA defines medium speed in § 236.811 as "A speed not exceeding 40 miles per hour." Thus, we believe the rule is clear in terms of the applicable maximum speed limit and consistent with the suggestions made by NYSMTA. While a particular railroad may internally define "medium speed" differently, the definitions contained in part 236 control the meaning of the terms used therein.

After a report is made in accordance with paragraph (b)(1), or made electronically and immediately by the PTC system itself, paragraph (b)(2) allows the train to continue to a point where an absolute block can be established in advance of the train in accordance with the limitations that follow in paragraphs (b)(2)(i) and (ii). Paragraph (b)(2)(i) requires that where no block signal system is in use, the train may proceed at restricted speed. Alternatively, under paragraph (b)(2)(ii), the train may proceed at a speed not to exceed medium speed where a block signal system is in operation according to signal indication.

Paragraph (b)(3) requires that, upon the subject train reaching the location where an absolute block has been established in advance of the train, the train may proceed in accordance with the limitations that follow in paragraphs (b)(3)(i), (ii), or (iii). Paragraph (b)(3)(i) requires that where no block signal system is in use, the train may proceed at medium speed; however, if the involved train is a train which is that of the criteria requiring the PTC system installation (i.e., a passenger train or a train hauling any amount of PIH material), it may only proceed at a speed not to exceed 30 miles per hour. Paragraph (b)(3)(ii) requires that where a block signal system is in use, a passenger train may proceed at a speed not to exceed 59 miles per hour and a freight train may proceed at a speed not to exceed 49 miles per hour. Paragraph (b)(3)(iii) requires that, except as provided in paragraph (c), where a cab signal system with an automatic train control system is in operation, the train may proceed at a speed not to exceed 79 miles per hour.

The Rail Labor Organizations believe that the rule is too permissive for en route failures of a PTC system where an underlying signal system is not governing train movements, as they assert that any train invisible to the PTC system in PTC territory presents an unacceptable risk. Instead, asserts the RLO, treatment of en route failures should parallel the restrictions required when a train experiences a signal failure, such as a switch position that is unknown or when a route is not known to be clear. While the NPRM proposed to allow a passenger or PIH PTC train in dark territory to traverse a switch in an unknown position at medium speed or 30 miles per hour, the RLO asserts that such trains should be limited to restricted speed or other methods, such as temporal separation.

FRA appreciates the RLO's concerns. However, FRA believes that the proposal to limit operations to restricted speed, or employ other protective methods such as temporal separation, would be too burdensome and unwarranted. FRA has elected to keep the language of the NPRM in this final rule for several reasons. First, it is expected that failures en route addressed by this rule, as well as temporary rerouting that could result in its application, will not occur on any frequent basis. Experience and requirements of other portions of this subpart would preclude this from being the case. Second, the assertion that "any train invisible to the PTC system in PTC territory presents an unacceptable risk" is inaccurate. Such a train would not in fact be "invisible" to the PTC system as there remains in place some type of authority for the train's movement, and all authorities of other trains that would be PTC-equipped would be enforced by the system. Additionally, the maximum speed of 30 miles per hour established by FRA for these situations is based on extensive analysis of past accident and incidence data, which has shown that train accidents at or below 30 miles per hour have not resulted in breach or compromise of cars carrying hazardous

materials. FRA has elected to keep this language of the NPRM in this final rule.

Paragraph (c) requires that, in order for a PTC train to deviate from the operating limitations contained in paragraph (b) of this section, the deviation must be described and justified in the FRA approved PTCDP or PTCSP. Amtrak had presented comments regarding the NPRM, as well as within the PTC Working Group task force assigned to address comments received regarding this section, asserting that the operational limitations of failure en route were too restricting and unwarranted. Directly in response to those comments, FRA may allow for deviation from the identified limitations of the rule if that deviation is described and justified in the applicable and FRA approved PTCDP, PTCSP, or Order of Particular Applicability. Furthermore, the speed threshold of 90 miles per hour proposed in the NPRM has been removed. FRA will consider deviation proposals for conventional operations, as well as high-speed operations. FRA continues to anticipate that existing operations on the Northeast Corridor will not be adversely impacted, since failure of one component of the onboard train control system will permit the remaining portion to function and provide for a reasonable level of safety.

Paragraph (d) requires that the railroad operate its PTC system within the design and operational parameters specified in the PTCDP and PTCSP. Railroads will not exceed maximum volumes, speeds, or any other parameter provided for in the PTCDP or PTCSP. On the other hand, a PTCDP or PTCSP could be based upon speed or volume parameters that are broader than the intended initial application, so long as the full range of sensitivity analyses is included in the supporting risk assessment. FRA feels this requirement will help ensure that comprehensive product risk assessments are performed before products are implemented.

Paragraph (e) sets forth the requirement that any testing of the PTC system must not interfere with its normal safety-critical functioning, unless an exception is obtained pursuant to 49 CFR § 236.1035, where special conditions have been established to protect the safety of the public and the train crew. Otherwise, paragraph (e) requires that each railroad ensure that the integrity of the PTC system not be compromised, by prohibiting the normal functioning of such system to be interfered with by testing or otherwise without first taking measures to provide for the safety of train movements, roadway workers, and on-track equipment that depend on the normal safety-critical functioning of the system. This provision parallels current § 236.4, which applies to all systems. By requiring this paragraph, FRA also intends to clarify that the standard in current § 236.4 also applies to subpart I PTC systems.

Paragraph (f) requires that each member of the operating crew has appropriate access to the information and functions necessary to perform his or her job safely when products are implemented and used in revenue service. FRA expects paragraph (f) to automatically require each engineer operating the controlling locomotive to have access to the PTC display providing such information. Paragraph (f) also applies to other crew members assigned duties in the locomotive cab. The rule is a performance standard which can be met in several different ways.

Train crews perform as a team and are required by railroad and FRA rules to do so. The importance of having assigned crew members fully involved in train operations is also clearly the intent of Congress in the RSIA. The Congress mandated the certification of the conductor to work in concert with the already federally-certified locomotive engineer. For the conductor and engineer to fulfill the expectations of Congress, it is necessary for both crewmembers to have sufficient information to perform their duties. For the conductor to be able to fulfill the assigned obligations, the conductor must have ready access to certain information, including the authority information being received from the dispatcher. As described below, FRA believes that safety would be materially diminished if the conductor in freight operations were denied access to the same information in the same format as the engineer.

For instance, under the operating rules or special instructions of the major freight railroads, each train crew member in the performance of his or her duties receives copies of a fair amount of paperwork that includes the train consist, which provides the number, loading, locations, and hazardous materials contents of cars, the length and weight of the train, General Orders, which provide loose footing issues, the safety rules of the day or week, security reminders, temporary speed restrictions, and the locations of maintenance of way crews performing track repairs. This paperwork provides the train crew with the work plan necessary to operate the assigned train during their tour of duty. Once the crew is underway, the conductor receives from the dispatcher, via radio, updates to the above information (and provides acknowledgment back to the dispatcher), transcribes hand written copies, and provides those copies to the engineer and other crew members (in lieu of stopping if engineer only). Each crew member keeps these copies in front of them (usually on a desk) for ready reference to approaching speed restrictions and working limits of roadway workers. Upon these documents, crew members make hand written notes and are required to write "void" across superseded or expired movement authorities. In case any questions pertaining to crew performance arise later, each crewmember keeps these copies. Particularly, in a PTC overlay system, which by definition depends upon continued performance of all of the safety-related functions of the underlying system of operation, all of these functions must continue to be performed either as they are now or in an equivalent manner. Removing or impairing any of those functions will diminish safety.

The conductor is responsible for determining the train consist and for ensuring compliance with hazardous materials train placement requirements. The conductor is also responsible for determining whether one or more cars in the train is restricted (e.g., requirement regarding appropriate placement in the train or speed restriction limiting the train's speed to avoid a derailment hazard).[9] Conductors are regularly disciplined in certain situations, including when the limits of authorities are violated or maximum speed limits are exceeded.

Moreover, in present cab signal territory, multiple crew members rely on the information provided by the cab signal display, typically mounted in the center of the cab or other conspicuous location. ACSES displays have also been centrally mounted in passenger and freight cabs for clear visibility.[10] Under this final rule, cab signals may continue to operate independently of the PTC display of the locomotive cab. However, based upon RSAC discussions, FRA is confident that PTC displays may (and

[9] Enforcement of a speed restriction associated with a particular car is not a mandated PTC function, but is an important function that will be provided within the Interoperable Train Control architecture for the general freight system.

[10] ITCS displays in freight locomotives have not been mounted so as to be clearly visible to freight crews. The subject line is principally used for passenger service, and the number of freight locomotives involved has been very small. ITCS has been permitted to operate under waiver, and FRA freely concedes that the issue of freight crew display visibility had not been clearly joined to this point.

probably will) supplant current cab signal displays and utilize the cab signal code as an input to the PTC display.[11] Section 236.515 has long provided that "The cab signals shall be plainly visible to a member or members of the locomotive crew from their stations in the cab." Positive train control systems will play a role very similar to, but in fact even more important than, automatic cab signals have played in the territories where installed. In addition to providing current displays (or "targets") for signal indications, FRA expects that PTC will also display in graphic form slow orders and other mandatory directives.

FRA recognizes that PTC systems are being designed to move much of this information into an electronic format. The intent of utilizing electronic transmission of authorities is to reduce human error associated with listening, copying, and reading back of updates over voice channels while the train crew is en route. Regardless if the information is transmitted digitally or verbally, the goal is to prevent the train from occupying the main track without authority, to prevent most over-speed issues, and to stop short of misaligned switches if the crew fails to follow the rules. While FRA supports this transition to digital communications, this final rule does not require it.

In the event that a certified PTC system does use digital transmissions to provide communications and acknowledgement of mandatory directives between the dispatcher and conductor, to allow the conductor to electronically input the train consist into the PTC system, or otherwise similarly modify a crew member's responsibilities, FRA expects under paragraph (f) that the subject crew member will be afforded appropriate access to the PTC system display to fulfill those responsibilities.

In its comments, the AAR also indicated that railroads have been planning to put a single display in locomotive cabs for the engineer in systems which FRA has already approved and that this requirement was redundant and excessive, referring to the BNSF ETMS system. The AAR questioned the need for a conductor to have access to a PTC display. The Class I railroads have attempted to present the case that FRA had previously blessed the implementation of PTC technology that would permit electronic delivery of mandatory directives while discontinuing the delivery of printed or voice transmitted directives. However, that is not the case.

The system to which AAR refers—BNSF's ETMS I configuration—was qualified under subpart H, which only requires that the system be at least as safe as existing systems and the approval was limited in material ways the AAR failed to mention. Subpart I, however, requires that non-vital overlay systems reduce the likelihood of PTC preventable accidents by at least 80%. Subpart H does not address or require interoperability, but subpart I requires interoperability.

The BNSF ETMS I configuration concept of operations was a pure non-vital overlay on the existing method of operations. The safety analysis for that system assumed that the conductor would continue to receive mandatory directives in the normal manner. BNSF, the only railroad to obtain authority for use of a first-generation freight PTC system, very heavily justified its safety case on the assumption that crewmembers would intervene should the PTC system experience a wrong-side failure (which could occur due to a software error, hardware malfunction, database error, or combination of these factors). This system was justified as an "overlay" on the existing method of operations; while there would be only one PTC display screen, it was contended that most wrong-side errors would be caught by crewmembers holding mandatory directives in paper form. This type of existing PTC system, which has only been deployed by BNSF on a few lines and with very few locomotives equipped, precludes one-half of the train crew from having any access to the information for which they are held accountable. This has been tolerable only because both crew members do have a full set of printed or written directives.

Note that basic interoperability is potentially a concern with respect to the human-machine interface and the means by which FRA addresses it. To the extent a locomotive from a railroad which uses only voice transmission of mandatory directives were to travel on a railroad using electronic transmission of mandatory directives, it would need to be equipped for the other railroad. Yet none of the major freight railroads has conducted a revenue demonstration of a system that relies exclusively on electronic transmission of authorities; and, after more than two decades of development and demonstrations, the major freight railroads have still not issued interoperability standards. Even if FRA were able to accept some of the arguments proffered in regard to the need for access to PTC information, addressing this issue through review of individual railroad plans would not be feasible. This issue needs to be settled "up front" in order to support an orderly implementation.

The testimony and written filings in this docket reflected a serious misunderstanding regard the distinctions noted above and the posture of the BNSF Product Safety Plan review. The AAR and CSXT both asserted that FRA has approved use of a single screen in the form of BNSF ETMS I configuration. More remarkably, BNSF itself testified at the public hearing that, "As approved by FRA, our locomotive cab configuration includes one display screen, which is positioned on the dashboard of the engineer." Comment of BNSF Railway Company, Docket FRA–2008–0132.0011.1 (Aug. 19, 2009); *Positive Train Control Systems: Hearing Before the Fed. Railroad Admin.* (Aug. 13, 2009) (statement of Mark Schulze, Vice President, BNSF Railway Company).

In fact, FRA's decision letter for that system stated as follows:

7. Prior to any further ETMS Configuration I operations, BNSF must either comply with 49 CFR § 236.515 (Visibility of cab signals), or submit a risk-based justification as to why the requirements of this rule should be waived. The justification shall be submitted in accordance with the PSP amendment procedures in 49 CFR § 236.913. (FRA Docket No. 2006–23687, Document No. 0021.)

The subject approval remains contingent as of the date of preparation of this final rule, since the railroad has not submitted the required justification.[12]

[11] In vital applications, reliance on these displays will be authorized and required. Although initially in-block signal upgrades may not be permitted to be acted upon, except in cab signal territory, FRA has no doubt that the ability to upgrade between wayside signals will be requested as the technology is proven reliable. According to the major railroads involved in the Interoperable Train Control effort, most Class I locomotives will need to be configured to operate essentially in any territory on the system.

[12] Prior to enactment of the RSIA08, FRA had taken significant steps to encourage voluntary PTC deployment, including offering the inducement of exceptions from traditional train control requirements. Had BNSF submitted a detailed justification for the single display visible only to the locomotive engineer, it is entirely possible that it would have been approved, since the performance standard under subpart H presents a very low bar for a reasonably competent train control system when applied in non-signaled or traffic control territory and since under the ETMS PSP the conductor would either continue to receive mandatory directives in writing or would copy mandatory directives transmitted verbally by the dispatcher via radio. 49 CFR 236.909(a). The point here is that, if the railroad had indeed conducted adequate human factors analysis, it had not been submitted to FRA; and no implications should be drawn with respect to this very different context, wherein interline operation of locomotives is at

Continued

The AAR also misstates the extent of the Volpe Center's review of ETMS. From the Volpe Center's review: "The purpose of the analysis was to assess the extent to which the ETMS system follows accepted human factors design guidelines that are likely to catch and correct potential human performance problems." Volpe did not perform a "thorough human factors analysis" as posited by AAR. Rather, Volpe focused on the user interface for locomotive engineers, identifying issues within the existing design (which was still under development) and within the concept of operations as defined by the railroad.

Once all of the paperwork is moved into electronic transmissions (which has been neither formally requested nor in any way justified under existing regulations), in the absence of an available display one-half of the train crew would not have the ability to review and receive updates while en-route, or keep records of the movement authorities and restrictions for future use. PTC is currently an imperfect technology fed by databases that can be corrupted. Mandatory directives will continue to be issued by dispatchers with limited conflict checking using non-vital computer-aided dispatching systems. As the point paper orders are no longer provided, and mandatory directives are issued electronically en route, there would be no general broadcast on the "road channel" that could lead to other train crews or roadway workers identifying a defective authority (e.g., a mandatory directive to traverse a track segment already occupied by another train). None of the freight railroads has yet demonstrated how the transition to full electronic delivery of mandatory directives will be accomplished. FRA believes that the transition will eventually be made, but in the initial period it is critical that existing provisions for safety—which work very well a very high percentage of the time—not be prematurely abandoned; these provisions include appropriate access to the PTC system display. Although FRA agrees that transmission of valid authorities should be more secure, and thus the trade-off is likely to be favorable, FRA sees no reason at this time to take a second or third crew member out of the loop or to load on the engineer the responsibility for both receiving mandatory directives and briefing the second or third crew member who will be expected under the railroad's rules to comply.

FRA believes it is important to the risk assessment process that the engineer and conductor perform at a level no less safe than they would have had there not been a PTC system. The PTC systems proposed for freight railroads are overlay systems. In an overlay system, the railroad adds a layer of safety to the existing operation. The risk assessment then is relatively easy, because it is easy to show that the new system adds safety, reducing the risk of certain accidents, while not adding any new risk. The key assumption of the risk assessment is no degradation of the underlying safety system, and the performance of crewmembers is a key element of that safety system.

It is impossible at present to quantify the additional risk associated with adding a task which compromises the safe operation of the train by the engineer or conductor, even if only for a short time. Engineers and conductors have an excellent record of avoiding accidents. PTC seeks to improve upon that excellent record. The existing human factors literature leads one to believe that entering complex acknowledgements into a PTC system while the train is in motion is a very significant risk. To quantify that risk, one would have to put it into the context of comparative safety using a human factors model far more complex and accurate than any of which FRA is aware. Also note that PTC does not address all accident scenarios, many of which are often avoided by timely locomotive engineer intervention. The timeliness of such intervention is dependent on situational awareness, which would be negatively impacted if the engineer were distracted. Reading text on a PTC screen appears to be as distracting as reading text on a cell phone or PDA and texting in reply. In order for FRA to accept the diversion of the engineer's attention which would come from having the engineer review and accept the mandatory directives while the train is motion, FRA would need a process different from the current risk assessment methodology. That in turn would require FRA to impose a specification standard, instead of a performance standard. Were FRA issuing only a specification standard, FRA would require the second display and input unit.

In short, the rule as it stands relies on comparing system risk, which is easy if the engineer is not distracted by the system, but impossible if the engineer might be distracted. What we do know with certainty is that having the engineer read and respond to lengthy written messages on the PTC screen would be a distraction resulting in greater risk exposure which would offset to some extent the risk reduction resulting from PTC systems.

AAR argues that the requirement in § 236.1029(f) pertaining to distraction of the locomotive engineer should be deleted. The AAR claims that FRA does not offer any study showing that safety is jeopardized by assigning the engineer PTC-related duties. FRA has directly observed engineers exceeding authorities while attempting to respond to PTC system requirements on tests of existing PTC systems. In those cases, the engineer was attempting to respond to digitally transmitted authority while the train was in motion and was plainly distracted from safety-critical duties. FRA does not need a study to verify the possibility of that which it has observed directly.

The AAR also raises an issue of accuracy in transmitting and receiving mandatory directives, and appears to make the argument that because electronic transmission of mandatory directives is likely to be much more accurate than voice communication of mandatory directives, that all will be safer if mandatory directives are transmitted electronically. FRA agrees that the electronic transmission is likely to be more accurate, but does not agree that accurate transmission is the only safety issue. FRA is concerned with procedures which might distract the engineer from his duties. There is no problem if the railroad intends to have engineers receive, review, and acknowledge mandatory directives, unless the railroad wants the engineer to perform that task with the train in motion, and provided the engineer can take the time to brief other crew members, who under current railroad operating rules would need to copy and retain the orders.

All systems of which FRA is aware will require the crew to acknowledge the mandatory directives. FRA has seen system designs that would permit acknowledgement by simply pressing a button. There is no reason to believe that simply pressing a button demonstrates understanding of a mandatory directive, and FRA does not intend to approve such systems because they will not provide an adequate level of safety. Simply pressing a button does not provide the evidence of comprehension and mutual understanding currently provided by the practice of reading mandatory directives back to the dispatcher over the radio. Even if this means of acknowledgment is elected and approved by FRA, it would be necessary for an engineer receiving such a directive to read it and consider its relevance to the current situation. This

stake and several major railroads clearly wish to abandon traditional means of delivering authorities.

could distract the engineer from actions needed to address other restrictions or an emerging situation on the railroad (e.g., need to warn equipment or personnel unexpectedly fouling the track ahead, requirement to manage a train over undulating terrain to avoid excessive in-train forces, emergency use of the train horn because of vehicle storage on the tracks in a quiet zone).

FRA believes that simply referencing the default PTC display screen will be consistent with good situational awareness and should not present a problem. However, excessive engagement with the PTC onboard computer while underway can distract a locomotive engineer from current duties. While acknowledgment by use of a single soft key may limit the distraction associated with manipulation of the device, it does not address whether the directive was understood. It is also possible to create greater interaction with the onboard computer while causing distraction and yet still not ensure that the directive is understood. For instance, a system tested by one railroad required an eight digit acknowledgment code to confirm receipt of a mandatory directive. In prototype testing locomotive engineers attempting to enter the code have exceeded their authority, because entering a code is a distraction similar to text messaging (a prohibited practice).[13]

In those cases where train consist information needs to be adjusted and confirmed in the PTC system, having that done by the conductor will eliminate a potential source of error. (Provision of input capability on the conductor's terminal will also (if so elected) avoid delays in train starts associated with multiple crews attempting to work out consist information over the radio or a cell phone link to the central office.) Having the conductor observe displayed PTC system data should also provide an additional opportunity for early identification of problems with mandatory directives and displayed information that may derive from corrupted databases, computational errors, or erroneous mandatory directives.

The purpose of paragraph (f) is to ensure that those assigned tasks in the cab are able to perform those tasks, including constructive engagement with the PTC system. Furthermore, while the train is moving, the locomotive engineer would be prohibited from performing functions related to the PTC system that have the potential to distract the locomotive engineer from performance of other safety-critical duties. According to the public comments, that would make it impractical for certain freight railroads not to equip its locomotives with a second, interactive, display.

AAR says that FRA cannot point to any computer-related activities that could result in distraction of the engineer. The 2009 FRA report entitled *Technology Implications of a Cognitive Task Analysis for Locomotive Engineers* touches on this. For example, the report states: "Sources of new cognitive demands include constraints imposed by the PTC braking profile that require locomotive engineers to modify train handling strategies; increases in information and alerts provided by the in-cab displays that require locomotive engineers to focus more attention on in-cab displays versus out the window, and requirements for extensive interaction with the PTC systems (e.g., to initialize it—to acknowledge messages and alerts) that impose new sources of workload." This suggests that, unless task sequencing is managed wisely, interaction with PTC can distract the engineer from looking outside the cab and attending to other duties important in train operation safety.

Over the years, FRA has conducted significant human factors research related to supervisory train control systems such as PTC. In the course of that research, it has been noted that the human-machine interface (HMI) should be configured to avoid task overload and to permit the locomotive engineer to attend to the safe movement of the train during all times when it is in motion. This may require responding to obstacles on the railroad ahead (e.g., vandalism, cars stored on grade crossings, unsecured equipment that has rolled out, personnel in the foul without prior notice to train crews), without regard to risk of collision with other trains. Further, FRA has noted from its experience with the initial freight implementations of PTC systems that having the second crew member, where applicable, directly interact with the PTC system may offer the best likelihood of its safe functioning. For instance, train consist information (number of locomotives and cars, tonnage, length of train) is provided in ETMS from the company's management information system). That information is essential to the braking computation onboard. But this is often the intended consist, and the actual consist may vary. Having the crew member responsible for the accuracy of the consist enter or confirm the consist in the PTC system will avoid one opportunity for error each time this is accomplished (which, in the case of a road switching assignment, may be several times during a duty tour).

The NPRM proposed, and the final rule requires, that the onboard apparatus be arranged so that each crew member assigned to perform duties in the locomotive cab could view a PTC display and execute any functions necessary to that crew member's duties. This provision does not require multiple screens, per se, nor does it require that more than one employee must be assigned to a crew. In fact, the proposed and final rules are technology neutral.

FRA is aware of multiple ways that paragraph (f) may be satisfied in the event multiple crew members are in the cab and need access to the information provided by the PTC system. Each alternative has its own advantages and difficulties. FRA is ultimately concerned that the crew members receive the same information displayed in the same manner. I.e., if an engineer is looking at a graphic on a screen, a conductor in the same cab should be looking at the same graphic on whatever device the conductor is using.

For instance, there can be a single large display placed in a location within the cab making it accessible to all crew members in the cab (as is done by Amtrak in the ACSES system used on the Northeast Corridor). A single display (similar to traditional cab signals) could be used if sufficiently large to provide adequate resolution of details. If the railroad opts to use a PTC system that includes the added functionality of digital transmissions for these purposes, a single screen placed between the crew members may be appropriate.

A configuration may also include two fixed screens; one for the locomotive engineer and another for other crew members. In providing cost estimates for this rulemaking, the Class I railroads have assumed that this approach would be employed and that the display would be associated with an interactive terminal. FRA does not question the rationale in this manner and has approached costs estimates in the Regulatory Impact Analysis with this assumption.

[13] The response to this kind of concern is typically that the PTC system will enforce, which was its purpose to start with. However, even vital electronics sometimes fail in other than a safe mode, and in that case the crew performance is relied upon to backstop the system (rather than the opposite)—assuming that the crew has information that it needs to do so. Further, if the engineer is distracted even for relatively few seconds the danger exists that the engineer will not take other necessary actions (sounding the horn at a crossing, monitoring the condition of the brake pipe and setting the train up for an upcoming slow order to avoid excessive in-train forces, etc.).

The railroads have also discussed the possibility that, where the locomotive engineer may have his or her own fixed screen, the other crew members could make use of individual "heads-up" displays or personal hand-held or portable wired or wireless devices with train control software, which could be set up as an interactive terminal. Through its Office of Research and Development, FRA has developed personal digital assistant (PDA) software for management of roadway worker authorities at a reasonable cost (at approximately one-quarter of the cost of a second dash-mounted display), and doing the same for a crew remote terminal should be just as practical. The vendor for the on-board portion of the ITC system already provides a router port, and routers are inexpensive. FRA assumes that there would be some additional costs related to replacement of misplaced or damaged devices and changing of batteries, but those costs should be reasonable. Under paragraph (f), hand-held or portable devices could be implemented and would have the same advantages as a fixed terminal. FRA does not require that the display be permanently affixed to the locomotive. The advantage of this approach would be a lesser initial cost, likely about one-fourth of the fixed terminal. Disadvantages include logistics of handling (loss, damage).

The major freight railroads point to passenger service as evidence that a "second display" is not required, but their arguments are inapposite. Crew responsibilities and interactions on passenger trains are historically different than is the case with freight crews, and thus crew resource management will not be undercut by use of a single display. For instance, in the case of a passenger train with a single locomotive engineer, the engineer will have the opportunity to initialize the system at the point of departure by making a relatively easy selection for class of train (if this is not done automatically). Moreover, unlike in freight operations, crew members for passenger operations do not need to enter or confirm detailed consist information for a heavy train that may have a wide variety of loaded and empty cars. If it is necessary for the locomotive engineer to take a mandatory directive through the PTC terminal, that can be done with the train stopped at a passenger station, as is the case today using the voice radio. Passenger railroads will almost certainly elect to use vital on-board processing, so the relative chance of an on-board computer error will be less.

For all of the systems proposed thus far, crewmembers must actively review and acknowledge mandatory directives in order for the system to provide the required level of safety. Where mandatory directives are transmitted by voice over the radio, which is the current practice for freight railroads, the conductor would typically be able to copy and acknowledge the transmission while the train is in motion. Passenger train engineers would have to be stopped (e.g., at a station) in order to copy and acknowledge the mandatory directive. *See* 49 CFR 220.61(b)(2).

FRA is aware of three ways to receive, safely review, and acknowledge mandatory directives. First, the engineer could receive, review, and acknowledge authorities while the train is stopped. Second, the conductor could receive, review, and acknowledge voice transmissions of mandatory directives, whether or not the train is moving. Third, the conductor could receive, review, and acknowledge authorities through a device which combines display and data entry capabilities, whether or not the train is moving. The first option is likely how passenger railroads will comply with the requirements. Such railroads have only one crewmember in most cabs. This is likely not to be extremely burdensome on most passenger trains, as the engineer can receive, review, and acknowledge mandatory directives at passenger station stops. Thus, FRA is not being illogical, as AAR asserts, by permitting passenger operations with a single cab occupant. What would be illogical would be to require a second display where only one crewmember is present. Freight locomotives with only one crewmember present would also be likely to use the first option, although the cab may be equipped with a second display. The second option would only require a display be within a conductor's view, but would be much lower cost. The third option, which FRA believes may be the norm for freight locomotives, may require the aforementioned second fixed screen, heads-up display, or handheld or portable device. FRA does not believe it would be practical for one terminal to serve both crewmembers if both may be required to enter or access data.

It should be noted that employing a fourth option, implied in railroad testimony, would be problematic on many fronts. That option would presumably involve a single display in front of the locomotive engineer. The train would receive electronic authorities exclusively through that device, and the engineer would acknowledge receipt using a simple procedure (e.g., pressing a single soft key) that was designed to hasten the task and limit distraction. The problem with such a procedure is that (i) there is no assurance that the engineer would understand what was being received, (ii) there is little chance that the engineer would identify any authority or slow order that was not appropriate to the situation, and (iii) there would be no reasonable way to convey the mandatory directive to the other crew member without stopping the train and copying it off the screen. This would be a perfect prescription for exclusive reliance on technology, which is ill-advised and which the railroads claim will not be done (i.e., these are said to be "overlay" systems that cannot detract from the underlying methods of operation).

Again, the railroads are perhaps correct that safety might still be improved under this fourth option, *at least as to the operations under PTC control,* but that is not the question here. The question is whether technology will be employed that primarily protects against human error on board, or whether technology will be employed that protects most of the time but induces human error on other occasions. Every day in the United States there are thousands of train starts and hundreds of thousands of opportunities for human error in train operations. Yet well-trained crews rise to these challenges, and as a result each year there are approximately 50 to 60 train collisions on the main lines, a small number of overspeed derailments and work zone violations, and a handful of movements through misaligned main track switches. Accordingly, a relatively small number of wrong-side errors in the operation of the PTC system accompanied by any diminishing of vigilance on the part of train crew members could easily cause results from PTC implementation to fall short of the risk reduction identified in FRA's analysis. With time and refinement of technology and databases, there may be significant adjustments that can be made in current operating rules and procedures. But existing PTC technology for the general freight system has not yet been proven at that level, and it will be some years before that will be the case. In the meantime, it will be crucial that informed and well coordinated crews maintain engagement in the management of mandatory directives and compliance with wayside or cab-displayed signal indications.

Accordingly, FRA remains convinced that each crew member should have access to, and engagement with, information and requirements pertinent

to the operations for which they are responsible. This third option, combined with electronic transmission of mandatory directives, would pay for itself in a very short time. Assuming that a train has to be stopped twice each day for the engineer to acknowledge a directive, and that such a stop results in a cost of at least, and probably a lot more than, $80 to account for additional braking and trip time as well as missed opportunity for meets and passes, the cost of implementing this option would surpass the cost of installing a second terminal in just 50 days of service as the controlling locomotive. Assuming the locomotive is in the lead one-fourth of the time it is in service, the avoided cost of stopping would be $8,000, the cost of an additional terminal, in 200 days. In other words, the device will return its cost in much less than a year.

Of course, the business benefits of a second terminal are not as great if the railroad does not adopt electronic transmission of mandatory directives. However, FRA believes that railroads will adopt electronic transmission of mandatory directives as rapidly as possible. They would benefit from being able to give roadway workers much more rapid access to track, as well as by being able to reduce the dispatchers' workload. Further, the business benefits envisioned in Appendix A require more efficient dispatching, which would rely on electronic transmission of mandatory directives, as well as managerial directives related to train pacing and meet-pass planning.

The railroads have made no convincing argument that providing a second display would be harmful, as such. Rather, they argue that the cost is excessive in relation to any expected benefits. The AAR and several Class I freight railroads commented that the cost to install a second display in the locomotive would be approximately $8,000 per locomotive. According to AAR estimates, 29,461 locomotives would need to be equipped. This would translate into an initial installation cost of $235,688,000. However, AAR overestimated the number of locomotives, based on the document it cites. In that document, FRA estimated that 27,598 freight locomotives would be equipped with VTMS technology only, and an additional 100 freight locomotives would be equipped with both VTMS and ACSES technology, for a total of 27,698 locomotives, which, at a unit cost of $8,000 per terminal type display, implies a total cost of $221,584,000. AAR did not include the locomotives which would have both VTMS and ACSES installed, and included passenger locomotives that will likely not require additional hardware to meet the requirement due to the nature of their operations. FRA does not disagree with the AAR and railroad unit cost estimates, as long as what AAR refers to is the type of unit that has input capabilities. FRA recognizes that the cost is actually for an additional "terminal" versus simply a display and that it must be made rugged for the locomotive cab operating environment. The AAR and other railroads objecting to these requirements maintain that there will be little safety benefit to the requirements, and that the benefits would be far less than the costs. However, in the long run, FRA believes that the additional cost for installing a second terminal would be justified by the aforementioned business benefits as well as the safety assurance.

FRA is not altering the cost estimates for PTC from those in the analysis of the NPRM, because the costs of the second terminal were already reflected.

FRA notes that estimated cost of the second display will be about 4% of the total initial costs of PTC deployment. FRA has narrowly construed the PTC mandate to avoid separate monitoring of switches in signal territory, to avoid significant costs and potential delay related to following train collisions at low speed, and to provide generous exceptions where allowed by law (restricted speed in yards and terminals, passenger exceptions, Class II/III locomotives in limited operations on PTC lines, etc.)—actions that will save one or more billions of dollars during this initial implementation. If FRA believed a deviation from historic train control practice was warranted here to save 4% of the initial cost, we would happily provide it. We do not. FRA believes that the PTC systems contemplated today will, at some point in the future, all accept electronic transmission of mandatory directives. The cost of providing a terminal to the second crewmember, where applicable, reflects that reality. Were railroads not planning to have conductors acknowledge mandatory directives, the railroad could provide the conductor with a screen without input devices, or a clearer view of the engineer's screen, which have a much lower unit cost.

FRA has placed in the docket of this rulemaking a document prepared by FRA's Office of Research and Development, referencing available human factors literature. Although FRA has addressed this issue from the point of view of whether the cost is justified, FRA wishes to emphasize that, at bottom, it is most crucial whether it would be possible to responsibly implement PTC on the national rail system without engaging the participation of each assigned crew member. We conclude that no such possibility has been demonstrated. Further, based upon FRA's knowledge of railroad operations and experience with oversight of existing and emerging train control technologies, FRA determines that it is essential for safety that each assigned crew member be provided the information and access to system inputs required to fulfill the crew member's respective duties.

AAR again raises the issue of single occupant cabs as an issue of "crew resource management" best left to the railroads. FRA maintains that these operators will only be authorized to receive, review, and acknowledge mandatory directives or similarly interact with the PTC systems when their trains are not in motion.

In the NPRM, FRA noted:

> [T]he principles of crew resource management and current crew briefing practices in the railroad industry require that all members of a functioning team (*e.g.,* engineer, conductor, dispatcher, roadway worker in charge) have all relevant information available to facilitate constructive interactions and permit incipient errors to be caught and corrected. Retaining and reinforcing this level of cooperation will be particularly crucial during the early PTC implementation as errors in train consist information, errors generated in onboard processing, delays in delivery of safety warnings due to radio frequency congestion, and occasional errors in dispatching challenge the integrity of PTC systems even as the normal reliability of day-to-day functioning supports reductions in vigilance. Loss of crew cooperation could easily spill over to other functions, including switching operations and management of emergency situations.

Commenters generally made scant reference to this point. The AAR did include an attachment to its testimony captioned with reference to this point, but it begins with a summary task analysis to the effect that "the conductor is responsible for assisting in the operation." How the conductor will assist without a copy of the requisite orders available, when the duty to copy mandatory directives is eliminated (as the AAR assumes it will be), is left unexplained.

This is a "far cry" from section 402 of the RSIA08, which requires that FRA adopt regulations for the certification of train conductors. In FRA's experience as the agency responsible for oversight of railroad operating rules and practices, the conductor plays a key role in rail freight over-the-road operations by, *inter alia,* determining the train consist, ensuring compliance with hazardous materials placement and documentation

requirement, calling or acknowledging signals, receiving mandatory directives, conducting frequent briefings with the locomotive engineer to ensure compliance with movement restrictions, and intervening through use of the conductor's brake valve if the engineer is unresponsive or incapacitated. A conductor may be disciplined with the locomotive engineer if a signal is violated or if a slow order or other mandatory directive is disobeyed, and this regularly occurs. The conductor plays the determinative role in switching operations, issuing the directions for operation of the locomotive(s) so as to accomplish safely the placement or pick-up of rail cars at customer locations, the making up and breaking up of trains, and the conduct of brake tests when mechanical personnel are not available.

Again, the major freight railroads have said that their PTC systems will "overlay" existing methods of operations. Those existing methods are defined in their books of rules, timetables and special instructions. The General Code of Operating Rules, applicable to most railroad operations in the western U.S., provides at section 1.47 that "The conductor and engineer are responsible for the safety and protection of their train and observance of the rules." It further provides that "The conductor supervises the operation and administration of the train." "The conductor must remind the engineer that the train is approaching an area restricted by:

- Limits of authority.
- Track warrant.
- Track bulletin.

or

- Radio speed restriction."

The rule continues: "To ensure the train is operated safely and rules are observed, all crew members must act responsibly to prevent accidents or rule violations. Crew members in the engine control compartment must communicate to each other any restrictions or other known conditions that affect the safety operation of their train sufficiently in advance of such condition to allow the engineer to take proper action." The rule further requires communication of signals and enjoins crew members to "take action to ensure safety, using the emergency brake valve to stop the train, if necessary."

The NORAC Operating Rules, applicable to a number of eastern U.S. railroads, provides at Rule 94 for general crew responsibilities similar to those quoted above. In addition, Rule 941 provides that "Conductors have general charge of the train to which they are assigned, and all persons employed thereon are subject to their instructions."

Each railroad is free, within the constraints of the Railway Labor Act as to staffing, and subject to oversight by FRA with respect to safety, to determine its operating rules and assignment of responsibilities to its personnel. Nevertheless, FRA remains concerned that railroad operating crews function as a team, discharging their responsibilities on the basis of adequate information and using their knowledge of the operating situation to identify safety concerns and resolve them. Within this framework, each crew member must remain able to respectfully and helpfully question a judgment by another crew member. This general approach is known as "crew resource management" (CRM), a concept perfected in aviation and urgently pressed on the railroad industry by the National Transportation Safety Board and the FRA. *See* NTSB Recommendation R–99–13 (July 29, 1999). Major railroads have included CRM in their training programs.

The fear with respect to a diminution of crew integrity and efficiency associated with asymmetrical distribution of current operational data is that, not only may opportunities be lost to correct errors within PTC operations, but also that the conductor's lack of engagement will transfer to operations on lines not equipped with PTC. Further, any reduction in ability to function as a team could transfer, as well, to road and yard switching operations. Should this occur, the price paid for PTC would include additional casualties and property damage where PTC is not available as a safety net. A substantial portion of the Class I freight network, and much of the switching and terminal railroad mileage over which Class I crews also operate, will not be equipped under the current mandate and perhaps not for many years. How crews are conditioned to function together will influence their behavior both within and outside of the PTC-equipped network. In summary, FRA believes that maintaining the involvement of all assigned crew members in operating and responding to the PTC system is necessary to achieve the desired risk reduction expected of PTC systems and is also necessary to avoid degrading crew performance outside of PTC territory and during switching operations.

NYSMTA requested clarification that in a multiple unit passenger train consist: (a) A second PTC display in every train operator compartment is not required inasmuch as only the train operator occupies the compartment, and; (b) the PTC operator displays in train operator compartments in a consist, other than those from which the train is operated from, are not to display PTC information while the train is en route. The MTA railroads have been repeatedly reassured on this point, and we are pleased to do so once again here.

As previously noted, on September 25, 2009, FRA entered into the docket to this rulemaking a compendium of human factors literature relevant to the HMI regulations and compiled by FRA's Office of Research and Development. AAR then submitted late-filed supplemental comments—which posted to the docket on October 20, 2009, approximately two months after the closing of the comment period and three weeks after FRA entered the compendium into the docket—addressing various portions of the compendium. FRA believes that this final rule already addresses each one of AAR's substantial concerns in its supplemental comments. AAR also states that it "has been deprived of the opportunity to consider its comments in a deliberative fashion." Supplemental Comment of the Association of American Railroads, Docket FRA–2008–0132–0055.1, at 3 (Oct. 20, 2009). However, contrary to AAR's suggestion, the Administrative Procedure Act (APA) does not require that FRA provide additional time to comment on the compendium. *See, e.g., Credit Union Nat. Ass'n* v. *National Credit Union Admin.,* 57 F.Supp.2d 294, 302 (E.D. Va. 1995) (agency complied with the APA's notice and comment requirements, despite not disclosing certain data related to the rulemaking, because the agency had provided a reasonable opportunity to participate in the rulemaking process); *see also Appalachian Power Co.* v. *E.P.A.,* 579 F.2d 846, 853 (4th Cir. 1978) (despite agency's failure to provide notice of certain data in advance of public hearings, interested parties were sufficiently advised of the scope and basis of the rulemaking to enable them to comment intelligently and meaningfully). Instead, the APA simply states that an agency must publish "the terms or substance of the proposed rule or a description of the subjects or issues involved." 5 U.S.C. 553(b)(3). To meet the requirements of section 553, an agency "must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully." *Florida Power & Light Co.* v. *United States,* 846 F.2d 765, 771 (DC Cir. 1988), *cert. denied,* 490 U.S. 1045 (1989).

FRA has provided that opportunity in this proceeding. The research recited in the compendium simply provided for the benefit of interested parties additional information that had previously been made public, FRA's views on the import of the research were aired during RSAC meetings and are expressed at various points in the NPRM, and the railroads obviously had sufficient time to prepare 16 pages of comments on the compendium itself. Clearly, the commenters were not prejudiced by the inclusion of the compendium in the docket.

Section 236.1031 Previously Approved PTC Systems

FRA recognizes that substantial effort has been voluntarily undertaken by the railroads to develop, test, and deploy PTC systems prior to the passage of the RSIA08, and that some of the PTC systems have accumulated a significant history of safe and reliable operations. In order to facilitate the ability of the railroads to leverage the results of PTC design, development, and implementation efforts that have been previously approved or recognized by FRA prior to the adoption of this subpart, FRA is proposing an expedited certification process in this section.

Under paragraph (a), each railroad that has a PTC system that may qualify for expedited treatment would have to submit a Request for Expedited Certification (REC) letter. Products that have not received approval under the subpart H, or have that have not been previously recognized by FRA, would be ineligible. The REC letter may be jointly submitted by PTC railroads and suppliers as long as there is at least one PTC railroad. A PTC system may qualify for expedited certification if it fulfills at least one of the descriptions proposed in paragraphs (a)(1) through (a)(3). While these descriptions are objective in nature, FRA intends them to cover ETMS, ITCS, and ACSES, respectively. The versions or configurations recognized would depend upon the status at the time of the request.

Paragraph (a)(1) applies to systems that have been recognized or approved by FRA after submission of a PSP in accordance with subpart H. Subpart I generally reflects the same criteria required for a PSP under subpart H. Thus, FRA believes that most of the PTCDP and PTCSP requirements in subpart I can be fulfilled with the submission of the existing and approved PSP. However, FRA notes that the subject railroad will also need to submit the information required in a PTCDP and PTCSP that is not in the current PSP.

FRA also recognizes that certain PTC systems may currently operate in revenue service with FRA approval through the issuance of a waiver or order. Paragraphs (a)(2) and (a)(3) intend to cover those systems.

If a PTC system complying with paragraph (a)(1) is provided expedited certification, the system plans should ultimately match the criteria required for each PTCDP and PTCSP. As previously noted, a railroad may seek to use a PTC system that has already received a Type Approval. To extend this benefit as it applies to previously used systems for which expedited certification is provided, paragraph (b) gives the Associate Administrator the ability to provide a Type Approval to systems receiving expedited certification in accordance with paragraph (a)(1).

FRA recognizes that certain systems eligible for expedited certification may not entirely comply with the subsequently issued statutory mandate. Accordingly, under paragraph (c), FRA is compelled to require that before any Type Approval or expedited certification may be provided, the PTC system must be shown to reliably execute the same functionalities of every other PTC system required by subpart I. Nothing in this abbreviated process should be construed as implying the automatic granting by FRA of a Type Approval or PTC System Certification. Each expedited request for a Type Approval or PTC System Certification must be submitted by the railroad under this abbreviated process and, as required under subpart I, must demonstrate that the system reliably enforces positive train separation and prevents overspeed derailments, incursions into roadway worker zones, and movements through misaligned switches.

Under paragraph (d), FRA encourages railroads, to the maximum extent possible, to use proven service history data to support their requests for Type Approval and PTC System Certification. While proven service history cannot be considered a complete replacement for an engineering analysis of the risks and mitigations associated with a PTC product, it provides great creditability for the accuracy of the engineering analysis. Testing and operation can only show the absence or mitigation of a particular failure mode, and FRA believes that there will always be some failure modes that may only be determined through analysis. Due to this inherent limitation associated with testing and operation, FRA also strongly encourages the railroads to also submit any available analysis or information.

Paragraph (e) requires that, to the extent that the PTC system proposed for implementation under this subpart is different in significant detail from the system previously approved or recognized, the changes shall be fully analyzed in the PTCDP or PTCSP as would be the case absent prior approval or recognition. FRA understands that the PTC product for which expedited Type Approval and PTC System Certification is sought may differ in terms of functionality or implementation from the PTC product previously approved or recognized by FRA. In such a case, the service history and analysis may not align directly with the new variant of the product. Similarly, the available service history and analysis associated with a PTC product may be inconclusive about the reliability of a particular function. It is because of these possible situations that FRA can not unequivocally promise that all requests for expedited Type Approval and PTC System Certification submitted by a railroad under this subpart will be automatically granted. FRA will, however, apply the available service history and analytical data as credible evidence to the maximum extent possible. FRA believes that this still greatly simplifies each railroad's task in making its safety case, since the additional testing and analysis required need only address those areas for which credible evidence is insufficient. To reduce the overall level of financial resources and effort necessary to obtain sufficient credible evidence to support the claims being made for the safety performance of the product, FRA also encourages each railroad to share with other railroads a system's service history and the results of any analysis, even in the case where the shared information does not fully support a particular railroad's safety analysis.

Paragraph (f) defines terms used only in this section. "Approved" refers to approval of a PSP under subpart H. As this final rule was being prepared, only BNSF ETMS I configuration had been so approved, but other systems were under development. "Recognized" refers to official action permitting a system to be implemented for control of train operations under an order or waiver, after review of safety case documentation for the implementation. As this NPRM was being prepared, only ACSES I had been recognized under an order of particular applicability, and ACSES II was under review for potential approval. Only one system, the ITCS in place on Amtrak's Michigan line, had been approved for unrestricted revenue service under waiver.

FRA was unable to fashion an outright "grandfathering" of equipment previously used in transit and foreign service. FRA does not have the same degree of direct access to the service history of these systems. Transit systems—except those that are connected to the general railroad system—are not directly regulated by FRA. FRA has had limited positive experience eliciting safety documentation from foreign authorities, particularly given the influence of national industrial policies.

However, FRA believes that, while complete exclusion may not be available in those circumstances, procedural simplification may be possible. FRA is considering a procedure under which the railroad and supplier could establish safety performance at the highest level of analysis for the particular product, relying in part on experience in the other service environments and showing why similar performance should be expected in the U.S. environment. Foreign signal suppliers should be in a good position to marshal service histories for these products and present them as part of the railroad's PTCSP. For any change, the applicant must provide additional information that will enable FRA to make an informed decision regarding the potential impact of the change on safety. This information must include, but is not limited to, the following: (1) A detailed description of the change; (2) a detailed description of the hardware and software impacted by the change; (3) a detailed description of any new functional data flows resulting from the change; (4) the results of the analysis used to verify that the change did not introduce any new safety risks or, if the change did introduce any new safety risks, a detailed description of the new safety risks and the associated risk mitigation actions taken; (5) the results of the tests used to verify and validate the correct functionality of the product after the change has been made; (6) a detailed description of any required modifications in the railroad training plan that are necessary for continued safe operation of the product after the change; and (7) a detailed description of any new test equipment and maintenance procedures required for the continued safe operation of the product.

In the same vein, paragraph (g) encourages re-use of safety case documentation previously reviewed, whether under subpart H or subpart I.

Section 236.1033 Communications and Security Requirements

Subpart I provides specific communications security requirements for PTC system messages. Section 236.1033 originated from the radio and communications task force within the PTC Working Group. The objectives of the requirements are to ensure data integrity and authentication for communications with and within a PTC system.

In data communications, "cleartext" is a message or data in a form that is immediately comprehensible to a human being without additional processing. In particular, it implies that this message is transferred or stored without cryptographic protection. It is related to, but not entirely equivalent to, the term "plaintext." Formally, plaintext is information that is fed as an input to a cryptographic process, while "ciphertext" is what comes out of that process. Plaintext might be compressed, encrypted, or otherwise manipulated before the cryptographic process is applied, so it is quite common to find plaintext that is not cleartext. Cleartext material is sometimes in plain text form, meaning a sequence of characters without formatting, but this is not strictly required. The security requirements are consistent with the Department of Homeland Security (DHS) guidance for SCADA systems and the National Institute of Standards and Technology guidance. FRA has coordinated this final rule with DHS.

Paragraph (a) establishes the requirement for message integrity and authentication. Integrity is the assurance that data is consistent and correct. Generally speaking, in cryptography and information security, integrity refers to the validity of data. Integrity can be compromised through malicious altering—such as an attacker altering an account number in a bank transaction, or forgery of an identity document—or accidental altering—such as a transmission error, or a hard disk crash. A level of data integrity can be achieved by mechanisms such as parity bits and cyclic redundancy codes. Such techniques, however, are designed only to detect some proportion of accidental bit errors; they are powerless to thwart deliberate data manipulation by a determined adversary whose goal is to modify the content of the data for his or her own gain. To protect data against this sort of attack, cryptographic techniques are required. Thus, appropriate algorithms and keys must be employed and commonly understood between the entity wanting to provide data integrity and the entity wanting to be assured of data integrity.

Authentication is the act of establishing or confirming something (or someone) as authentic. Various systems have been invented to provide a means for readers to reliably authenticate the sender. In any event, the communication must be properly protected; otherwise, an eavesdropper can simply copy the relevant data and later replay it, thereby successfully masquerading as the original, legitimate entity.

Sender authentication typically finds application in two primary contexts. Entity identification serves simply to identify the specific entity involved, essentially in isolation from any other activity that the entity might want to perform. The second context is data origin identification, which identifies a specific entity as the source or origin of a given piece of data. This is not entity identification in isolation, nor is it entity identification for the explicit purpose of enabling some other activity. Rather, this is identification with the intent of statically and irrevocably binding the identified entity to some particular data, regardless of any subsequent activities in which the entity might engage. Cryptographically based signatures provide nearly irrefutable evidence that can be used subsequently to prove to a third party that this entity did originate—or at least possess—the data.

Paragraph (b)(1) requires that cryptographic algorithms and keys used to establish integrity and authenticity be approved by either the National Institute of Standards & Technology (NIST) or a similar standards organization acceptable to FRA. As a practical matter, cryptographic algorithms can be believed secure by competent, experienced, and practicing cryptographers. This requires that the algorithms be publicly known and have been seriously studied by working cryptographers. Algorithms that have been approved by NIST (or similar standards bodies) can be assured of being both publicly known and seriously studied.

Paragraph (b)(2) allows the use of either manual or automated means to distribute keys. Key distribution is the most important component in secure transmissions. The general key distribution problem refers to the task of distributing keys between communicating parties to provide the required security properties. Frequent key changes are usually desirable to limit the amount of data compromised if an attacker learns the key. Therefore, the strength of any cryptographic system

results with the key distribution technique, a term that refers to the means of delivering a key to two parties that wish to exchange data without allowing others to see the key. Key distribution can be achieved in a number of ways. There are various combinations by which a key can be selected manually or in automation amongst one or multiple parties.

Paragraph (b)(3) establishes the conditions under which cryptographic keys must be revoked. Paragraph (b)(3)(i) addresses the situation when a key has actually been found to have been compromised and when the possibility of key compromise exists. Cryptographic algorithms are part of the foundations of the security house, and any house with weak foundations will collapse. Adequate procedures should be foreseen to take an algorithm out of service or to upgrade an algorithm which has been used beyond its lifetime.

Paragraph (d) addresses physical protection as applied to cryptographic equipment. Compliance does not necessitate locking devices within mechanical safes or enclosing their electronics within thick steel or concrete shields (i.e., making them tamper-proof). Compliance does, however, involve using sound design practices to construct a system capable of attack detection by a comprehensive range of sensors (i.e., tamper resistant). The level of physical security suggested should be such that unauthorized attempts at access or use will either be unsuccessful or will have a high probability of being detected during or after the event. Additionally, the cryptographic equipment should be prominently situated in operation so that its condition (outward appearance, indicators, controls, etc.) is easily visible to minimize the possibility of undetected penetration. In any system containing detection and destruction methods as described here, there is naturally a cost penalty for providing very high levels of tamper resistance, due to construction and test requirements by the manufacturer. It is naturally important to analyze the risks of key disclosure against cost of protection and specify a suitable implementation.

Confidentiality has been defined by the International Organization for Standardization (ISO) as "ensuring that information is accessible only to those authorized to have access." Confidentiality, integrity, and authentication all rely on the same basic cryptographic primitives—algorithms with basic cryptographic properties—and their relationship to other cryptographic problems. These primitives provide fundamental properties, which guarantee one or more of the high-level security properties. In paragraph (e)(1), FRA makes it clear that while providing for confidentiality of message data is not a regulatory requirement, if confidentiality is elected to be implemented by a railroad, that the same protection mechanisms applicable to the cryptographic primitives that support integrity and authentication must also be provided for the cryptographic primitives that support confidentiality.

It is only the difficulty of obtaining the key that determines security of the system, provided that there is no analytic attack (i.e., a "structural weakness" in the algorithms or protocols used), and assuming that the key is not otherwise available (such as via theft, extortion, or compromise of computer systems). A key should therefore be large enough that a brute force attack (possible against any encryption algorithm) is infeasible, whereas the attack would take too long to execute. Under information theory, to achieve perfect secrecy, it is necessary for the key length to be at least as large as the message to be transmitted and only used once (this algorithm is called the one-time pad). In light of this, and the practical difficulty of managing such long keys, modern cryptographic practice has discarded the notion of perfect secrecy as a requirement for encryption, and instead focuses on computational security. Under this definition, the computational requirements of breaking an encrypted text must be infeasible for an attacker. Paragraph (e)(2) requires that in the event that a railroad elects to implement confidentiality, the chosen key length should provide the appropriate level of computational complexity to protect the information being protected, and that this information be included in the PTCSP. Both academic and private organizations provide recommendations and mathematical formulas to approximate the minimum key size requirement for security based on mathematic attacks; they generally do not take algorithmic attacks, hardware flaws, or other such issues into account. Paragraph (e)(2) has been revised in the final rule to correct an erroneous cross-reference to the security requirements set forth in § 236.1013(a)(7).

Key management—the process of handling and controlling cryptographic keys and associated material during their life cycle in a cryptographic system—includes ordering, generating, distributing, storing, loading, escrowing, archiving, auditing, and destroying the different types of material. Paragraph (e) requires that cleartext stored cryptographic keys be protected from unauthorized disclosure, modification, or substitution. During key management, however, it may be necessary to validate the accuracy of the key being entered, especially in cases where the key management process is being done manually. During the key entry process, keys not encrypted to protect against disclosures may be temporarily displayed to allow visual verification. However, if the key has been encrypted to protect against disclosure, then the cleartext version of the key may not be displayed. This does not, however, preclude the display of the encrypted version of the key.

In paragraph (f), FRA requires that each railroad implement a service restoration and mitigation plan to address restoral of communications services in the event of their loss or disruption and to make this plan available to FRA. Loss of communications services reduces or eliminates the effectiveness of a PTC system and FRA requires that these critical safety systems, once implemented, are restored to operation as soon as practical. FRA believes that the restoration plan must include testing and validating the plan, communicating the plan, and validating backup and restoration operations.

To ensure that these or any other procedures work in the railroad's operational environment, the railroad must validate each procedure intended for implementation. The backup and restoration plan should clearly describe who is to implement procedures and how they are to do it. The primary information to be communicated includes: The team or person (specified as an individual or a role) that is responsible for determining when restoration of service is required and the procedures to be used to restore service, as well as the team or person responsible for implementing procedures for each restoration scenario; the criteria for determining which restoration procedures are most appropriate for a specific situation; the time estimates for restoration of service in each restoration scenario; the restoration procedures to be used, including the tools required to complete each procedure; and the information required to restore data and settings.

Finally, paragraph (g) makes clear that railroads are permitted to implement more restrictive security requirements provided the requirements do not adversely impact the interoperability.

FRA has received no comments on § 236.1033 and has adopted it as proposed.

Section 236.1035 Field Testing Requirements

Initial field or subsequent regression testing of a PTC product on the general rail system is often required before the product has been certified in order to obtain data to support the safety case presented in the PTCSP. To ensure the safety of the public and train crews, prior FRA approval is required to conduct test operations on the general rail system. This paragraph provides an alternative to the waiver process when only part 236 regulations are involved. When regulations concerning track safety grade crossing safety or when operational rules are involved, however, this process would not be available. Such testing may also implicate other safety issues, including adequacy of warning at highway-rail crossings (including part 234 compliance), qualification of passenger equipment (part 238), sufficiency of the track structure to support higher speeds or unbalance (part 213), and a variety of other safety issues, not all of which can be anticipated in any special approval procedure. Approval under this part for testing does not grant relief from other parts of this title and the railroads must still apply for relief from the non-part 236 regulations under the discrete special approval sections of those regulations, the provisions of part 211 related to waivers, or both.

The information required for this filing is described in paragraphs 236.1035(a)(1) through (a)(7). This information is necessary in order for FRA to make informed decisions regarding the safety of testing operations. FRA would prefer that the informational filings to test under this part be accompanied by any requests for relief from non-part 236 regulations so that they may be considered as a whole.

Paragraph (b) provides notification that FRA may—based on the results of the review of the information provided in paragraph (a) and in order to provide additional oversight to ensure the safety of rail operations—impose special conditions on the execution of the testing, including the appointment of an FRA test monitor. When a test monitor is appointed, he or she has the authority to stop testing if unsafe conditions arise, require additional tests as necessary to demonstrate the safe operation of the system, or have tests rerun when the results are in question.

Paragraph (c) reemphasizes the earlier discussion that either temporary or permanent requests for relief for other than requirements of part 236 must be submitted in accordance with the waiver processes specified by part 211.

FRA has received no comments on § 236.1035 and has adopted it as proposed.

Sections 236.1037 Through 236.1049

In subpart H, §§ 236.917 through 236.929 contain various requirements that involve PSPs. FRA believes that these requirements should apply equally to PTC systems governed by subpart I. FRA has included §§ 236.1037 to 236.1049 to inform interested parties how these elements would apply. FRA intends that the meanings of those sections in subpart H, as described in the preamble to its proposed and final rules, would also apply equally in the context of this final rule. While FRA has considered amending these sections in subpart H to incorporate references to subpart I, FRA believes such an attempt and its results would be cumbersome and awkward. Thus, FRA has included the provisions in subpart I for clarity.

The Rail Labor Organizations have expressed support for the training and qualification provisions in §§ 236.1041, 236.1045, 236.1047, and 236.1049 and support an expansion of PTC personnel training requirements, as necessary, based upon experience gained and any training deficiencies identified during operations of these systems. The RLO states that training on the PTC system is essential for all employees who will interface with this technology. While the RLO supports the requirement that employees must maintain the skill level necessary to safely operate trains, they urge FRA to consider that the "4 hour work period" of manual operation of a train should be conducted not less often than once in any given tour of duty. Considering that the maximum workday (except in extreme emergencies) is 12 hours, the locomotive engineer will then be manually operating the train at least 33% of the time. FRA has considered this suggestion for a change in the approach from subpart H. However, FRA believes that this is an issue that should be more specifically addressed in the PTCSP for the system, should automatic operation ever be proposed.

Appendix A to Part 236—Civil Penalties

Appendix A to part 236 contains a schedule of civil penalties for use in connection with this part. FRA is revising this schedule of civil penalties through issuance of the final rule to reflect the addition of subpart I to this part.

Appendix B to Part 236—Risk Assessment Criteria

FRA hereby modifies Appendix B of part 236 to enhance the language for risk assessment criteria in light of the experience gained during the initial stage of PTC system implementation under subpart H and to accommodate the requirements of subpart I regulating the use of mandatory PTC systems. As modified, Appendix B includes certain headings and new language in paragraphs (a) through (h).

Paragraph (a) reflects the change in the required length of time over which the system's risk must be computed. FRA replaces the requirement to assess risk for the system "over the life-cycle of 25 years or greater" with the requirement to assess risk "over the designed life-cycle of the product." FRA believes that the language is consistent with the preamble discussion of the subpart H final rule inasmuch that they do not specify the length of a system's life cycle, thereby providing flexibility for new processor-based systems to have a life cycle other than 25 years.

FRA hereby modifies paragraph (b) only to clarify FRA's intent.

FRA hereby modifies the heading and content of paragraph (c) to better identify the main purpose of this requirement and to ensure its consistency with the associated requirements of §§ 236.909(c) and (d). FRA believes that previous paragraph (c) and its heading did not fully support or clarify the main intent of subpart H, which requires that the total cost of hazardous events should be the risk measure for a full risk assessment and that the mean time to hazardous event (MTTHE) calculations for all hazardous events should be the risk measure for the abbreviated risk assessment. The existing subpart H text asks for both the base case and the proposed case to be expressed in the same metrics. Paragraph (c) of this appendix, as written prior to the issuance of this final rule, did not fully reflect FRA's intent that the same risk metric is to be used in the risk assessment for both the previous and current conditions (*see* § 236.913(g)(2)(vii)). FRA believes that the revised title of this paragraph poses the right question and that its new language provides better guidance on how to perform risk assessment for previous and current conditions.

FRA hereby modifies the heading and text of paragraph (d) to create a comprehensive and detailed list of system characteristics that must be included in the risk assessment for each proposed PTC system subject to requirements of subpart H or subpart I,

or both, as applicable. FRA believes that the extended description of system characteristics better suits the risk assessment requirements of subpart H and subpart I. For example, the revisions clarify that the risk assessment must account for the total volume of traffic, the type of transported freight materials (PIH, TIH), and any additional requirements for PTC systems with trains operating at certain speeds.

FRA hereby modifies paragraph (e) to clarify its intent and reflect the industry's experience in risk assessment techniques gained during the initial stage of PTC system implementation under subpart H. In the language of paragraph (e), FRA provides more specific guidance on how to derive the main risk characteristics, MTTHE, and what role reliability and availability parameters, such as mean time to failure (MTTF) or mean time between failures (MTBF), for different system components can play while assessing risk for vital and non-vital hardware or software components of the system. FRA emphasizes that it is critical that each railroad and its vendors or suppliers include the software failure rates into risk assessments for the system. FRA also finds it necessary to advise each railroad and its vendors or suppliers to include reliability and availability characteristics, such as MTTF or MTBF, into its risk assessment to account for potential system exposure to hazards during system failures or malfunctioning when the system operates in its fall back mode—the back-up operation, as described in the PTCSP, when the PTC system fails to operate.

FRA believes that the modifications to paragraph (e) more accurately address the industry's need for clarity in interpretation and execution of the requirements related to risk assessment. FRA received comments from HCRQ/CGI noting that the phrases "frequency of hazardous events" and "failure frequency", which were contained in paragraph (e) of the proposed rule, are equivalent. HCRQ/CGI therefore recommended that FRA revise the second sentence in paragraph (e) to read as follows: "The MTTHE is to be derived for both fail-safe and non-fail-safe subsystems or components." FRA agrees with this recommendation and has therefore revised the second sentence of paragraph (e) accordingly.

Several commenters questioned whether additional guidance on acceptable methods for calculating MTTHE values for processor-based subsystems and components can be given by FRA. FRA believes it is inappropriate to provide this guidance in the text of the final rule, especially counting the fact that FRA is not to be involved in all aspects of the design and engineering associated with a product. Any guidance that FRA could provide would not reflect the level of understanding that the vendor(s) or supplier(s) and system integrators of the product should have gained throughout the design and implementation process that would enable them to specify, evaluate and determine such critical measures as MTTF, MTBF, and MTTHE. There is a large body of publicly available work from the research and engineering community that addresses various perspectives on determination of appropriate methods of determining MTTHE and other related parameters. Upon receipt of the risk assessment documentation in the PTCSP, FRA will provide feedback on the appropriateness of a vendor, supplier, or railroad selected methodology for determining MTTHE and the acceptability of the results of calculations based on that methodology with respect to regulatory acceptability. However FRA views the specification and determination of appropriate MTTHE and other design parameters as a fundamental responsibility of the system integrator, vendor, or supplier that neither can nor should be abrogated.

FRA received comments on the last sentence in paragraph (f)(1) from HCRQ/CGI, in which HCRQ/CGI asserted that "permanent" faults would result in an MTTHE of zero. In addition, HCRQ/CGI asserted that "transient" by definition is something that comes and then goes away, which may never be detected. Thus, HCRQ/CGI questioned how one could determine the rate of its occurrence. In order to address these concerns, HCRQ/CGI recommended that FRA revise the last sentence in paragraph (f)(1) to read as follows: "The MTTHE calculation must consider the rates of failures caused by contributory faults accounting for the fault coverage of the integrated hardware/software subsystem or component, phased interval maintenance, and restoration of the detected failures."

In response to this comment, FRA would like to reiterate that the main intent of the requirement specified in paragraph (f)(1) was to request that the statistics on subsystem or component failures available for MTTHE calculation must be used in its entirety. This means that all types of failures (faults) observed during subsystem or component operation should be accounted for, regardless of the types of failures by their appearance to the observer (permanent, transient or intermittent), and regardless of whether the failure was caused by the fault of the subsystem or component itself or by errors of the operating agent (human factor associated with operation, maintenance or restoration of the subsystem). FRA feels that replacing the enumerated in the original text types of faults "permanent, transient, and intermittent" with the term "contributory faults" will not assure that all types of faults will be accounted for. FRA also notes that the derivation of MTTHE for the operating system, subsystem or component for which the risk assessment is to be performed is a complex process which may require the use of Fault Tree Analysis or other relevant techniques. These techniques will use the probabilities of single point component failures identified for the system. This process cannot lead to MTTHE of zero value. Neither can this process result in MTTHE being equal to infinity. The calculated probability of accidents (the inverse value of MTTHE) may be infinitely small to the extent that the safety requirement of this Part is met (i.e., during the entire life time of the system it is very unlikely for the accident to occur), but rarely will the probability of such events be zero in a practical world. Based on this reasoning, FRA retains the text in proposed paragraph (f)(1).

FRA hereby modifies paragraph (f)(2) to reflect FRA's understanding that a software failure analysis may not necessarily be based on MTTHE "Verification and Validation" processes and that MTTHE characteristics cannot be easily obtained for the system software components. The modification intends to outline the significance of detailed software fault/failure analysis and software testing to demonstrate repeatable predictive results that all software defects are identified and corrected.

FRA received comments from HCRQ/CGI on paragraph (f)(2), in which HCRQ/CGI asserted that "proper" assessment is open to interpretation, while Real Time Operating System (RTOS) "evaluation" is possible. HCRQ/CGI also asserted that the assessment of device driver software would require the source code, which is usually proprietary. Thus, HCRQ/CGI recommended that the assessment should include Commercial Off-The-Shelf (COTS) software, if incorporated, other than the operating system. HCRQ/CGI asserted that FRA could make this change by revising the first sentence in paragraph (f)(2) to read as follows: "Software fault/failure analysis must be based on the assessment of the design and implementation of the application code, an evaluation of the operating/

executive program and other COTS software components." HCRQ/CGI also commented that it is not possible to demonstrate that all software defects have been identified with a high degree of confidence. HCRQ/CGI quotes a famous statement made years ago (author unknown): "It is common in industry to find a piece of software, which has been subjected to a thorough and disciplined testing regime, has serious flaws." HCRQ/CGI asserted that it is not clear what "high degree of confidence" implies. Therefore, HCRQ/CGI recommended that the last sentence in paragraph (f)(2) be revised to read as follows: "The software assessment process must demonstrate, through repeatable predictive results, that the software operates as specified without error."

In response to this comment, FRA revises paragraph (f)(2) to replace the phrase "proper assessment" with the word "assessment," and to specify that "all safety-related software" should be included in the software fault/failure analysis including COTS software.

However, FRA disagrees with the commenter that, in the requirement for the software defects to be identified and corrected with the "high degree of confidence," the term "high degree of confidence" requires further clarification. The definition of this term is already given in the preamble discussion for § 236.903 in subpart H of this part. *See* 70 FR 11,052, 11,067 (Mar. 7, 2005). This term is widely issued in sections of this part related to safety and risk assessment. Therefore, FRA leaves the last sentence of paragraph (f)(2) unchanged.

FRA hereby modifies paragraph (g) to clarify that MMTHE calculations should account for the restoration time after system or component failure and that the system design must be assessed for adequacy through the Verification and Validation process.

HCRQ/CG, in reference to paragraph (g)(1), repeated its comment given for the last sentence in paragraph (f)(1) that relates to the types of faults (permanent, transient).

FRA notes that the explanations provided in FRA's response to this comment for paragraph (f)(1) are also applicable for this paragraph and therefore includes the text of proposed (g)(1) in the final rule.

FRA hereby modifies paragraph (h) to emphasize the need to document all assumptions made during the risk assessment process. FRA believes that the assumptions should be documented while deriving the total cost of potential accident consequences for full risk assessment or MTTHE values for abbreviated risk assessment, rather than only documenting assumptions for other intermediate parameters, such as MTTF and Mean Time To Repair (MTTR), as currently required. These two referenced parameters may or may not be relevant for the risk assessment.

FRA received comments from HCRQ/CGI on paragraph (h)(1), in which HCRQ/CGI asserted that the first sentence should be its own paragraph. However, HCRQ/CGI also asserted that the proposed rule text was unclear as to how the railroad would be expected to comply with this requirement.

FRA disagrees with the commenter that the paragraph (h)(1) should be restructured and that further clarification is required for the process of documenting all assumptions made while deriving the risk metrics that are to be used in the risk assessment for the product. In order for FRA to assess the validity of risk assessment done by railroads for their particular products, all assumptions made by the railroad in regards of deriving chosen risk metrics shall be presented along with the risk assessment. This is critical for the further confirmation that the assumptions made were correct based on the following in-service experience. Documenting assumptions made in the process of risk analysis is rather common procedure recommended by various studies in safety and reliability engineering.

In its comments, HCRQ/CGI also asserted that there is no need to specify an "automated" process for comparing risk assessment assumptions with actual experience. This comment also was made for the similar text in paragraph (h)(3). Thus, HCRQ/CGI recommended that FRA revise the last sentence of paragraph (h)(1) to read as follows: "The railroad shall document these assumptions in such a form as to permit later comparisons with in-service experience." FRA agrees with this comment and has therefore revised the last sentences of paragraphs (h)(1) and (h)(3) accordingly.

HCRQ/CGI also submitted comments on paragraph (h)(4), asserting that the language in this paragraph seems to imply that a detailed document, separate from the fault trees themselves, is required, which would be very costly. Therefore, HCGI/CGI recommended that FRA revise paragraph (h)(4) to read as follows: "The railroad shall document all of the identified safety critical fault paths to a mishap."

FRA does not see the need to eliminate the clause in the first sentence "as predicted by the safety analysis methodology," but finds it necessary to clarify that no additional tool to that chosen by the railroad for the risk assessment is required by this paragraph.

Appendix C to Part 236—Safety Assurance Criteria and Processes

FRA hereby modifies Appendix C to part 236 to enhance and clarify its language, reorganize the existing list of safe system design principles in accordance with the well established models of system safety engineering, and augment the list of safe system design principles with the principles related to safe system software design. A safe state is a system state that the system defaults to in the event of a fault or failure or when unacceptable or dangerous conditions are detected. The safe state is a state when the hazardous event cannot occur. This final rule revises proposed paragraph (a) to reflect the main purpose of this appendix in clear, accurate, and consistent language that will be repeatedly used throughout the appendix. It also outlines that the requirements of this appendix will be applicable to each railroad's PTCIP and PTCSP, as required by subpart I.

This final rule modifies and restructures paragraph (b) to consistently present a complete list of safety assurance principles properly classified or categorized in accordance with well established system safety engineering principles that need to be followed by the designer of the system to assure that all system components perform safely under normal operating conditions and under failures, accounting for human factor impacts, external influencing, and procedures and policies related to maintenance, repair, and modification of the system. FRA also adds language indicating that these principles must also be applicable to PTC systems designed and implemented under the requirements of subpart I. FRA's intent in initially promulgating Appendix C was to ensure that safety principles are followed during the design stage and that Verification and Validation methods are used to assure that the product meets the safety criteria established in § 236.909. The heading of this paragraph and its subparagraphs are changed to more adequately and precisely capture this paragraph's purpose. For instance, FRA hereby modifies the heading of paragraph (b)(1) to better suit the chosen base of classification for all safety principles under paragraph (b).

HCRQ/CGI submitted comments asserting that the third sentence of paragraph (b)(1) implies that the system will operate safely in the presence of human error. Questioning whether this

would be possible, HCRQ/CGI recommended deletion of this sentence.

In order to avoid ambiguity in interpreting the important requirement spelled out in the third sentence of this paragraph, FRA revises it to read as follows: "The system shall operate safely even in the absence of prescribed operator actions or procedures."

With respect to the fifth sentence in paragraph (b)(1), HCRQ/CGI asserted that it is a rare situation when hazards can be "eliminated." Therefore, HCRQ/CGI recommended that FRA revise the fifth and sixth sentences of proposed paragraph (b)(1) to read as follows: "The safety order of precedence is to eliminate hazards categorized as unacceptable or undesirable. If this is not possible or practical, these hazards should be mitigated to acceptable levels as required by this part."

FRA agrees with the commenter that the last clause in this paragraph discussing elimination of unacceptable and undesirable hazards requires modification and revises this clause by adding extra clarifying sentence in the final rule for the entire clause to read as follows: "Hazards categorized as unacceptable, which is determined by hazard analysis, must be eliminated by design. Best effort must be made by the designer to also eliminate by design the hazards categorized as undesirable. Those undesirable hazards that cannot be eliminated should be mitigated to the acceptable level as required by this part."

HCRQ/CGI submitted comments on the first and second sentences of paragraph (b)(2)(ii), asserting that it is not possible to implement a system that would continue to operate safely in the presence of multiple hardware failures. Therefore, HCRQ/CGI recommended that FRA revise the first and second sentences of paragraph (b)(2)(ii) to read as follows: "The product must be shown to operate safely under conditions of random hardware failure. This includes single failures and multiple hardware failures where one or more failures."

FRA agrees with the commenter that the paragraph requires modification and revises the first two sentences to read as follows: "The product must be shown to operate safely under conditions of random hardware failures. This includes single hardware failures as well as multiple hardware failures that may occur at different times but remain undetected (latent) and react in combination with a subsequent failure as a later time to cause an unsafe operating situation."

HCRQ/CGI asserted that the meaning of each of the last sentences in paragraphs (b)(2)(iii) and (b)(2)(iv) was unclear. In order to address this concern, HCRQ/CGI recommended that the last sentence in paragraph (b)(2)(iii) be revised to read as follows: "Occurrence of credible single point failures that can result in hazards must be detected and the product must achieve a known safe state before inadvertently activating any physical appliance." Similarly, HCRQ/CGI recommended that the last sentence in paragraph (b)(2)(iv) be revised to read as follows: "If one non-self-revealing failure combined with a second failure can cause a hazard that is categorized as unacceptable or undesirable, then the second failure must be detected and the product must achieve a known safe state before inadvertently activating any physical appliance."

FRA agrees with the commenter and revises the referenced sentences in paragraphs (b)(2)(iii) and (b)(2)(iv) for the sentences to end with the following clause: "* * * the product must achieve a known safe state that eliminates the possibility of false activation of any physical appliance."

Under paragraph (b)(3), FRA amends the definition of Closed Loop Principle to reflect its industry accepted definition provided by the AREMA Manual. FRA believes that the previous definition was too general and did not reflect the essence of the most significant principles of safe signaling system design.

HCRQ/CGI submitted comments on the last sentence of paragraph (b)(3), asserting that the sentence is confusing because all system operation is a product of actions and decisions. In order to provide clarification, HCRQ/CGI recommended that FRA revise the last sentence of paragraph (b)(3) to read as follows: "In addition, closed loop design requires that failure to perform a single logical operation, or absence of a single logical input, output or decision shall not cause an unsafe condition, i.e. system safety does not depend upon the occurrence of a single action or logical decision."

FRA has made an effort to perfect the definition of close loop principle in the NPRM and found it satisfactory to adopt the definition given in the 2009 issue of AREMA Communication and Signal Manual of Recommended Practices. FRA does not see the need for further enhancement of this definition.

Under paragraph (b)(4), FRA adds a list of Safety Assurance Concepts that the designer may consider for implementation to assure sail-safe system design and operation. These principles are predominantly applicable for the safe system software design and quoted from the IEEE–1483 standard. Based on this amendment, FRA also renumbers some of the remaining subparagraphs of paragraph (b) to follow the chosen scheme for the proper classification and sequence of safety principles.

GE asserts that more detail is required for the Human Factor Engineering Principle in paragraph (b)(5), which is part of the section on "safety principles during product development." There are two components to applied Human Factor engineering in system safety: The component of ergonomic design and the system risk contribution of the human interaction with the system, along with the degree of dependency on the operator for safety coverage. According to GE, the latter is missing from the discussion and is most relevant to the safety principles section.

In response to this comment, FRA would like to emphasize that the main purpose of Appendix C is to provide safety criteria and processes for design of safe systems, or fail-safe, or vital signaling systems that by definition must exclude any hazards associated with human errors. The "reliance factor" or, in other words, the possibility of hazards arising due to overreliance of the operator on the proper functioning of the system itself, which the commenter is referring to, is an issue solely relevant to the non-vital overlays complementing existing method of operation. For non-vital signaling systems the designer must adhere to the safety principles of Appendix C only to the extent necessary to satisfy the safety requirements of this part. Therefore FRA does not see a need for further modification of paragraph (b)(5).

This final rule amends paragraph (c) to reflect the changes in recommended standards. For instance, the standard "EN50126: 1999, Railway Applications: Specification and Demonstration of Reliability, Availability, Maintainability and Safety" (RAMS) is superseded by the standard IEC62278: 2002 under the same title. The standard "EN50128 (May 2001), Railway Applications: Software for Railway Control and Protection Systems" is superseded by the Standard IEC62279: 2002 under the same title.

HCRQ/CGI submitted comments asserting that the U.S. Department of Defense Military Standard (MIL–STD) 882C, "System Safety Program Requirements" (January 19, 1993) has been superseded by U.S. Department of Defense Military Standard (MIL–STD) 882C, "System Safety Program Requirements", Notice 1 (January 19, 1996)".

In the NPRM, FRA suggested that railroads follow recommendations of MIL–STD–882C of January 19, 1993

issuance specifically. The notice issued on January 19, 1996 does not contain material necessary for the risk analysis, verification and validation processes. Therefore FRA retains the former reference to MIL–STD–882C of January 19, 1993.

Under paragraph (c)(3)(i), FRA references additional IEEE standards that have become available and will support the designs of PTC systems that are widely using communications as their main component. In addition to existing reference under paragraph (c)(3)(i)(A) for IEEE–1483 Standard, the following standards are added to paragraph (c)(3)(i): IEEE 1474.2–2003, Standard for user interface requirements in communications based train control (CBTC) systems; and IEEE 1474.1–2004, Standard for Communications-Based Train Control (CBTC) Performance and Functional Requirements.

After an analysis of the current applicability of ATCS Specification 130 and 140, FRA believes that they are not being used. Thus, FRA hereby removes these standards from the list of referenced standards. However, FRA also adds the ATCS 200, Data Communication standard that remains relevant for communication segment of PTC system designs.

FRA also considers it necessary to reference several additional sections of the current AREMA 2009 Communications and Signal Manual of Recommended Practices. In addition to Section 17 of this manual referenced in a previous version of Appendix C, FRA hereby adds to the list of references Section 16 Vital Circuit and Software Design; Section 21 Data Transmission; and Section 23 Communication-Based Signaling.

Appendix D to Part 236—Independent Review of Verification and Validation

There has been no change in the underlying engineering principles associated with Appendix D. The changes made in this final rule are cosmetic, simply updating the Appendix so that it is applicable to both subpart H and I, and reducing the workload on the vendor or supplier, the railroad, and FRA. FRA determined that it would have been more burdensome to refer to different Appendices that are functionally identical, and whose only practical difference would be that one referred only to subpart H, and the other to subpart I of this part.

Paragraph (a) discusses the purpose of an independent third-party assessment of product Verification and Validation. FRA's position that the requirement for an independent third-party assessment is reasonably common in the field of safety-critical systems remains unchanged. FRA's recent experience confirms that this approach can enhance the quality of decision making by railroads and FRA. The potential for undergoing a third party audit provides incentives to those who design and produce safety-critical systems to more rigorously create and maintain safety documentation for their systems. FRA acknowledges that documentation, by itself, will not ensure a safe system. However, the absence of documentation will make it virtually impossible to ensure the safety of the system throughout its life-cycle. The third party also brings a level of technical expertise, and a perspective that may not be available on the staff of the railroad (or FRA)—effectively permitting the railroad (and thus FRA) to look behind claims of the vendor or supplier to actual engineering practice. This may be especially appropriate where the system in question utilizes a novel architecture or relies heavily on COTS hardware and software.

Paragraph (b) establishes the requirements for independence of the third-party auditor. The text associated with the underlying principle of independence has simply been clarified to indicate that there must be independence at all levels of the product design and manufacture. This situation has arisen where a third party wished to provide independent safety assessments of the system, but also provide technical support for the design of a component that would be used in the system being reviewed. FRA maintains that such practices, even if the entity in question attempts to firewall the parts of the organization doing the respective tasks, represents a conflict of interest and is unacceptable.

Paragraphs (c) through (f) discuss the substance of the third-party assessment. This assessment should be performed on the system as it is finally configured, before revenue operations commence. The assessor should review the supplier's processes as set forth in the applicable documentation and provide comments to the supplier. The reviewer should be able to determine vulnerabilities in the supplier's processes and the adequacy of the safety analysis (be it in an RSPP and PSP or in a PTCDP and PTCSP) as they apply to the product. "Acceptable methodology" is intended to mean standard industry practice, for example, as contained in MIL–STD–882C. FRA is aware of many other acceptable industry standards, but usage of a less common one in an analysis would most likely require a higher level of FRA scrutiny. In addition, the reviewer considers the completeness and adequacy of the required safety documents.

Paragraph (d) discusses the reviewer's tasks at the functional level. Here, the reviewer will analyze the supplier's methods to establish that they are complete and correct. First, a Preliminary Safety Analysis is performed in the design stage of a product. In addition to describing system requirements within the context of the concept of operations, it attempts, in an early stage, to classify the severity of the hazards and to assign an integrity level requirement to each major function (in conventional terms, a preliminary hazard analysis). Again there are many practices widely accepted within industry such as: Hazard Analysis (HA), Fault Tree Analysis (FTA), Failure Mode and Effects Analysis (FMEA), and Failure Modes, Effects, and Criticality Analysis (FMECA). Other simulation methods may also be used in conjunction with the preceding methods, or by themselves when appropriate. Commonly practiced techniques and methods include fault injection, a technique that evaluates performance by injecting known faults at random times during a simulation period; Markov modeling, a modeling technique that consists of states and transitions that control events; Monte Carlo model, a simulation technique based on randomly-occurring events; and Petri-net, an abstract, formal model of information flow that shows static and dynamic properties of a system.

Paragraphs (e) and (f) address what must be performed at the implementation level. At this stage, the product is beginning to take form. The reviewer typically evaluates the software and, if appropriate or required, the hardware. In the case of software, the software will most likely be in modular form, such that software modules are produced in accordance to a particular function. In the case of hardware, this may be at the component or line replaceable unit level. The reviewer must select a significant number of modules to be able to establish that the product is being developed in a safe manner.

Paragraph (g) discusses the reviewer's tasks at closure. The reviewer's primary task at this stage is to prepare a final report where all product deficiencies are noted in detail. This final report may include material previously presented to the supplier during earlier development stages.

FRA received several comments on Appendix D related to the proper documentation to be reviewed by the third-party reviewer according to

paragraph (d)(1), the scope of hazard analysis required to be reviewed by paragraph (d)(2), and the methods of software development techniques to be reviewed according to paragraph (f)(2)(vii). These comments are the same as those submitted by the commenter on the text of Appendix F. Due to the wider applicability of these comments to the material presented in Appendix F, FRA has provided a response to these comments in the section-by-section analysis for Appendix F.

Appendix E to Part 236—Human-Machine Interface (HMI) Design

Appendix E provides human factors design criteria. Paragraphs (a) through (f) cover the same material as was previously contained in Appendix E. *See* 70 FR 11,107 (March 7, 2005). However, Appendix E has been reformatted to support its use for subparts H and I of this part and, with a few exceptions, is textually the same. This Appendix still addresses the basic human factors principles for the design and operation of displays, controls, supporting software functions, and other components in processor-based signal or train control systems and subsystems regardless if they are voluntarily implemented (as is the case with systems qualified under subpart H of this part) or mandatorily implemented (as is the case with systems developed under subpart I of this part). The HMI requirements in this Appendix attempt to capture the lessons learned from the research, design, and implementation of similar technology in other modes of transportation and other industries. The rationale for each of the requirements associated with paragraphs (a) through (f) remains the same as was presented in the former version of Appendix E. *See* 70 FR 11,107, 11,090–11,091 (Mar. 7, 2005).

FRA has noted that products implemented under the requirements of subpart H of this part, or proposed products that will be developed under subpart I of this part, all have been capable of generating electromagnetic radiation. Such emissions are strictly regulated by the Federal Communications Commission for public safety and health, as well as to ensure that the limited electromagnetic spectrum is optimally utilized. FRA is therefore adding a new paragraph (h) to Appendix E, which requires that as part of the HMI design process, the designer must ensure that the product has the appropriate FCC Equipment Authorization, and that the product meets FCC requirements for Maximum Permissible Exposure limits for field strength and power density. Paragraph (g) does not levy any new regulatory requirements. The requirements cited are mandatory FCC requirements for any device that emits electromagnetic radiation that the system designer must comply with. FRA is simply identifying these requirements, as not all railroad product developers may be aware of them.

Appendix F to Part 236—Minimum Requirements of FRA Directed Independent Third-Party Assessment of PTC System Safety Verification and Validation

FRA has revised the title of Appendix F in response to comments submitted by GE, in which GE noted that, while FRA may require a railroad to engage in an independent assessment of its PTC system based on the criteria set forth in § 236.913, FRA is not requiring an independent assessment of every PTCSP.

FRA received several comments from HCRQ/CGI on paragraphs (d), (e), (f), and (i) of Appendix F.

The commenter asserted that the term "acceptable methodology" used in the second sentence of paragraph (d) is not clear and suggested that it be replaced with the term "methodologies typical to safety-critical systems." If revised in accordance with this recommendation, the second sentence of paragraph (d) would read as follows: "At a minimum, the reviewer shall compare the supplier processes with methodologies typical of safety-critical systems and employ any other such tests or comparisons if they have been agreed to previously with FRA." In response to this comment, FRA notes that the term "acceptable methodologies," by its very nature, includes methodologies typical of safety-critical systems. FRA believes that the proposed modification may artificially limit the use of the atypical analysis methodologies that may provide an equivalent, or better, analytical results. Therefore, FRA did not incorporate the proposed change. However, in the interest of providing clarification to reflect the main intent of this paragraph, FRA has modified the second and third sentences in paragraph (d) to read as follows: "At a minimum, the reviewer shall evaluate the supplier design and development process regarding the use of an appropriate design methodology. The reviewer may use the comparison processes and test procedures that have been previously agreed to with FRA."

The commenter also asserted that, with respect to paragraph (e), the reviewer will be required to analyze a "Hazard Log," as opposed to a "Preliminary Hazard Analysis" document, since the Hazard Log will supersede the Preliminary Hazard Analysis on the final stage of the system development process.

FRA agrees with the commenter that the Hazard Log more accurately reflects the perceived risk in the as-built condition and, therefore, has modified paragraph (e) to read as follows: "The reviewer shall analyze the Hazard Log and/or any other hazard analysis documents for comprehensiveness and compliance with applicable railroad, vendor, supplier, industry, national, and international standards." The commenter also suggested that this comment is equally applicable to former paragraph (d)(1) in the prior version of Appendix D. FRA agrees and has modified the various applicable phrases in Appendices D and F accordingly. The commenter further suggested that in paragraph (f) the reviewer should be required to analyze samples of the hazard analyses "for completeness, correctness, and compliance with industry, national, or international standards," as opposed to the proposed requirement to analyze "all" hazard analyses such as Fault Tree Analyses (FTA), Failure Mode and Effects Criticality Analysis (FMECA). The commenter asserted that it will be "difficult and prohibitive" for both the supplier and the reviewer to analyze "all" of these documents in their entire length. The commenter also noted that these comments are applicable to existing Appendix D, paragraph (d)(2).

In response to this comment, FRA notes that there does not appear to be a need for additional clarification on the depth of the quoted documents analysis by the reviewer. As FRA has already indicated in the section-by-section analysis of § 236.1017, "FRA has the discretion to limit the extent of the third party assessment." Moreover, the section-by-section analysis of § 236.1017 goes on to state that "Appendix F represents minimum requirements and that if circumstances warrant, FRA may expand upon the Appendix F requirements as necessary to render a decision that is in the public interest." FRA will, if appropriate, limit the scope of analysis. FRA notes the comment, and will execute its regulatory discretion in this matter.

With respect to paragraph (i)(7), HCRQ/CGI points out that the text of NPRM, while discussing methods of safety-critical software development by the manufacturer, enumerates examples that, according to the commenter, are not particular to the safety-critical systems, which appears to be contrary to the intent of this paragraph. The commenter recommends that FRA

include in the text of the final rule an extended list of examples for methods of software development instead of those cited in NPRM, for example, such methods as "system requirement analysis, requirements traceability to functional and derived safety requirements, design analysis, documented peer review," etc. The commenter also noted that this comment is equally applicable to Appendix D, paragraph (f)(2)(vii).

FRA understands the commenter's concern. FRA believes that the review should include any documentation associated with the software development that may reflect on, or address, the safety of the system. To address the commenter's concern and to more accurately reflect FRA's position, paragraph (i)(7) has been revised by deleting the list of examples of methods of software development previously proposed in the NPRM. FRA modifies the text of this paragraph to emphasize that the review on any documentation that may reflect on the safety of software design is required. As with the preceding comment, FRA will exercise its regulatory discretion with regards to the specific documentation based on the system in question and public safety. FRA has also modified paragraph (i)(7) in Appendix D that discusses the same issue.

VIII. Regulatory Impact and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule has been evaluated in accordance with existing policies and procedures, and determined to be significant under both Executive Order 12866 and DOT policies and procedures. 44 FR 11,034 (Feb. 26, 1979). We have prepared and placed in the docket a regulatory impact analysis (RIA) addressing the economic impact of this final rule.

The costs anticipated to accrue from adopting this final rule would include: (1) Costs associated with developing implementation plans and administrative functions related to the implementation and operation of PTC systems, including the information technology and communication systems that make up the central office; (2) hardware costs for onboard locomotive system components, including installation; (3) hardware costs for wayside system components, including installation; and (4) maintenance costs for all system components.

Two types of benefits are expected to result from the implementation of this final rule—benefits from railroad accident reduction and business benefits from efficiency gains. The first type would include safety benefits or savings expected to accrue from the reduction in the number and severity of casualties arising from train accidents that would occur on lines equipped with PTC systems. Casualty mitigation estimates are based on a value of statistical life of $6 million. In addition, benefits related to accident preventions would accrue from a decrease in damages to property such as: Locomotives, railroad cars, and track; equipment cleanup; environmental damage; train delay resulting from track closures; road closures; emergency response; and evacuations. Benefits more difficult to monetize—such as the avoidance of hazmat accident related costs incurred by federal, state, and local governments and impacts to local businesses—will also result. FRA also expects that once PTC systems are refined, there would likely be substantial additional business benefits resulting from more efficient transportation service; however, such benefits are not included because of significant uncertainties regarding whether and when individual elements will be achieved and given the complicating factor that some benefits might, absent deployment of PTC, be captured using alternative technologies at lower cost. In the NPRM, FRA requested comments on whether the proposed regulation exercised the appropriate level of discretion and flexibility to comply with RSIA08 in the most cost effective and beneficial manner. The FRA received comments, discussed above in the section-by-section analysis, that FRA had exceeded its discretion, in general, in not creating a *de minimis* exception, in § 236.1005, by designating that the railroad base its system designation on 2008 base year traffic patterns; in § 236.1029, by requiring that each crewmember assigned to a cab have access to a display adequate to perform assigned duties safely, which the railroads claimed meant that they have to install a second display; and in § 236.1006 (b)(4) in permitting Class II and Class III railroads to operate locomotives unequipped with PTC on Class I railroad lines under certain conditions. FRA believes that the agency interpreted RSIA08 correctly in not granting AAR's very broad request for a *de minimis* exception (however, FRA did craft a new *de minimis* exception in § 236.1006(b)(4)(ii), discussed above in the section-by-section analysis), in using the 2008 traffic patterns as a basis for designating the system and in requiring that each crewmember in the locomotive cab have access to a display adequate to perform assigned safety-related duties. FRA also believes that it acted with an appropriate level of discretion and flexibility in permitting some operations of unequipped locomotives on PTC equipped routes. All of these responses are discussed in detail above, in the Section-by-Section analysis.

The RIA presents a 20-year analysis of the costs and benefits associated with this rule, using both 7 percent and 3 percent discount rates, and two types of sensitivity analyses. The first is associated with varying cost assumptions used for estimating PTC implementation costs. The second takes into account potential business benefits from realizing service efficiencies and related additional societal benefits from attainment of environmental goals and an overall reduction in transportation risk from modal diversion.

The 20-year total cost estimates are $9.55 billion (PV, 7%) and $13.21 billion (PV, 3%). Annualized costs are $0.87 billion (PV, 7%) and $0.88 billion (PV, 3%). Using high-cost assumptions, the 20-year total cost estimates would be $16.25 billion (PV, 7%) and $22.54 billion (PV, 3%). Using low-cost assumptions, the 20-year cost estimates would be $6.73 billion (PV, 7%) and $9.34 billion (PV, 3%). The later the expenditures are made, the lower the discounted cost impact, which in any event is a very small portion of the total PTC costs. This estimate is lower than the cost estimate presented in the NPRM. It reflects the low freight traffic volume exception for passenger train routes and the *de minimis* exception for freight railroads. These exceptions result in lower wayside costs than estimated in the NPRM RIA. FRA has not revised its locomotive cost estimates to reflect reduced burden resulting from the additional flexibility granted because the magnitude of the reduction is very small relative to the overall system cost.

Twenty-year railroad safety (railroad accident reduction) benefit estimates associated with implementation of the rule are $440 million (PV, 7%) and $674 million (PV, 3%). Annualized benefits are $42 million (PV, 7%), and $45 million (PV, 3%). This estimate is lower than that estimated at the NPRM stage of the rulemaking. The estimate was lowered as a result of revisions made to a study performed by Volpe Center regarding the cost of PTC-preventable accidents. Some forecasts predict significant growth of both passenger and freight transportation demands, and it is thus possible that greater activity on the system could present the potential for

larger safety benefits than estimated in this analysis. The presence of a very large PTC-equipped freight locomotive fleet also supports the opportunity for introduction of new passenger services of higher quality at less cost to the sponsor of that service. Information is not currently available to quantify that benefit.

The table below presents cost and benefit estimates by element using a 3% discount rate as well as a 7% discount rate.

TOTAL 20-YEAR DISCOUNTED COSTS AND DISCOUNTED BENEFITS

[At 3% and 7%]

Discount rate	3.00%	7.00%
Costs by Category:		
Central Office and Development	$283,025,904	$263,232,675
Wayside Equipment	2,902, 751,825	2,414,794,033
On-Board Equipment	1,613,568,678	1,390,618,364
Maintenance	8,406,267,684	5,478,877,649
Total	13,205,614,091	9,547,522,721
Benefits by Category:		
Fatalities	268,999,278	175,541,848
Injuries	203,984,196	133,114,717
Train Delay	24,530,630	16,008,043
Property Damage	159,149,846	103,857,000
Emergency Response	431,143	281,353
Equipment Clean Up	2,509,576	1,637,683
Road Closure	580,664	378,926
Environmental Cleanup	6,486,888	4,233,172
Evacuations	7,129,699	4,652,654
Total Railroad Safety Benefits	673,801,919	439,705,397

The Port Authority Trans Hudson (PATH), a commuter railroad, is apparently considering the system used by the New York City Transit Authority on the Canarsie line. This system, which is known as Communication-Based Train Control, is not similar in concept to any of the other PTC systems (including the CSX CBTC, with which its name might easily be confused), and would not be suitable, as FRA understands the system, except on a railroad with operating characteristics similar to a heavy rail mass transit system. FRA believes that, in absence of the statutory mandate or this rulemaking, PATH would have adopted PTC for business reasons.

Although costs associated with implementation of the final rule are significant and such costs would far exceed the benefits, FRA is constrained by the requirements of RSIA08, which do not provide latitude for implementing PTC differently. Nevertheless, FRA has taken several steps to avoid triggering unnecessary costs in the proposed rule. For instance, FRA is not requiring use of separate monitoring of switch position in signal territory or that the system be designed to determine the position of the end of the train. FRA has also minimized costs, such as by requiring the monitoring of derails protecting the mainline, but limiting it to derails connected to the signal system; and by requiring the monitoring of hazard detectors protecting the mainline, but limiting it to hazard detectors connected to the signal system. FRA has also minimized costs related to diamond crossings, where a PTC equipped railroad crosses a non-PTC equipped railroad at grade; included exceptions to main track for passenger train operations, and provisions that would permit some Class III railroad operation of trains not equipped with PTC over Class I railroad freight lines equipped with PTC. FRA has also added provisions to the final rule which will permit passenger railroads to exclude up to roughly 1,900 miles of track from the requirements to install PTC. Finally, FRA has provided for de minimis exceptions for Class I freight lines with not passenger service and negligible risk, avoiding any expenses for right-of-way modifications on about 300 miles, saving about $15 million, and reducing costs by about 80% on about 3,200 additional miles, saving about $127 million.

RSIA08 requires the railroads to have all mandatory PTC systems operational on or before December 31, 2015. Members of the PTC Working Group, especially railroad and supplier representatives, said that the timeframe was very tight, and that the scheduled implementation dates would be difficult to meet. In general, the faster a government agency requires a regulated entity to adopt new equipment of procedures, the more expensive compliance becomes. In part, this is due to supply elasticity being less over shorter time periods.

FRA is unable to estimate the potential savings if Congress provided a longer implementation schedule or provided incentives, rather than mandates, for PTC system installation. In order to estimate the likely reduction in costs in such situations, FRA would need to develop some other schedule for implementation. The element least sensitive to an implementation's schedule appears to be onboard costs. Each PTC system's onboard equipment seems similar and is not very different from existing onboard systems. Further, the 2015 deadline is not so restrictive that it would cause railroads to pull locomotives out of service just to install on board PTC equipment. Locomotives must be inspected thoroughly every 90 and more extensively every 360 days. The inspections can last from one to several days. Railroads usually bring locomotives into their shops to perform these inspections, during which time a skilled and experienced team could install the on board equipment for PTC. System development is much less certain, and more time would enable vendors or suppliers to develop, test, and implement the software at a more reasonable cost. Wayside costs are also sensitive to the installation timetable, as the wayside must be mapped and

measured, and then the railroads must install wayside interface units (WIUs). Wayside mapping and measurement takes a highly skilled workforce. A larger workforce is necessary to timely implement the required PTC systems in a shorter amount of time. WIU installation is likely similar to existing signal or communication systems installation, and is likely to involve use of existing railroad skilled workers. The shorter the installation time period, the more work will be done at overtime rates, which are, of course, higher.

FRA believes that lower costs could result from a longer installation period, but FRA also believes that the differences in costs would be within the range of the low costs provided in the main analysis of the proposed rule. The 2004 report included some lower cost estimates, but, in light of current discussions with railroads, the cost estimates in the 1998 report seem more accurate. The lower estimates FRA received in preparing the 2004 report were both overly optimistic, and excluded installation costs, as well as higher costs which stem from meeting the performance standards.

Some of the costs of PTC implementation, operation, and maintenance may be offset by business benefits, especially in the long run, although there is uncertainty regarding the timing and level of those benefits. Economic and technical feasibility of the necessary system refinements and modifications to yield the potential business benefits has not yet been demonstrated. FRA analyzed business benefits associated with PTC system implementation and presented its findings in the 2004 Report. Due to the aggressive implementation schedule for PTC and the resulting need to issue a rule promptly, FRA has not formally updated this study. Nevertheless, FRA believes that there is opportunity for significant business benefits to accrue several years after implementation once the systems have been refined to the degree necessary. Thus, FRA conducted a sensitivity analysis of potential business benefits based on the 2004 Report.

The 2004 Report included business benefits from improved or enhanced locomotive diagnostics, fuel savings attributable to train pacing, precision dispatching, and capacity enhancement. Although railroads are enhancing locomotive diagnostics using other technologies, FRA believes that PTC could provide the basis for significant gains in the other three areas.

In the years since the 2004 Report, developing technology and rising fuel costs have caused the rail supply industry and the railroads to focus on additional means of conserving diesel fuel while minimizing in-train forces that can lead to derailments and delays from train separations (usually broken coupler knuckles). Software programs exist that can translate information concerning throttle position and brake use, together with consist information and route characteristics, to produce advice for prospective manipulation of the locomotive controls to limit in-train forces. Programs are also being conceived that project arrival at meet points and other locations on the railroad. These types of tools can be consolidated into programs that either coach the locomotive engineer regarding how to handle the train or even take over the controls of the locomotive under the engineer's supervision. The ultimate purpose of integrating this technology is to conserve fuel use while handling the train properly and arriving at a designated location "just in time" (e.g., to meet or pass a train or enter a terminal area in sequence ahead of or behind other traffic). Further integrating this technology with PTC communications platforms and traffic planning capabilities could permit transmittal of "train pacing" information to the locomotive cab in order to conserve fuel. Like the communications backbone, survey data concerning route characteristics can be shared by both systems. The cost of diesel fuel for road operations to the Class I railroads is approximately $3.5 billion annually and is gradually rising. If PTC technology helps to spur the growth and effective use of train pacing, fuel savings of 5% ($175,000,000 annually) or greater could very likely be achieved. Clearly, if the railroads are able to conserve use of fuel, they will also reduce emissions and contribute to attainment of environmental goals, even before modal diversion occurs.

The improvements in dispatch and capacity have further implications. With those improvements, railroads could improve the reliability of shipment arrival time and, thus, dramatically increase the value of rail transportation to shippers, who in turn would divert certain shipments from highway to rail. Such diversion would yield greater overall transportation safety benefits, since railroads have much lower accident risk than highways, on a point-to-point ton-mile basis. The total societal benefits of PTC system implementation and operation, following the analysis, would be much greater than total societal costs, although the costs would fall disproportionately more heavily on the railroads.

At present, the PTC systems contemplated by the railroads, with the possible exception of PATH, would not increase capacity, at least not for some time. If the locomotive braking algorithms need to be made more conservative in order to ensure that each train does not exceed the limits of its authority, PTC system operation may actually decrease rail capacity where applied in the early years. Further investment would be required to bring about the synergy that would result in capacity gains. A more significant business benefit of PTC system operation would be derived from precision dispatching, which decreases the variance of arrival times of delivered freight. To avoid the risk of running out of stock, shippers often overstock their inventory at an annual cost of approximately 25% of its inventory value, regardless of the material being stored. This estimate accounts for shrinkage, borrowing costs, and storage costs. Of course, freight with more value per unit of mass or volume tends to have greater storage costs per unit. At present, no rail precision dispatch system exists. However, if a shipper would take advantage of precision dispatching, thus increasing freight arrival time accuracy, then it could reduce its overstock inventory. Accurate train data is a necessary, but not a sufficient condition, for precision dispatch. At least two of the Class I railroads have unsuccessfully attempted to develop precision dispatch systems. The mandatory installation of PTC systems is likely to divert any resources that might have been devoted to precision dispatch, so these benefits are unlikely during the first several years of this rule.

Applying current factors to the variables used in the 2004 Report to Congress, the resulting analysis indicates that diversion could result in highway annual safety benefits of $744 million by 2022, and $1,148 million by 2032. Of course, these benefits require that the productivity enhancing systems be added to PTC, and are heavily dependent on the underlying assumptions of the 2004 model.

Modal diversion would also yield environmental benefits. The 2004 Report estimated that reduced air pollution costs would have been between $68 million and $132 million in 2010 (assuming PTC would be implemented by 2010), and between $103 million and $198 million in 2020. This benefit would have accrued to the general public. FRA has not broken out the pollution cost benefit of the current

rule, but offers the estimates from the 2004 Report as a guide to the order of magnitude of such benefits.

While railroads argued that many of the benefits identified in FRA's 2004 report were exaggerated, shortly after the publication of the report, several railroads began developing strategies for PTC system development and implementation. This investment by the railroads would seem to illustrate that they believe that there is some potential for PTC to provide a boost to railroad profits, beyond providing any of the aforementioned societal benefits.

Modal diversion is highly sensitive to service quality. Problems with terminal congestion and lengthy dwell times might overwhelm the benefits of PTC or other initiatives which the railroads have been pursuing (reconfiguration of yards, pre-blocking of trains, shared power arrangements, car scheduling, Automatic Equipment Identification, etc.) that might actually work in synergy with PTC. It should also be noted that, in the years since the 2004 Report was developed, the Class I railroads have shown an increased ability to retain operating revenue as profit, rather than surrendering it in the form of reduced rates. This was particularly true during the period prior to the current recession, when strained highway capacity favored the growth of rail traffic. The sensitivity analysis performed by FRA indicates that realization of business benefits could yield benefits sufficient to close the gap between PTC implementation costs and rail accident reduction benefits within the first 18 years of the rule, applying a 3% discount rate, and by year 24 of the rule, applying a discount rate of 7%. Accordingly, the precise partition of business and societal benefits cannot be estimated with any certainty.

FRA recognizes that the likelihood of business benefits is uncertain and that the cost-to-benefit comparison of this rule, excluding any business benefits, is not favorable. However, FRA has taken measures to minimize the rule's adverse impacts and to provide as much flexibility as FRA is authorized to grant under RSIA08.

B. Regulatory Flexibility Act and Executive Order 13272

To ensure potential impacts of rules on small entities are properly considered, we developed this rule in accordance with Executive Order 13272 ("Proper Consideration of Small Entities in Agency Rulemaking") and DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

The Regulatory Flexibility Act requires an agency to review regulations to assess their impact on small entities. An agency must conduct a Final Regulatory Flexibility Analysis (FRFA) unless it determines and certifies that a rule is not expected to have a significant impact on a substantial number of small entities.

In the NPRM, we published an Initial Regulatory Flexibility Assessment (IRFA) to aid the public in commenting on the potential small business impacts of the proposals. FRA has considered all comments submitted to the docket and at public hearings in response to the NPRM. FRA also worked with the PTC Working Group and its task forces in developing many of the facets of the final rule. We appreciate the information provided by the various parties. The proposed rule, and consequently the IRFA, included as part of the NPRM, have been modified as a result, as described above. Due to the uncertainties associated with new product development and deployment, FRA has prepared a FRFA and will issue a Small Entity Guidance document soon.

In accordance with the Regulatory Flexibility Act, a FRFA must contain:

(1) A succinct statement of the need for, and objectives of the rule;

(2) A summary of the significant issues raised by the public comments in response to the IRFA, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments.

(3) A description and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

(4) A description of the projected reporting, recordkeeping and other compliance requirements of the final rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and

(5) A description of the steps the agency has taken to minimize the significant adverse economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each of the other significant alternatives to the rule considered by the agency was rejected. 5 U.S.C. 604(a)(1)–(5).

1. Need for, and Objectives of the Rule

PTC systems will be designed to prevent train-to-train collisions, overspeed derailments, incursions into established work zone limits, and the movement of a train through a switch left in the wrong position.

As discussed in more detail in section I of the preamble, the RSIA08 mandates that widespread implementation of PTC across a major portion of the U.S. rail industry be accomplished by December 31, 2015. RSIA08 requires each Class I carrier and each entity providing regularly scheduled intercity or commuter rail passenger transportation to develop a plan for implementing PTC by April 16, 2010. The Secretary of Transportation is responsible for reviewing and approving or disapproving such plans. The Secretary has delegated this responsibility to FRA. This final rule details the process and procedure for obtaining FRA approval of the plans.

As discussed earlier in the preamble, FRA is issuing this final rule to provide regulatory guidance and performance standards for the development, testing, implementation, and use of Positive Train Control (PTC) systems for railroads mandated by the Rail Safety Improvement Act of 2008 § 104, Public Law 110–432, 122 Stat. 4848, 4856, (Oct. 16, 2008) (codified at 49 U.S.C. 20157).

2. Significant Issues Raised by Public Comment in Response to the IRFA

The only comment which directly referred to the IRFA was a comment from Class I railroad representatives noting that the IRFA implied that Class I railroads would pay for installation of split point derails at railroad-railroad crossings where a PTC equipped line crosses a line not equipped with PTC. FRA agrees with commenters that costs will be borne according to preexisting agreements and any other laws or regulations that might affect which party is responsible for the costs incurred and has modified its analysis accordingly.

Other comments which affect the IRFA related to definition of main track for intercity and commuter operations where freight densities are relatively low. These comments, primarily from Amtrak, not a small entity, directly referred to the proposed rule, and not to the IRFA. In response, FRA provided significant relief to Amtrak for operations over Class II and Class III railroads, thus indirectly providing relief to some of the Class II and III railroads, potentially allowing one or more to avoid PTC system installation. The RSIA08 generally defines "main line" as "a segment of railroad tracks over which 5,000,000 or more gross tons of railroad traffic is transported

annually. *See* 49 U.S.C. 20157(i)(2). However, FRA may also define "main line" by regulation "for intercity rail passenger transportation or commuter rail passenger transportation routes or segments over which limited or no freight railroad operations occur." *See* 49 U.S.C. 20157(i)(2)(B); 49 CFR 1.49(oo). FRA recognizes that there may be circumstances where certain statutory PTC system implementation and operation requirements are not practical and provide no significant safety benefits. In those circumstances, FRA will exercise its statutory discretion provided under 49 U.S.C. 20157(i)(2)(B).

In accordance with the authority provided by the statute and with carefully considered recommendations from the RSAC, FRA will consider requests for designation of track over which rail operations are conducted as "other than main line track" for passenger and commuter railroads, or freight railroads operating jointly with passenger or commuter railroads. Such relief may be granted only after request by the railroad or railroads filing a PTCIP and approval by the Associate Administrator.

In § 236.1019(a), FRA requires the submittal of a main line track exclusion addendum (MTEA) to any PTCIP filed by a railroad that seeks to have any particular track segment deemed as other than main line. Since the statute only provides for such regulatory flexibility as it applies to passenger transportation routes or segments over which limited or no freight railroad operations occur, only a passenger railroad may file an MTEA as part of its PTCIP. This may include a PTCIP jointly filed by freight and passenger railroads. In fact, FRA expects that, in the case of joint operations, only one MTEA should be agreed upon and submitted by the railroads filing the PTCIP. After reviewing a submitted MTEA, FRA may provide full or conditional approval for the requested exemptions.

Each MTEA must clearly identify and define the physical boundaries, use, and characterization of the trackage for which exclusion is requested. When describing each track's use and characterization, FRA expects the requesting railroad or railroads to include copies of the applicable track and signal charts. Ultimately, FRA expects each MTEA to include information sufficiently specific to enable easy segregation between main line track and non-main line track. In the event the railroad subsequently requests additional track to be considered for exclusion, a well-defined MTEA should reduce the amount of future information required to be submitted to FRA. Moreover, if FRA decides to grant only certain requests in an MTEA, the portions of track for which FRA has determined should remain considered as main line track can be easily severed from the MTEA. Otherwise, the entire MTEA, and thus its concomitant PTCIP, may be entirely disapproved by FRA, increasing the risk of the railroad or railroads not meeting its statutory deadline for PTC implementation and operation.

For each particular track segment, the MTEA must also provide a justification for such designation in accordance with paragraphs (b) or (c) of this section.

In § 236.1019(b), FRA specifically addresses the conditions for relief for passenger and commuter railroads with respect to passenger-only terminal areas. As noted previously in the analysis of § 236.1005(b), any track within a yard used exclusively by freight operations moving at restricted speed is excepted from the definition of main line. In those situations, operations are usually limited to preparing trains for transportation and do not usually include actual transportation. This automatic exclusion does not extend to yard or terminal tracks that include passenger operations. Such operations may also include the boarding and disembarking of passengers, heightening FRA's sensitivity to safety. Moreover, while FRA could not expend its resources to review whether a freight-only yard should be deemed other than main line track, FRA believes that the relatively lower number of passenger yards and terminals would allow for such review. Accordingly, FRA believes that it is appropriate to review these circumstances on a case-by-case basis.

During the PTC Working Group discussions, the major passenger railroads requested an exception for tracks in passenger terminal areas because of the impracticability of installing PTC. These are locations where signal systems govern movements over very complex special track work divided into short signal blocks. Operating speeds are low (not to exceed 20 miles per hour), and locomotive engineers moving in this environment expect conflicting traffic and restrictive signals. Although low-speed collisions do occasionally occur in these environments, the consequences are low; and the rate of occurrence is very low in relation to the exposure. It is the nature of current-generation PTC systems that they use conservative braking algorithms. Requiring PTC to short blocks in congested terminals would add to congestion and frustrate efficient passenger service, in the judgment of those who operate these railroads. The density of wayside infrastructure required to effect PTC functions in these terminal areas would also be exceptionally costly in relation to the benefits obtained. FRA agrees that technical solutions to address these concerns are not presently available. FRA does believe that the appropriate role for PTC in this context is to enforce the maximum allowable speed (which is presently accomplished in cab signal territory through use of automatic speed control, a practice which could continue where already in place).

If FRA grants relief, the conditions of paragraphs (b)(1), (b)(2), or (b)(3), as applicable, as well as conditions attached to the approval, must be strictly adhered to.

In § 236.1019(b)(1), FRA specifies that relief under paragraph (b) is limited to operations that do not exceed 20 miles per hour. The PTC Working Group agreed upon the 20 miles per hour limitation, instead of requiring restricted speed, because the operations in question will be by signal indication in congested and complex terminals with short block lengths and numerous turnouts. FRA agrees with the PTC Working Group that the use of restricted speed in this environment would unnecessarily exacerbate congestion, delay trains, and diminish the quality of rail passenger service.

Moreover, when trains on the excluded track are controlled by a locomotive with an operative PTC onboard apparatus that PTC system component must enforce the regulatory speed limit or actual maximum authorized speed, whichever is less. While the actual track may not be outfitted with a PTC system in light of a MTEA approval, FRA believes it is nevertheless prudent to require such enforcement when the technology is available on the operating locomotives. This can be accomplished in cab signal territory using existing automatic train stop technology and outside of cab signal territory by mapping the terminal and causing the onboard computer to enforce the maximum speed allowed.

FRA also limits relief under § 236.1019(b)(2) to operations that enforce interlocking rules. Under interlocking rules, trains are prohibited from moving in reverse directions without dispatcher permission on track where there are no signal indications. FRA believes that such a restriction will minimize the potential for a head-on impact.

Also, under § 236.1019(b)(3), such operations are only allowed in yard or terminal areas where no freight

operations are permitted. While the definition of main line may not include yard tracks used solely by freight operations, FRA is not extending any relief or exception to tracks within yards or terminals shared by freight and passenger operations. The collision of a passenger train with a freight consist is typically a more severe condition because of the greater mass of the freight equipment. However, FRA did receive a comment suggesting some latitude within terminals when passenger trains are moving without passengers (e.g., to access repair and servicing areas). FRA agrees that low-speed operations under those conditions should be acceptable as trains are prepared for transportation. FRA has not included a request by Amtrak (discussed below) to allow movements within major terminals at up to 30 miles per hour in mixed passenger and freight service, which appears in FRA's judgment to fall outside of the authority to provide exclusions conferred on FRA by the law.

In § 236.1019(c), FRA provides the conditions under which joint limited passenger and freight operations may occur on defined track segments without the requirement for installation of PTC. Under § 236.1003 (Definitions), "limited operations" is defined as "operations on main line track that have limited or no freight operations and are approved to be excepted from this subpart's PTC system implementation and operation requirements in accordance with § 236.1019(c)." This paragraph provides five alternative paths to the main line exception, three of which were contained in the proposed rule and a fourth and fifth that respond to comments on the proposed rule.

The three alternatives derived from the NPRM are set forth in § 236.1019(c)(1). First, an exception may be available where both the freight and passenger trains are limited to restricted speed. Such operations are feasible only for short distances, and FRA will examine the circumstances involved to ensure that the exposure is limited and that appropriate operating rules and training are in place.

Second, under § 236.1019(c)(1)(ii), FRA notes that it will consider an exception where temporal separation of the freight and passenger operations can be ensured. A more complete definition of temporal separation is provided in § 236.1019(e). Temporal separation of passenger and freight services reduces risk because the likelihood of a collision is reduced (e.g., due to freight cars engaged in switching that are not properly secured) and the possibility of a relatively more severe collision between a passenger train and much heavier freight consist is obviated.

Third, under § 236.1019(c)(1)(iii), FRA notes that it will consider commingled freight and passenger operations provided that a jointly agreed risk analysis is provided by the passenger and freight railroads, and the level of safety is the same as that which would be provided under one of the two prior options selected as the base case. FRA requested comments on whether FRA or the subject railroad should determine the appropriate base case, but received none. FRA recognizes that there may be situations where temporal separation may not be possible. In such situations, FRA may allow commingled operations provided the risk to the passenger operation is no greater than if the passenger and freight trains were operating under temporal separation or with all trains limited to restricted speed. For an exception to be made under § 236.1019(c)(3), FRA requires a risk analysis jointly agreed to and submitted by the applicable freight and passenger services. This ensures that the risks and consequences to both parties have been fully analyzed, understood, and mitigated to the extent practical. FRA would expect that the moving party would elect a base case offering the greatest clarity and justify the selection.

Comments on the proposed rule generally supported the aforementioned exclusions or were silent.

In its comments on the NPRM, Amtrak requested further relief relating to lines requiring the implementation and operation of a PTC system due solely to the presence of light-density passenger traffic. According to Amtrak, the defining characteristic of light-density lines is the nature of the train traffic; low-density patterns on these lines lead to a correspondingly low risk of collision. Amtrak also asserted that, due to relatively limited wear and tear from lower traffic densities, these lines often have fewer track workers on site, further reducing the chance of collisions and incursions into work zones. Thus, states Amtrak, one of the principal reasons for installing PTC—collision avoidance—is a relatively low risk on many light density lines. With only marginal safety benefits anticipated from PTC use in such applications, Amtrak believed that there may be minimal justification for installing PTC on certain light-density lines.

Amtrak further noted that FRA itself had concluded that the costs of PTC generally exceed its benefits, and Amtrak urged that this may be even more so on light-density lines. Amtrak believed that Congress understood this issue and thus created the regulatory flexibility for the definition of "main line" for passenger routes found at 49 U.S.C. 20157(i)(2)(B) as a means to allow the Secretary to exempt certain routes from the PTC mandate. According to Amtrak, this provision essentially allows the Secretary to define certain passenger routes with limited or no freight traffic as other than "main line," thereby effectively exempting such lines from the reach of the PTC mandate because the mandate only applies to railroad operations over "main line[s]." Said another way, urged Amtrak, the provision allows the Secretary the freedom to decide in what circumstances such routes should be considered "main lines" and thus be required to install PTC—pursuant to whatever factors the Secretary deems appropriate through the rulemaking process.

Amtrak urged that the Secretary should use this flexibility to limit which passenger routes it defines as "main lines" to those deemed to warrant the use of PTC using the FRA's usual risk-based approach to safety regulation and traditional measures of reasonableness, costs, and benefits. Amtrak posited that such a risk-based analysis by FRA would likely lead to the conclusion that PTC is simply not needed on many light-density lines over which passenger trains currently operate. Amtrak therefore asked that FRA exercise this authority by working with Amtrak and the rail industry to exempt certain light density freight lines which host passenger traffic from the obligation to install PTC where operating and safety conditions do not warrant an advanced signal system.

Should FRA choose not to exempt some of these light density freight lines over which passenger trains operate, Amtrak felt that the high costs of full PTC systems will be passed on to the passenger and freight operators of these routes. According to Amtrak, this obligation could threaten the continuation of intercity passenger rail service on several routes, including lines in California, Colorado, Kansas, Maine, Massachusetts, Michigan, Missouri, New Hampshire, New Mexico, North Dakota, Vermont, and Virginia, on what are potentially light density lines. Additionally, states Amtrak, this obligation, where it can be financed, could force the diversion of significant capital dollars away from essential safety investments in track and other infrastructure improvements, which are typically the leading safety risks for such light-density operations. According to Amtrak, the cost of PTC installation on these lines may be so out

of proportion to the benefit that Amtrak's service will need to be rerouted onto a different line (e.g., to a Class I line with PIH materials) if a reroute option exists, or eliminated entirely because there is no feasible alternate route and no party is willing or able to bear the cost of installing PTC on the existing route. The defining characteristic of light-density lines is the nature of the train traffic: low density patterns on these lines lead to a correspondingly low risk of collision. In its filing, Amtrak noted that it was currently assembling the details (e.g., annual freight tonnage, frequency of freight train operations) "for those lines that it believes may qualify as light-density, and will submit as a supplement to these Comments a recommendation as to what criteria the FRA should adopt in determining what light-density lines are other than 'main lines.'" Amtrak did subsequently file data referred to below, but did not propose criteria.

According to the Amtrak testimony, the "limited operations exception" in subsection 236.1019(c) of the NPRM did not provide a practical solution to the problem created by defining all light-density routes and terminal areas with passenger service as "main lines." Amtrak stated that this subsection would arguably require installation of PTC on most of the trackage and locomotives of the Terminal Railroad Association of St Louis (TRRA) unless: (1) The entire terminal operates at restricted speed (which TRRA is unlikely to agree to), (2) passenger and freight trains are temporally separated (which would not be practical on TRRA, and is unlikely to be practical on any of the light-density lines over which Amtrak operates, due to the 24/7 nature of railroad operations), or (3) a risk mitigation plan can be effected that would achieve a level of safety not less than would pertain if all operations on TRRA were at restricted speed or subject to temporal separation. Accordingly, Amtrak recommended: (a) That the FRA adopt a risk analysis-based definition of "main line" passenger routes that excludes light-density lines on which the installation of PTC is not warranted; and (b) with respect to freight terminal areas in which passenger trains operate, that FRA modify the limited operations exception in subsection 236.1019(c) to require that all trains be limited to 30 miles per hour rather than to restricted speed, or that non-PTC equipped freight terminals be deemed as other than "main lines" so long as all passenger operations are pursuant to signal indication and at speeds not greater than 30 miles per hour (with speeds reduced to not greater than restricted speed on unsignaled trackage or if the signals should fail).

FRA believes that Amtrak's request is much broader than contemplated by the law. FRA notes that TRRA is a very busy terminal operation. FRA does not believe that the "limited freight operations" concept is in any way applicable under those circumstances. Nor is there any indication in law that FRA was expected to fall back to traditional cost-benefit principles in relation to PTC and scheduled passenger service. However, there are a number of Amtrak routes with limited freight operations that will not otherwise be equipped with PTC because they are operated by other than Class I railroads. Further, there are some Class I lines with less than 5 million gross tons, or no PIH, that also warrant individualized review to the extent Amtrak and the host railroad might elect to propose it.

Accordingly, in response to the Amtrak comments, §§ 236.1019(c)(2) and (c)(3) have been added to the final rule to provide an option by which certain additional types of limited passenger train operations may qualify for a main line track exception where freight operations are also suitably limited and the circumstances could lead to significant hardship and cost that might overwhelm the value of the passenger service provided. In § 236.1019(c)(2), FRA addresses lines where the host is not a Class I freight railroad, describing characteristics of line segments that might warrant relief from PTC. In § 236.1019(c)(2)(i), FRA addresses passenger service involving up to four regularly scheduled passenger trains during a calendar day over a segment of unsignaled track on which less than 15 million gross tons of freight traffic is transported annually. In § 236.1019(c)(2)(ii), FRA addresses passenger service involving up to 12 regularly scheduled passenger trains during a calendar day over a segment of signaled track on which less than 15 million gross tons of freight traffic is transported annually. FRA derived § 236.1019(c)(2) indirectly from discussions in the RSAC in response to comments by Amtrak set forth above. The PTC Working Group proposed an exception that might have been available anywhere an intercity or commuter railroad operated over a line with 5 million gross tons of freight traffic, including Class I lines and the lines of the intercity or commuter railroad. This would have opened the potential for a considerable exception for lines with very light freight density under circumstances not thoroughly explored in the short time available to the working group (e.g., on commuter rail branch lines, low density track segments on Class I railroads, etc.).

Subsequent to the RSAC activities, Amtrak notified FRA that its conversations with Class II and III railroads whose lines had been at the root of the Amtrak comments revealed that some of the situations involved freight traffic exceeding 5 million gross tons, potentially rendering the exception ineffective for this purpose. At the same time, FRA noted that the policy rationale behind the proposed additional exception was related as much to the inherent difficulty associated with PTC installation during the initial period defined by law, given that the railroads identified by Amtrak were for the most part very small operations with limited technical capacity, as well as limited safety exposure. It was clear that in these cases care would need to be taken to analyze collision risk and potentially require mitigations.[14] Accordingly, FRA has endeavored to address the concern brought forward by Amtrak with a provision that is broad enough to permit consideration of actual circumstances, limit this particular exception to operations over railroads that would not otherwise need to install PTC (e.g., Class II and III freight railroads), provide for a thorough review process, and make explicit reference to the potential requirement for safety mitigations. In this regard, FRA has chosen 15 million gross tons as a threshold that should accommodate situations where Amtrak trains will, in actuality, face few conflicts with freight movements (i.e., requiring trains to clear the main line for meets and passes or to wait at junctions) and where mitigations are in place or could be put in place to establish a high sense of confidence that operations will continue to be conducted safely. FRA believes that less than 15 million gross tons represents a fair test of "limited freight operations" for these purposes, with the further caveat that specific operating arrangements will be examined in each case.[15] FRA emphasizes that this is not

[14] An example of an existing mitigation, which is provided to support service quality but also supports safety, is the practice of one Class III Amtrak host and its connecting freight partner to hold out fleeted empty coal trains off the Class III property during the period that Amtrak is running. While not constituting strict "temporal separation," it does significantly reduce collision risk over the route.

[15] Freight tonnage on Amtrak lines varies from zero on two segments to over 150 million gross tons. On a per-mile basis, 15 million gross tons falls into the twenty first percentile of Amtrak track

an entitlement, but an exclusion for which the affected railroads will need to make a suitable case.

Amtrak also provided to FRA a spreadsheet identifying each of its route segments with attributes such as route length, freight tonnage, number of Amtrak trains, and numbers of commuter trains. FRA further reviewed this information in light of Amtrak's request for main track exceptions. FRA noted a number of segments of the Amtrak system on Class I railroads where the number of Amtrak trains was low and the freight tonnage was also low (less than 15 million gross tons). Each of these lines, with the exception of one 33-mile segment, is signalized. FRA further noted that, with both Amtrak and Class I railroad locomotives equipped for PTC, use of partial PTC technology (e.g., monitoring of switches where trains frequently clear) should be available as a mitigation for collision risk. Accordingly, in § 236.1019(c)(3) FRA has provided a further narrow exception for Class I lines carrying no more than four intercity or commuter passenger trains per day and cumulative annual tonnage of less than 15 million gross tons, subject to FRA review. The limit of four trains takes into consideration that it is much less burdensome to equip the wayside of a Class I rail line than to install a full PTC system on a railroad that would not otherwise require one. Again, the exception is not automatic, and FRA's approval of a particular line segment would be discretionary.

The new § 236.1019(d), FRA makes clear that it will carefully review each proposed main track exception and may require that it be supported by appropriate hazard analysis and mitigations. FRA has previously vetted through the RSAC a Collision Hazard Analysis Guide that can be useful for this purpose. If FRA determines that freight operations are not "limited" as a matter of safety exposure or that proposed safety mitigations are inadequate, FRA will deny the exception.

3. Description and Estimate of Small Entities Affected

"Small entity" is defined in 5 U.S.C. 601. Section 601(3) defines a "small entity" as having the same meaning as "small business concern" under section 3 of the Small Business Act. This includes any small business concern that is independently owned and operated, and is not dominant in its field of operation. Section 601(4) includes not-for-profit enterprises that are independently owned and operated, and are not dominant in their field of operations within the definition of "small entities." Additionally, section 601(5) defines as "small entities" governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000.

The U.S. Small Business Administration (SBA) stipulates "size standards" for small entities. It provides that the largest a for-profit railroad business firm may be (and still classify as a "small entity") is 1,500 employees for "Line-Haul Operating" railroads, and 500 employees for "Short-Line Operating" railroads. *See* "Table of Size Standards," U.S. Small Business Administration, January 31, 1996, 13 CFR part 121; *see also* NAICS Codes 482111 and 482112.

SBA size standards may be altered by Federal agencies in consultation with SBA, and in conjunction with public comment. Pursuant to the authority provided to it by SBA, FRA has published a final policy, which formally establishes small entities as railroads that meet the line haulage revenue requirements of a Class III railroad. *See* 68 FR 24,891 (May 9, 2003). Currently, the revenue requirements are $20 million or less in annual operating revenue, adjusted annually for inflation. The $20 million limit (adjusted annually for inflation) is based on the Surface Transportation Board's threshold of a Class III railroad carrier, which is adjusted by applying the railroad revenue deflator adjustment. *See also* 49 CFR part 1201. The same dollar limit on revenues is established to determine whether a railroad shipper or contractor is a small entity. FRA uses this definition for this rulemaking.

The FRA's "universe" of considered entities generally includes only those small entities that can reasonably be expected to be directly regulated by the final rule. One type of small entity is potentially affected by this final rule: railroads. The level of impact on small railroads will vary from railroad to railroad. Class III railroads will be impacted for one or more of the following reasons: (1) They operate on Class I railroad lines that carry PIH materials and are required to have PTC, in which case they will need to equip the portion of their locomotive fleet that operates on such lines; (2) they operate on Amtrak or commuter rail lines, including freight railroad lines that host such service; (3) they host regularly scheduled intercity or commuter rail transportation; or (4) they have at-grade railroad crossings over lines required by RSIA08 to have PTC.

The final rule will apply to small railroads' tracks over which a passenger railroad conducts intercity or commuter operations and locomotives operating on main lines of Class I freight railroads required to have PTC and on railroads conducting intercity passenger or commuter operations. The impact on Class III railroads that operate on Class I railroad lines required to be equipped with PTC will depend on the nature of such operations. Class III railroads often make short moves on Class I railroad lines for interchange purposes. To the extent that their moves do not exceed four per day or 20 miles in length of haul (one way), Class III railroads will be exempt from the requirement to equip the locomotives. However, some Class III railroads operate much more extensively on Class I railroad lines that will be required to have PTC and will have to equip some of their locomotives. It is likely that Class III railroads will dedicate certain locomotives to such service, if they have not done so already. FRA estimates that approximately 55 small railroads will have to equip locomotives with PTC system components because they have trackage rights on Class I freight railroad PIH lines that will be required to have PTC and will not be able to qualify for any of the operational exceptions discussed.

FRA further estimates that 10 small railroads have trackage rights on intercity passenger or commuter railroads or other freight railroads hosting such operations, and will need to equip some locomotives with PTC systems. Half of these will need to equip locomotives anyway, because they also have trackage rights on Class I railroads that haul PIH and would otherwise be required to have PTC.

Thus, a total of 60 railroads will need to equip locomotives. FRA estimates that the average small railroad will need to equip four locomotives, at a per railroad cost of $55,000 each, totaling $220,000, and that the total cost for all 60 small railroads which will need to equip locomotives will be $13,200,000. FRA further estimates that the annual maintenance cost will be 15% of that total, equaling $33,000 per railroad or $1,980,000 total for all small railroads.

In addition, 15 small railroads host commuter or intercity passenger operations on what might be defined as main line track under the accompanying rulemaking; however, only five of these railroads are neither terminal nor port railroads, which tend to be owned and operated by large railroads or port authorities, or subsidiaries of large short

miles. The candidate lines on the Class I system comprise about 6.8% of Amtrak's route structure.

line holding companies with the expertise and resources across the disciplines comparable to larger railroads. Of those five railroads, only one has trackage exceeding 3.8 miles. The other four railroads may request that FRA define such track as other than main line after ensuring that all trains will be limited to restricted speed. The cost burden on the remaining railroad will likely be reduced by restricting speed, temporally separating passenger train operations, or by passing the cost to the passenger railroad. Thus, the expected burden to small entities hosting passenger operations is minimal. This impact will further be reduced by exclusion of track from the main track under § 236.1019.

At rail-to-rail crossings where at least one of the intersecting tracks allows operating speeds in excess of 40 miles per hour, the approaching non-PTC line must have a permanent maximum speed limit of 20 miles per hour and either have some type of positive stop enforcement or a split-point derail incorporated into the signal system on the non-PTC route. In the IRFA, FRA incorrectly assumed that the cost of the derail would be borne by the PTC-equipped railroad, and that slowing to 20 miles per hour reflects current practice at most diamond crossings. In response to comments from Class I railroad representatives, FRA has revised its assumption and estimates that roughly half of the cost of derails will be borne by small entities. FRA estimates that five small railroads have rail-to-rail crossings, with two such crossings each, where the newly burdened small railroad will be slowing to 20 miles per hour from a higher track speed. FRA estimates that the average traffic on the newly burdened route is two trains per day, and that the cost to slow from a higher track speed is $30 per train, for a total cost of $60 per crossing per day, a per railroad cost of $120 per day, and a total national cost for all ten small railroads of $600 per day and an annual cost of $43,800 per railroad and a total for all small railroads of $219,000 per year. FRA further estimates that small railroads will pay for derails at five of the ten impacted crossings, at a price per crossing of $80,000, for two sets of derails, one on each side of the crossings, and a total cost of $400,000, with annual maintenance costs of $60,000 (15% of installation cost) total. The initial investment will therefore be $400,000 and the total annual cost will be $279,000. FRA estimates that only five Class III railroads will be affected by this provision, and that they will be railroads not affected by the requirement to equip locomotives, because railroads with equipped locomotives could simply use the PTC system and avoid the requirement to slow down.

This analysis yields a total of 65 affected small entities that may be impacted by implementation of the final rule. FRA requested comments regarding this estimate of small entities potentially impacted, and the only comment was that Class I railroads would not necessarily bear the cost of equipping rail-to-rail crossings with derails.

4. Description of Reporting, Recordkeeping, and Other Compliance Requirements and Impacts on Small Entities Resulting From Specific Requirements

Class III railroads that host intercity or commuter rail service will need to file implementation plans, whether or not they directly procure or manage installation of the PTC system. FRA believes that, although the implementation plan must be jointly filed by the small host railroad and passenger tenant railroad, the cost of these plans will be borne by the passenger railroads, because under typical trackage rights agreements, the passenger railroads are responsible for any costs that would not exist in the absence of the passenger operations. Clearly, the Class III railroads would not be required to install PTC in the absence of passenger traffic, so any costs the Class III railroads bear initially will eventually be passed on to the passenger railroads operating on the Class III railroads' lines. FRA believes that only one small entity, as described above, is likely to have PTC installed on its lines. The implementation plan is likely to be an extension of the passenger railroad's plan, and the marginal cost will be the cost of tailoring the plan to the host railroad, which will be borne by the passenger railroad, and maintaining copies of the plan at the host railroad, which FRA estimates to be approximately $1,000 per year.

The total cost to small entities will include the initial cost of equipping locomotives, $13,200,000, and $400,000 to equip diamond crossings; annual costs of $1,980,000 for maintenance of locomotive systems; $219,000 due to operating speed restrictions at diamond crossings; $60,000 to maintain diamond crossings; and $1,000 to maintain a copy of the PTC implementation plan. The total annual costs to small entities after initial acquisition will be $2,260,000 ($1,980,000 + $219,000 + $60,000 + $1,000). Individual railroads affected will either face an initial cost of $220,000 to equip locomotives, and an annual cost of $33,000 to maintain the PTC systems on those locomotives, or will face a per railroad cost of $80,000 to equip a diamond crossing, $12,000 per year to maintain a diamond crossing, and $43,800 per year to slow at diamond crossings. No railroad will face both sets of costs, because if its locomotives are equipped, they will not need to slow down at diamond crossings, nor would the crossings need to be equipped with derails.

5. Steps the Agency Has Taken To Minimize Adverse Economic Impact on Small Entities

FRA is unaware of any significant alternatives that would meet the intent of RSIA08 and that would minimize the economic impact on small entities. FRA is exercising its discretion to provide the greatest flexibility for small entities available under RSIA08 by allowing operations of unequipped trains operated by small entities on the main lines of Class I railroads, and by defining main track on passenger railroads to avoid imposing undue burdens on small entities. The definition of passenger main track was adopted based on PTC Working Group recommendations that were backed strongly by representatives of small railroads. FRA added further, more expansive exclusions from main track for passenger railroads in the final rule. The provisions permitting operations of unequipped trains of Class I railroads exceeded the maximum flexibility for which the PTC Working Group could reach a consensus. FRA requested comments on this finding of no significant alternative related to small entities, but received no such comments.

The process by which this final rule was developed provided outreach to small entities. As noted earlier in the preamble, this notice was developed in consultation with industry representatives via the RSAC, which includes small railroad representatives. From January to April 2009, FRA met with the entire PTC Working Group five times over the course of twelve days. This PTC Working Group established a task force to focus on issues specific to short line and regional railroads. The discussions yielded many insights and this final rule takes into account the concerns expressed by small railroads during the deliberations. The PTC Working Group had further discussions after publication of the NPRM, on August 31, 2009, and September 1 and 2, 2009, related to the impact on small entities and on passenger railroads

(small entities may be affected under the final rule by their operations on passenger railroads or as hosts of passenger operations) and added new exclusions from main track to the RSAC recommendations. FRA extended these exclusions further, based on Amtrak comments, to the benefit of small entities.

C. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The sections that contain the new information collection requirements and the estimated time to fulfill each requirement are as follows:

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
234.275—Processor-Based Systems—Deviations from Product Safety Plan (PSP)—Letters.	20 Railroads	25 letters	4 hours	100 hours.
236.18—Software Mgmt. Control Plan	184 Railroads	184 plans	2,150 hours	395,600 hours.
—Updates to Software Mgmt. Control Plan.	90 Railroads	20 updates	1.50 hours	30 hours.
236.905—Updates to RSPP	78 Railroads	6 plans	135 hours	810 hours.
—Response to Request for Additional Info.	78 Railroads	1 updated doc	400 hours	400 hours.
—Request for FRA Approval of RSPP Modification.	78 Railroads	1 request/modified RSPP.	400 hours	400 hours.
236.907—Product Safety Plan (PSP)—Dev	5 Railroads	5 plans	6,400 hours	32,000 hours.
236.909—Minimum Performance Standard				
—Petitions for Review and Approval	5 Railroads	2 petitions/PSP	19,200 hours	38,400 hours.
—Supporting Sensitivity Analysis	5 Railroads	5 analyses	160 hours	800 hours.
236.913—Notification/Submission to FRA of Joint Product Safety Plan (PSP).	6 Railroads	1 joint plan	25,600 hours	25,600 hours.
—Petitions for Approval/Informational Filings.	6 Railroads	6 petitions	1,928 hours	11,568 hours.
—Responses to FRA Request for Further Info. After Informational Filing.	6 Railroads	2 documents	800 hours	1,600 hours.
—Responses to FRA Request for Further Info. After Agency Receipt of Notice of Product Development.	6 Railroads	6 documents	16 hours	96 hours.
—Consultations	6 Railroads	6 consults	120 hours	720 hours.
—Petitions for Final Approval	6 Railroads	6 petitions	16 hours	96 hours.
—Comments to FRA by Interested Parties.	Public/RRs	7 comments	240 hours	1,680 hours.
—Third Party Assessments of PSP	6 Railroads	1 assessment	104,000 hours	104,000 hours.
—Amendments to PSP	6 Railroads	15 amendments	160 hours	2,400 hours.
—Field Testing of Product—Info. Filings	6 Railroads	6 documents	3,200 hours	19,200 hours.
236.917—Retention of Records.				
—Results of tests/inspections specified in PSP.	6 Railroads	3 documents/records	160,000 hrs.; 160,000 hrs.; 40,000 hrs.	360,000 hours.
—Report to FRA of Inconsistencies with frequency of safety-relevant hazards in PSP.	6 Railroads	1 report	104 hours	104 hours.
236.919—Operations & Maintenance Man.				
—Updates to O & M Manual	6 Railroads	6 updated docs	40 hours	240 hours.
—Plans for Proper Maintenance, Repair, Inspection of Safety-Critical Products.	6 Railroads	6 plans	53,335 hours	320,010 hours.
—Hardware/Software/Firmware Revisions.	6 Railroads	6 revisions	6,440 hours	38,640 hours.
236.921—Training Programs: Development	6 Railroads	6 Tr. Programs	400 hours	2,400 hours.
—Training of Signalmen & Dispatchers	6 Railroads	300 signalmen; 20 dispatchers.	40 hours; 20 hours	12,400 hours.
236.923—Task Analysis/Basic Requirements: Necessary Documents.	6 Railroads	6 documents	720 hours	4,320 hours.
—Records	6 Railroads	350 records	10 minutes	58 hours.
SUBPART I—NEW REQUIREMENTS				
236.1001—RR Development of More Stringent Rules Re: PTC Performance Stds.	30 Railroads	3 rules	80 hours	240 hours.
236.1005—Requirements for PTC Systems.				
—Temporary Rerouting: Emergency Requests.	30 Railroads	50 requests	8 hours	400 hours.
—Written/Telephonic Notification to FRA Regional Administrator.	30 Railroads	50 notifications	2 hours	100 hours.
—Temporary Rerouting Requests Due to Track Maintenance.	30 Railroads	760 requests	8 hours	6,080 hours.
—Temporary Rerouting Requests That Exceed 30 Days.	30 Railroads	380 requests	8 hours	3,040 hours.
236.1006—Requirements for Equipping Locomotives Operating in PTC Territory.				

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
—Reports of Movements in Excess of 20 Miles/RR Progress on PTC Locomotives.	30 Railroads	45 reports + 45 reports.	8 hours + 170	8,010 hours.
—PTC Progress Reports	35 Railroads	35 reports	16 hours	560 hours.
236.1007—Additional Requirements for High Speed Service.				
—Required HSR—125 Documents with approved PTCSP.	30 Railroads	11 documents	3,200 hours	35,200 hours.
—Requests to Use Foreign Service Data.	30 Railroads	2 requests	8,000 hours	16,000 hours.
—PTC Railroads Conducting Operations at More than 150 MPH with HSR–125 Documents.	30 Railroads	4 documents	3,200 hours	12,800 hours.
—Requests for PTC Waiver	30 Railroads	1 request	1,000 hours	1,000 hours.
236.1009—Procedural Requirements.				
—PTC Implementation Plans (PTCIP)	30 Railroads	25 plans	535 hours	13,375 hours.
—Host Railroads Filing PTCIP or Request for Amendment (RFAs).	30 Railroads	1 PCTIP; 15 RFAs	535 hours; 320 hours	5,335 hours.
—Jointly Submitted PTCIPs	30 Railroads	5 PTCIPs	267 hours	1,335 hours.
—Notification of Failure to File Joint PTCIP.	30 Railroads	25 notifications	32 hours	800 hours.
—Comprehensive List of Issues Causing Non-Agreement.	30 Railroads	25 lists	80 hours	2,000 hours.
—Conferences to Develop Mutually Acceptable PCTIP.	25 Railroads	3 conf. calls	60 minutes	3 hours.
—Type Approval	30 Railroads	10 Type Appr	8 hours	80 hours.
—PTC Development Plans Requesting Type Approval.	30 Railroads	20 Ltr. + 20 App; 10 Plans.	8 hrs/1,600 hrs.; 6,400 hours.	96,160 hours.
—Notice of Product Intent w/PTCIPs (IPs).	30 Railroads	24 NPI; 24 IPs	1,070 + 535 hrs	38,520 hours.
—PTCDPs with PTCIPs (DPs + IPs)	30 Railroads	6 DPs; 6 IPs	2,135 + 535 hrs	16,020 hours.
—Updated PTCIPs w/PTCDPs (IPs + DPs).	30 Railroads	24 IPs; 24 DPs	535 + 2,135 hrs	64,080 hours.
—Disapproved/Resubmitted PTCIPs/NPIs.	30 Railroads	6 IPs + 6 NPIs	135 + 270 hrs	2,430 hours.
—Revoked Approvals—Provisional IPs/DP.	30 Railroads	6 IPs + 6 DPs	135 + 535 hrs	4,020 hours.
—PTCIPs/PTCDPs Still Needing Rework.	30 Railroads	2 IPs + 2 DPs	135 + 535 hrs	1,340 hours.
—PTCIP/PTCDP/PTCSP Plan Contents—Documents Translated into English.	30 Railroads	1 document	8,000 hours	8,000 hours.
—Requests for Confidentiality	30 Railroads	30 ltrs; 30 docs	8 hrs.; 800 hrs	24,240 hours.
—Field Test Plans/Independent Assessments—Req. by FRA.	30 Railroads	150 field tests; 2 assessments.	800 hours	121,600 hours.
—FRA Access: Interviews with PTC Wrkrs.	30 Railroads	60 interviews	30 minutes	30 hours.
—FRA Requests for Further Information	30 Railroads	5 documents	400 hours	2,000 hours.
236.1011—PTCIP Requirements—Comment	7 Interested Groups	21 rev.; 60 com	143 + 8 hrs	3,483 hours.
236.1015—PTCSP Content Requirements & PTC System Certification.				
—Non-Vital Overlay	30 Railroads	2 PTCSPs	16,000 hours	32,000 hours.
—Vital Overlay	30 Railroads	16 PTCSPs	22,400 hours	358,400 hours.
—Stand Alone	30 Railroads	10 PTCSPs	32,000 hours	320,000 hours.
—Mixed Systems—Conference with FRA regarding Case/Analysis.	30 Railroads	3 conferences	32 hours	96 hours.
—Mixed Sys. PTCSPs (incl. safety case).	30 Railroads	2 PTCSPs	28,800 hours	57,600 hours.
—FRA Request for Additional PTCSP Data.	30 Railroads	15 documents	3,200 hours	48,000 hours.
—PTCSPs Applying to Replace Existing Certified PTC Systems.	30 Railroads	15 PTCSPs	3,200 hours	48,000 hours.
—Non-Quantitative Risk Assessments Supplied to FRA.	30 Railroads	15 assessments	3,200 hours	48,000 hours.
236.1017—PTCSP Supported by Independent Third Party Assessment.	30 Railroads	1 assessment	8,000 hours	8,000 hours.
—Written Requests to FRA to Confirm Entity Independence.	30 Railroads	1 request	8 hours	8 hours.
—Provision of Additional Information After FRA Request.	30 Railroads	1 document	160 hours	160 hours.
—Independent Third Party Assessment: Waiver Requests.	30 Railroads	1 request	160 hours	160 hours.

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
—RR Request for FRA to Accept Foreign Railroad Regulator Certified Info.	30 Railroads	1 request	32 hours	32 hours.
236.1019—Main Line Track Exceptions.				
—Submission of Main Line Track Exclusion Addendums (MTEAs).	30 Railroads	30 MTEAs	160 hours	4,800 hours.
—Passenger Terminal Exception—MTEAs.	30 Railroads	23 MTEAs	160 hours	3,680 hours.
—Limited Operation Exception—Risk Mit	30 Railroads	23 plans	160 hours	3,680 hours.
—Ltd. Exception—Collision Hazard Anal	30 Railroads	12 analyses	1,600 hours	19,200 hours.
—Temporal Separation Procedures	30 Railroads	11 procedures	160 hours	1,760 hours.
236.1021—Discontinuances, Material Modifications, Amendments—Requests to Amend (RFA) PTCIP, PTCDP or PTCSP.	30 Railroads	15 RFAs	160 hours	2,400 hours.
—Review and Public Comment on RFA	7 Interested Groups	7 reviews + 20 comments.	3 hours; 16 hours	341 hours.
236.1023—PTC Product Vendor Lists	30 Railroads	30 lists	8 hours	240 hours.
—RR Procedures Upon Notification of PTC System Safety-Critical Upgrades, Rev., Etc.	30 Railroads	30 procedures	16 hours	480 hours.
—RR Notifications of PTC Safety Hazards.	30 Railroads	150 notifications	16 hours	2,400 hours.
—RR Notification Updates	30 Railroads	150 updates	16 hours	2,400 hours.
—Manufacturer's Report of Investigation of PTC Defect.	5 System Suppliers	5 reports	400 hours	2,000 hours.
—PTC Supplier Reports of Safety Relevant Failures or Defective Conditions.	5 System Suppliers	150 reports + 150 rpt. copies.	16 hours + 8 hours	3,600 hours.
236.1029—Report of On-Board Lead Locomotive PTC Device Failure.	30 Railroads	960 reports	96 hours	92,160 hours.
236.1031—Previously Approved PTC Systems.				
—Request for Expedited Certification (REC) for PTC System.	30 Railroads	3 REC Letters	160 hours	480 hours.
—Requests for Grandfathering on PTCSPs.	30 Railroads	3 requests	1,600 hours	4,800 hours.
236.1035—Field Testing Requirements	30 Railroads	150 field test plans	800 hours	120,000 hours.
—Relief Requests from Regulations Necessary to Support Field Testing.	30 Railroads	50 requests	320 hours	16,000 hours.
236.1037—Records Retention.				
—Results of Tests in PTCSP and PTCDP.	30 Railroads	960 records	4 hours	3,840 hours.
—PTC Service Contractors Training Records.	30 Railroads	9,000 records	30 minutes	4,500 hours.
—Reports of Safety Relevant Hazards Exceeding Those in PTCSP and PTCDP.	30 Railroads	4 reports	8 hours	32 hours.
—Final Report of Resolution of Inconsistency.	30 Railroads	4 final reports	160 hours	640 hours.
236.1039—Operations & Maintenance Manual (OMM): Development.	30 Railroads	30 manuals	250 hours	7,500 hours.
—Positive Identification of Safety-critical components.	30 Railroads	75,000 i.d. components.	1 hour	75,000 hours.
—Designated RR Officers in OMM regarding PTC issues.	30 Railroads	60 designations	2 hours	120 hours.
236.1041—PTC Training Programs	30 Railroads	30 programs	400 hours	12,000 hours.
236.1043—Task Analysis/Basic Requirements: Training Evaluations.	30 Railroads	30 evaluations	720 hours	21,600 hours.
—Training Records	30 Railroads	350 records	10 minutes	58 hours.
236.1045—Training Specific to Office Control Personnel.	30 Railroads	20 trained employees	20 hours	400 hours.
236.1047—Training Specific to Loc. Engineers & Other Operating Personnel.				
—PTC Conductor Training	30 Railroads	5,000 trained conductors.	3 hours	15,000 hours.

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC 20503, *Attention:* FRA Desk Officer. Comments may also be sent via e-mail to the Office of Management and Budget at the following address: *oira_submissions@omb.eop.gov.*

OMB is required to make a decision concerning the collection of information requirements contained in this direct final rule between 30 and 60 days after publication of this document in the **Federal Register.** Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

FRA cannot impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of this direct final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

D. Federalism Implications

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, "Federalism." *See* 64 FR 43,255 (Aug. 4, 1999).

As discussed earlier in the preamble, this final rule would provide regulatory guidance and performance standards for the development, testing, implementation, and use of Positive Train Control (PTC) systems for railroads mandated by the Rail Safety Improvement Act of 2008.

Executive Order 13132 requires FRA 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" are 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." Under Executive Order 13132, the agency may not issue a regulation with Federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has Federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

FRA has determined that this final rule would not have substantial direct effects on the states, on the relationship between the national government and the states, nor on the distribution of power and responsibilities among the various levels of government. In addition, FRA has determined that this final rule, which is required by the Rail Safety Improvement Act of 2008, would not impose any direct compliance costs on state and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

However, this final rule will have preemptive effect. Section 20106 of Title 49 of the United States Code provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the local safety or security exception to § 20106. The intent of § 20106 is to promote national uniformity in railroad safety and security standards. 49 U.S.C. 20106(a)(1). Thus, subject to a limited exception for essentially local safety or security hazards, this final rule would establish a uniform federal safety standard that must be met, and state requirements covering the same subject matter would be displaced, whether those state requirements are in the form of a state law, regulation, order, or common law. Part 236 establishes federal standards of care which preempt state standards of care, but this part does not preempt an action under state law seeking damages for personal injury, death, or property damage alleging that a party has failed to comply with the federal standard of care established by this part, including a plan or program required by this part. Provisions of a plan or program which exceed the requirements of this part are not included in the federal standard of care. The Locomotive Boiler Inspection Act (49 U.S.C. 20701–20703) has been held by the U.S. Supreme Court to preempt the entire field of locomotive safety; therefore, this part preempts any state law, including common law, covering the design, construction, or material of any part of or appurtenance to a locomotive.

In sum, FRA has analyzed this final rule in accordance with the principles and criteria contained in Executive Order 13132. As explained above, FRA has determined that this final rule has no federalism implications, other than the preemption of state laws covering the subject matter of this final rule, which occurs by operation of law under 49 U.S.C. 20106 whenever FRA issues a rule or order. Accordingly, FRA has determined that preparation of a federalism summary impact statement for this proposed rule is not required.

E. Environmental Impact

FRA has evaluated this final rule in accordance with its "Procedures for Considering Environmental Impacts" ("FRA's Procedures") (64 FR 28,545 (May 26, 1999)) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this final rule is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this final rule is not a major federal action significantly affecting the quality of the human environment.

F. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531) (UMRA) 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 expenditures by state, local or tribal governments, in the aggregate, or by the private sector, of $100 million (adjusted annually for inflation with base year of 1995) or more in any one year. The value equivalent of $100 million in CY 1995, adjusted annual for inflation to CY 2008 levels by the Consumer Price Index for All Urban Consumers (CPI–U) is $141.3 million. The assessment may be included in conjunction with other assessments, as it is in this rulemaking.

FRA is issuing this final rule to provide regulatory guidance and performance standards for the development, testing, implementation, and use of PTC systems for railroads mandated by the Rail Safety Improvement Act of 2008 § 104, Public Law 110–432, 122 Stat. 4854 (Oct. 16, 2008) (codified at 9 U.S.C. 20157), to

implement PTC systems. The RIA provides a detailed analysis of the costs of implementing PTC systems. This analysis is the basis for determining that, other than to the extent that this regulation incorporates requirements specifically set forth in RSIA08, this rule will not result in total expenditures by state, local or tribal governments, in the aggregate, or by the private sector of $141.3 million or more in any one year. The vast bulk of costs associated with this final rule are directly attributable to the statutory mandate. The only unfunded mandate attributable to this final rule that does not incorporate the requirements specifically set forth in RSIA08 is the cost pertaining to the filing of paperwork to prove compliance with RSIA08. The effects are discussed above and in the Regulatory Impact Analysis, which has been placed in the docket for this rulemaking.

FRA received comments asserting that the rule extends beyond the congressional mandates communicated in RSIA08. Even if this assertion was correct, the final rule alone would not create an unfunded mandate in excess of the threshold amount. For instance, some railroads believe that § 236.1029(f)—which requires PTC screen access to every person in the locomotive cab—exceeds the statutory requirements. Certain freight railroads have said that this provision requires a second display unit, which will cost $8,000. AAR estimates that approximately 29,461 second display units would require installation, resulting in a cost of $235,688,000. FRA, however, believes that only 27,598 screens would require installation, totaling $220,784,000.

Certain railroads have also contested § 236.1005(b)(2), which governs the baseline information necessary to determine whether a Class I railroad's track segment shall be equipped with a PTC system. Under that provision, initial PTC territory shall be determined based on 2008 traffic levels. CSXT asserts that this provision will cause it to install PTC on 844 miles of track which will no longer meet the PIH materials threshold or will no longer meet the 5 million gross tons threshold in 2010. According to CSXT, the installation will cost $45,000 per mile (the RIA uses an estimate of $50,000 per mile) for a CSXT estimated cost of almost $38,000,000.

As noted above, FRA believes that these requirements respond directly to the requirements set forth in RSIA08. For instance, to effectuate Congress' intent to prevent incursions into roadway worker zones, it is necessary to require PTC screen access to all crew members in the locomotive cab so that they may perform their respective duties. Sometimes, this may require installation of a second display unit. In its analysis of § 236.1005(b), FRA provides sufficient justification for the baseline level based on the language in the statute, the context of the legislative process, and Congress' intent. If anything, FRA has reduced railroad expenditures by, *inter alia,* providing a number of exceptions from the installation requirements and opportunities for plan amendments.

In any event, the aforementioned costs borne by the railroads will not exceed $141.3 million or more in any one year. The costs indicated above—totaling between $258,784,000 and $273,688,000, depending upon whether one relies on AAR's or FRA's second screen estimates—would be incurred over a period of several years. Even if FRA were to add the costs of paperwork filings, which FRA estimates to each have a one time cost of approximately $20,000, the annual monetary threshold will likely not be met.

G. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any "significant energy action." 66 FR 28,355 (May 22, 2001). Under the Executive Order, a "significant energy action" is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this final rule in accordance with Executive Order 13211. FRA has determined that this final rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a "significant regulatory action" within the meaning of Executive Order 13211.

H. Privacy Act

FRA wishes to inform all interested parties that anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document), if submitted on behalf of an association, business, labor union, etc.). Interested parties may also review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19,477) or visit *http://www.regulations.gov.*

List of Subjects

49 CFR Part 229

Event recorders, Locomotives, Railroad safety.

49 CFR Part 234

Highway safety, Penalties, Railroad safety, Reporting and recordkeeping requirements.

49 CFR Part 235

Administrative practice and procedure, Penalties, Railroad safety, Reporting and recordkeeping requirements.

49 CFR Part 236

Penalties, Positive Train Control, Railroad safety, Reporting and recordkeeping requirements.

IX. The Rule

■ In consideration of the foregoing, FRA amends chapter II, subtitle B of title 49, Code of Federal Regulations as follows:

PART 229—[AMENDED]

■ 1. The authority citation for part 229 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20133, 20137–38, 20143, 20701–03, 21301–02, 21304; 28 U.S.C. 2401, note; and 49 CFR 1.49(c), (m).

■ 2. Section 229.135 is amended by revising paragraphs (b)(3)(xxv) and (b)(4)(xxi) to read as follows:

§ 229.135 Event recorders.

* * * * *

(b) * * *

(3) * * *

(xxv) Safety-critical train control data routed to the locomotive engineer's display with which the engineer is required to comply, specifically including text messages conveying mandatory directives and maximum authorized speed. The format, content, and proposed duration for retention of such data shall be specified in the Product Safety Plan or PTC Safety Plan submitted for the train control system under subparts H or I, respectively, of part 236 of this chapter, subject to FRA approval under this paragraph. If it can be calibrated against other data required by this part, such train control data may, at the election of the railroad, be

retained in a separate certified crashworthy memory module.

(4) * * *

(xxi) Safety-critical train control data routed to the locomotive engineer's display with which the engineer is required to comply, specifically including text messages conveying mandatory directives and maximum authorized speed. The format, content, and proposed duration for retention of such data shall be specified in the Product Safety Plan or PTC Safety Plan submitted for the train control system under subparts H or I, respectively, of part 236 of this chapter, subject to FRA approval under this paragraph. If it can be calibrated against other data required by this part, such train control data may, at the election of the railroad, be retained in a separate certified crashworthy memory module.

* * * * *

PART 234—[AMENDED]

■ 3. The authority citation for part 234 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107; 28 U.S.C. 2461, note; and 49 CFR 1.49.

■ 4. In § 234.275 revise paragraphs (b)(1), (b)(2), (c), and (f) to read as follows:

§ 234.275 Processor-based systems.

* * * * *

(b) *Use of performance standard authorized or required.* (1) In lieu of compliance with the requirements of this subpart, a railroad may elect to qualify an existing processor-based product under part 236, subparts H or I, of this chapter.

(2) Highway-rail grade crossing warning systems, subsystems, or components that are processor-based and that are first placed in service after June 6, 2005, which contain new or novel technology, or which provide safety-critical data to a railroad signal or train control system that is governed by part 236, subpart H or I, of this chapter, shall also comply with those requirements. New or novel technology refers to a technology not previously recognized for use as of March 7, 2005.

* * * * *

(c) *Plan justifications.* The Product Safety Plan in accordance with 49 CFR 236.907—or a PTC Development Plan and PTC Safety Plan required to be filed in accordance with 49 CFR 236.1013 and 236.1015—must explain how the performance objective sought to be addressed by each of the particular requirements of this subpart is met by the product, why the objective is not relevant to the product's design, or how the safety requirements are satisfied using alternative means. Deviation from those particular requirements is authorized if an adequate explanation is provided, making reference to relevant elements of the applicable plan, and if the product satisfies the performance standard set forth in § 236.909 of this chapter. (See § 236.907(a)(14) of this chapter.)

* * * * *

(f) *Software management control for certain systems not subject to a performance standard.* Any processor-based system, subsystem, or component subject to this part, which is not subject to the requirements of part 236, subpart H or I, of this chapter but which provides safety-critical data to a signal or train control system shall be included in the software management control plan requirements as specified in § 236.18 of this chapter.

PART 235—[AMENDED]

■ 5. The authority citation for part 235 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107; 28 U.S.C. 2461, note; and 49 CFR 1.49.

■ 6. In § 235.7, revise paragraph (a)(4), add paragraph (a)(5), and revise paragraphs (b)(2), (b)(3), and (c)(25) to read as follows:

§ 235.7 Changes not requiring filing of application.

(a) * * *

(4) Removal from service not to exceed 6 months of block signal system, interlocking, or traffic control system necessitated by catastrophic occurrence such as derailment, flood, fire, or hurricane; or

(5) Removal of an intermittent automatic train stop system in conjunction with the implementation of a positive train control system approved by FRA under subpart I of part 236 of this chapter.

(b) * * *

(2) Removal of electric or mechanical lock, or signal used in lieu thereof, from hand-operated switch in automatic block signal or traffic control territory where train speed over the switch does not exceed 20 miles per hour; or

(3) Removal of electric or mechanical lock, or signal used in lieu thereof, from hand-operated switch in automatic block signal or traffic control territory where trains are not permitted to clear the main track at such switch.

(c) * * *

(25) The temporary or permanent arrangement of existing systems necessitated by highway-rail grade crossing separation construction. Temporary arrangements shall be removed within 6 months following completion of construction.

PART 236—[AMENDED]

■ 7. The authority citation for part 236 is revised to read as follows:

Authority: 49 U.S.C. 20102–20103, 20107, 20133, 20141, 20157, 20301–20303, 20306, 20501–20505, 20701–20703, 21301–21302, 21304; 28 U.S.C. 2461, note; and 49 CFR 1.49.

■ 8. Section 236.0 is amended by revising paragraphs (a) and (c) through (e) and by adding paragraph (i) to read as follows:

§ 236.0 Applicability, minimum requirements, and penalties.

(a) Except as provided in paragraph (b) of this section, this part applies to all railroads and any person as defined in paragraph (f) of this section.

* * * * *

(c)(1) Prior to January 17, 2012, where a passenger train is operated at a speed of 60 or more miles per hour, or a freight train is operated at a speed of 50 or more miles per hour—

(i) A block signal system complying with the provisions of this part shall be installed; or

(ii) A manual block system shall be placed permanently in effect that shall conform to the following conditions:

(A) A passenger train shall not be admitted to a block occupied by another train except when absolutely necessary and then only by operating at restricted speed;

(B) No train shall be admitted to a block occupied by a passenger train except when absolutely necessary and then only by operating at restricted speed;

(C) No train shall be admitted to a block occupied by an opposing train except when absolutely necessary and then only while one train is stopped and the other is operating at restricted speed; and

(D) A freight train, including a work train, may be authorized to follow a freight train, including a work train, into a block and then only when the following train is operating at restricted speed.

(2) On and after January 17, 2012, where a passenger train is permitted to operate at a speed of 60 or more miles per hour, or a freight train is permitted to operate at a speed of 50 or more miles per hour, a block signal system complying with the provisions of this part shall be installed, unless an FRA approved PTC system meeting the requirements of this part for the subject speed and other operating conditions is installed.

(d)(1) Prior to December 31, 2015, where any train is permitted to operate at a speed of 80 or more miles per hour, an automatic cab signal, automatic train stop, or automatic train control system complying with the provisions of this part shall be installed, unless an FRA approved PTC system meeting the requirements of this part for the subject speed and other operating conditions, is installed.

(2) On and after December 31, 2015, where any train is permitted to operate at a speed of 80 or more miles per hour, a PTC system complying with the provisions of subpart I shall be installed and operational, unless FRA approval to continue to operate with an automatic cab signal, automatic train stop, or automatic train control system complying with the provisions of this part has been justified to, and approved by, the Associate Administrator.

(3) Subpart H of this part sets forth requirements for voluntary installation of PTC systems, and subpart I of this part sets forth requirements for mandated installation of PTC systems, each under conditions specified in their respective subpart.

(e) Nothing in this section authorizes the discontinuance of a block signal system, interlocking, traffic control system, automatic cab signal, automatic train stop or automatic train control system, or PTC system, without approval by the FRA under part 235 of this title. However, a railroad may apply for approval of discontinuance or material modification of a signal or train control system in connection with a request for approval of a Positive Train Control Development Plan (PTCDP) or Positive Train Control Safety Plan (PTCSP) as provided in subpart I of this part.

* * * * *

(i) *Preemptive effect.* (1) Under 49 U.S.C. 20106, issuance of these regulations preempts any state law, regulation, or order covering the same subject matter, except an additional or more stringent law, regulation, or order that is necessary to eliminate or reduce an essentially local safety or security hazard; is not incompatible with a law, regulation, or order of the United States Government; and that does not impose an unreasonable burden on interstate commerce.

(2) This part establishes federal standards of care for railroad signal and train control systems. This part does not preempt an action under state law seeking damages for personal injury, death, or property damage alleging that a party has failed to comply with the federal standard of care established by this part, including a plan or program required by this part. Provisions of a plan or program which exceed the requirements of this part are not included in the federal standard of care.

(3) Under 49 U.S.C. 20701–20703, issuance of these regulations preempts the field of locomotive safety, extending to the design, the construction, and the material of every part of the locomotive and tender and all appurtenances thereof.

■ 9. Section 236.410 is amended by removing the Note following paragraph (b), and republishing paragraphs (b) and (c), to read as follows:

§ 236.410 Locking, hand-operated switch; requirements.

* * * * *

(b) Approach or time locking shall be provided and locking may be released either automatically, or by the control operator, but only after the control circuits of signals governing movement in either direction over the switch and which display aspects with indications more favorable than "proceed at restricted speed" have been opened directly or by shunting of track circuit.

(c) Where a signal is used in lieu of electric or mechanical lock to govern movements from auxiliary track to signaled track, the signal shall not display an aspect to proceed until after the control circuits of signals governing movement on main track in either direction over the switch have been opened, and either the approach locking circuits to the switch are unoccupied or a predetermined time interval has expired.

* * * * *

■ 10. Section 236.909 is amended by adding four new sentences directly after the first sentence of paragraph (e)(1) and by revising paragraph (e)(2)(i) to read as follows:

§ 236.909 Minimum performance standards.

* * * * *

(e) * * *

(1) * * * The total risk assessment must have a supporting sensitivity analysis. The analysis must confirm that the risk metrics of the system are not negatively affected by sensitivity analysis input parameters including, for example, component failure rates, human factor error rates, and variations in train traffic affecting exposure. In this context, "negatively affected" means that the final residual risk metric does not exceed that of the base case or that which has been otherwise established through MTTHE target. The sensitivity analysis must document the sensitivity to worst case failure scenarios. * * *

(2) * * *

(i) In all cases exposure must be expressed as total train miles traveled per year over the relevant railroad infrastructure. Consequences must identify the total cost, including fatalities, injuries, property damage, and other incidental costs, such as potential consequences of hazardous materials involvement, resulting from preventable accidents associated with the function(s) performed by the system.

* * * * *

■ 11. Add a new subpart I to part 236 to read as follows:

Subpart I—Positive Train Control Systems

Sec.

Subpart I—Positive Train Control Systems

§ 236.1001 Purpose and scope.

(a) This subpart prescribes minimum, performance-based safety standards for PTC systems required by 49 U.S.C. 20157, this subpart, or an FRA order, including requirements to ensure that the development, functionality,

architecture, installation, implementation, inspection, testing, operation, maintenance, repair, and modification of those PTC systems will achieve and maintain an acceptable level of safety. This subpart also prescribes standards to ensure that personnel working with, and affected by, safety-critical PTC system related products receive appropriate training and testing.

(b) Each railroad may prescribe additional or more stringent rules, and other special instructions, that are not inconsistent with this subpart.

(c) This subpart does not exempt a railroad from compliance with any requirement of subparts A through H of this part or parts 233, 234, and 235 of this chapter, unless:

(1) It is otherwise explicitly excepted by this subpart; or

(2) The applicable PTCSP, as defined under § 236.1003 and approved by FRA under § 236.1015, provides for such an exception per § 236.1013.

§ 236.1003 Definitions.

(a) Definitions contained in subparts G and H of this part apply equally to this subpart.

(b) The following definitions apply to terms used only in this subpart unless otherwise stated:

After-arrival mandatory directive means an authority to occupy a track which is issued to a train that is not effective and not to be acted upon until after the arrival and passing of a train, or trains, specifically identified in the authority.

Associate Administrator means the FRA Associate Administrator for Railroad Safety/Chief Safety Officer.

Class I railroad means a railroad which in the last year for which revenues were reported exceeded the threshold established under regulations of the Surface Transportation Board (49 CFR part 1201.1–1 (2008)).

Cleartext means the un-encrypted text in its original, human readable, form. It is the input of an encryption or encipher process, and the output of an decryption or decipher process.

Controlling locomotive means *Locomotive, controlling,* as defined in § 232.5 of this chapter.

Host railroad means a railroad that has effective operating control over a segment of track.

Interoperability means the ability of a controlling locomotive to communicate with and respond to the PTC railroad's positive train control system, including uninterrupted movements over property boundaries.

Limited operations means operations on main line track that have limited or no freight operations and are approved to be excluded from this subpart's PTC system implementation and operation requirements in accordance with § 236.1019(c);

Main line means, except as provided in § 236.1019 or where all trains are limited to restricted speed within a yard or terminal area or on auxiliary or industry tracks, a segment or route of railroad tracks:

(1) Of a Class I railroad, as documented in current timetables filed by the Class I railroad with the FRA under § 217.7 of this title, over which 5,000,000 or more gross tons of railroad traffic is transported annually; or

(2) Used for regularly scheduled intercity or commuter rail passenger service, as defined in 49 U.S.C. 24102, or both. Tourist, scenic, historic, or excursion operations as defined in part 238 of this chapter are not considered intercity or commuter passenger service for purposes of this part.

Main line track exclusion addendum ("MTEA") means the document submitted under §§ 236.1011 and 236.1019 requesting to designate track as other than main line.

Medium speed means, *Speed, medium,* as defined in subpart G of this part.

NPI means a Notice of Product Intent ("NPI") as further described in § 236.1013.

PTC means positive train control as further described in § 236.1005.

PTCDP means a PTC Development Plan as further described in § 236.1013.

PTCIP means a PTC Implementation Plan as required under 49 U.S.C. 20157 and further described in § 236.1011.

PTCPVL means a PTC Product Vendor List as further described in § 236.1023.

PTCSP means a PTC Safety Plan as further described in § 236.1015.

PTC railroad means each Class I railroad and each entity providing regularly scheduled intercity or commuter rail passenger transportation required to implement or operate a PTC system.

PTC System Certification means certification as required under 49 U.S.C. 20157 and further described in §§ 236.1009 and 236.1015.

Request for Amendment ("RFA") means a request for an amendment of a plan or system made by a PTC railroad in accordance with § 236.1021.

Request for Expedited Certification ("REC") means, as further described in § 236.1031, a request by a railroad to receive expedited consideration for PTC System Certification.

Restricted speed means, *Speed, restricted,* as defined in subpart G of this part.

Safe State means a system state that, when the system fails, cannot cause death, injury, occupational illness, or damage to or loss of equipment or property, or damage to the environment.

Segment of track means any part of the railroad where a train operates.

Temporal separation means that passenger and freight operations do not operate on any segment of shared track during the same period and as further defined under § 236.1019 and the process or processes in place to assure that result.

Tenant railroad means a railroad, other than a host railroad, operating on track upon which a PTC system is required.

Track segment means segment of track.

Type Approval means a number assigned to a particular PTC system indicating FRA agreement that the PTC system could fulfill the requirements of this subpart.

Train means one or more locomotives, coupled with or without cars.

§ 236.1005 Requirements for Positive Train Control systems.

(a) *PTC system requirements.* Each PTC system required to be installed under this subpart shall:

(1) Reliably and functionally prevent:

(i) Train-to-train collisions—including collisions between trains operating over rail-to-rail at-grade crossings in accordance with the following risk-based table or alternative arrangements providing an equivalent level of safety as specified in an FRA approved PTCSP:

Crossing type	Max speed *	Protection required
(A) Interlocking—one or more PTC routes intersecting with one or more non-PTC routes.	≤ 40 miles per hour	Interlocking signal arrangement in accordance with the requirements of subparts A–G of this part and PTC enforced stop on PTC routes.

Crossing type	Max speed *	Protection required
(B) Interlocking—one or more PTC routes intersecting with one or more non-PTC routes.	> 40 miles per hour	Interlocking signal arrangement in accordance with the requirements of subparts A–G of this part, PTC enforced stop on all PTC routes, and either the use of other than full PTC technology that provides positive stop enforcement or a split-point derail incorporated into the signal system accompanied by 20 miles per hour maximum allowable speed on the approach of any intersecting non-PTC route.
(C) Interlocking—all PTC routes intersecting.	Any speed	Interlocking signal arrangements in accordance with the requirements of subparts A–G of this part, and PTC enforced stop on all routes.

(ii) Overspeed derailments, including derailments related to railroad civil engineering speed restrictions, slow orders, and excessive speeds over switches and through turnouts;

(iii) Incursions into established work zone limits without first receiving appropriate authority and verification from the dispatcher or roadway worker in charge, as applicable and in accordance with part 214 of this chapter; and

(iv) The movement of a train through a main line switch in the improper position as further described in paragraph (e) of this section.

(2) Include safety-critical integration of all authorities and indications of a wayside or cab signal system, or other similar appliance, method, device, or system of equivalent safety, in a manner by which the PTC system shall provide associated warning and enforcement to the extent, and except as, described and justified in the FRA approved PTCDP or PTCSP, as applicable;

(3) As applicable, perform the additional functions specified in this subpart;

(4) Provide an appropriate warning or enforcement when:

(i) A derail or switch protecting access to the main line required by § 236.1007, or otherwise provided for in the applicable PTCSP, is not in its derailing or protecting position, respectively;

(ii) A mandatory directive is issued associated with a highway-rail grade crossing warning system malfunction as required by §§ 234.105, 234.106, or 234.107;

(iii) An after-arrival mandatory directive has been issued and the train or trains to be waited on has not yet passed the location of the receiving train;

(iv) Any movable bridge within the route ahead is not in a position to allow permissive indication for a train movement pursuant to § 236.312; and

(v) A hazard detector integrated into the PTC system that is required by paragraph (c) of this section, or otherwise provided for in the applicable PTCSP, detects an unsafe condition or transmits an alarm; and

(5) Limit the speed of passenger and freight trains to 59 miles per hour and 49 miles per hour, respectively, in areas without broken rail detection or equivalent safeguards.

(b) *PTC system installation.* (1) *Lines required to be equipped.* Except as otherwise provided in this subpart, each Class I railroad and each railroad providing or hosting intercity or commuter passenger service shall progressively equip its lines as provided in its approved PTCIP such that, on and after December 31, 2015, a PTC system certified under § 236.1015 is installed and operated by the host railroad on each:

(i) Main line over which is transported any quantity of material poisonous by inhalation (PIH), including anhydrous ammonia, as defined in §§ 171.8, 173.115 and 173.132 of this title;

(ii) Main line used for regularly provided intercity or commuter passenger service, except as provided in § 236.1019; and

(iii) Additional line of railroad as required by the applicable FRA approved PTCIP, this subpart, or an FRA order requiring installation of a PTC system by that date.

(2) *Initial baseline identification of lines.* For the purposes of paragraph (b)(1)(i) of this section, the baseline information necessary to determine whether a Class I railroad's track segment shall be equipped with a PTC system shall be determined and reported as follows:

(i) The traffic density threshold of 5 million gross tons shall be based upon calendar year 2008 gross tonnage, except to the extent that traffic may fall below 5 million gross tons for two consecutive calendar years and a PTCIP or an RFA reflecting this change is filed and approved under paragraph (b)(4) of this section and, if applicable, § 236.1021.

(ii) The presence or absence of any quantity of PIH hazardous materials shall be determined by whether one or more cars containing such product(s) was transported over the track segment in calendar year 2008 or prior to the filing of the PTCIP, except to the extent that the PTCIP or RFA justifies, under paragraph (b)(4) of this section, removal of the subject track segment from the PTCIP listing of lines to be equipped.

(3) *Addition of track segments.* To the extent increases in freight rail traffic occur subsequent to calendar year 2008 that might affect the requirement to install a PTC system on any line not yet equipped, the railroad shall seek to amend its PTCIP by promptly filing an RFA in accordance with § 236.1021. The following criteria apply:

(i) If rail traffic exceeds 5 million gross tons in any year after 2008, the tonnage shall be calculated for the preceding two calendar years and if the total tonnage for those two calendar years exceeds 10 million gross tons, a PTCIP or its amendment is required.

(ii) If PIH traffic is carried on a track segment as a result of a request for rail service or rerouting warranted under part 172 of this title, and if the line carries in excess of 5 million gross tons of rail traffic as determined under this paragraph, a PTCIP or its amendment is required. This does not apply when temporary rerouting is authorized in accordance with paragraph (g) of this section.

(iii) Once a railroad is notified by FRA that its RFA filed in accordance with this paragraph has been approved, the railroad shall equip the line with the applicable PTC system by December 31, 2015, or within 24 months, whichever is later.

(4) *Exclusion or removal of track segments from PTC baseline.*

(i) *Routing changes.* In a PTCIP or an RFA, a railroad may request review of the requirement to install PTC on a track segment where a PTC system is otherwise required by this section, but has not yet been installed, based upon changes in rail traffic such as reductions in total traffic volume or cessation of passenger or PIH service. Any such request shall be accompanied by estimated traffic projections for the next 5 years (e.g., as a result of planned rerouting, coordinations, or location of new business on the line). Where the request involves prior or planned rerouting of PIH traffic, the railroad must provide a supporting analysis that takes into consideration the requirements of subpart I, part 172 of

this title, assuming the subject route and each practicable alternative route to be PTC-equipped, and including any interline routing impacts.

(A) FRA will approve the exclusion if, based upon data in the docket of the proceeding, FRA finds that it would be consistent with safety as further provided in this paragraph.

(*1*) In the case of a requested exclusion based on cessation of passenger service or a decline in gross tonnage below 5 million gross tons as computed over a 2-year period, the removal will be approved absent special circumstances as set forth in writing (e.g., because of anticipated traffic growth in the near future).

(*2*) In the case of cessation of PIH traffic over a track segment, and absent special circumstances set forth in writing, FRA will approve an exclusion of a line from the PTCIP (determined on the basis of 2008 traffic levels) upon a showing by the railroad that:

(*i*) There is no remaining local PIH traffic expected on the track segment;

(*ii*) Either any rerouting of PIH traffic from the subject track segment is justified based upon the route analysis submitted, which shall assume that each alternative route will be equipped with PTC and shall take into consideration any significant interline routing impacts; or the next preferred alternative route in the analysis conducted as set forth in this paragraph is shown to be substantially as safe and secure as the route employing the track segment in question and demonstrated considerations of practicability indicate consolidation of the traffic on that next preferred alternative route; and

(*iii*) After cessation of PIH traffic on the line, the remaining risk associated with PTC-preventable accidents per route mile on the track segment will not exceed the average comparable risk per route mile on Class I lines in the United States required to be equipped with PTC because of gross tonnage and the presence of PIH traffic (which base case will be estimated as of a time prior to installation of PTC). If the subject risk is greater than the average risk on those PIH lines, and if the railroad making the application for removal of the track segment from the PTCIP offers no compensating extension of PTC or PTC technologies from the minimum required to be equipped, FRA may deny the request.

(B) [Reserved]

(ii) *Lines with de minimis PIH risk.* (A) In a PTCIP or RFA, a railroad may request review of the requirement to install PTC on a low density track segment where a PTC system is otherwise required by this section, but has not yet been installed, based upon the presence of a minimal quantity of PIH hazardous materials (less than 100 cars per year, loaded and residue). Any such request shall be accompanied by estimated traffic projections for the next 5 years (e.g., as a result of planned rerouting, coordinations, or location of new business on the line). Where the request involves prior or planned rerouting of PIH traffic, the railroad must provide the information and analysis identified in paragraph (b)(4)(i) of this section. The submission shall also include a full description of potential safety hazards on the segment of track and fully describe train operations over the line. This provision is not applicable to lines segments used by intercity or commuter passenger service.

(B) Absent special circumstances related to specific hazards presented by operations on the line segment, FRA will approve a request for relief under this paragraph for a rail line segment:

(*1*) Consisting exclusively of Class 1 or 2 track as described in part 213 of this title;

(*2*) That carries less than 15 million gross tons annually;

(*3*) Has a ruling grade of less than 1 percent; and

(*4*) On which any train transporting a car containing PIH materials (including a residue car) is operated under conditions of temporal separation from other trains using the line segment as documented by a temporal separation plan accompanying the request. As used in this paragraph, "temporal separation" has the same meaning given by § 236.1019(e), except that the separation addressed is the separation of a train carrying any number of cars containing PIH materials from other freight trains.

(C) FRA will also consider, and may approve, requests for relief under this paragraph for additional line segments where each such segment carries less than 15 million gross tons annually and where it is established to the satisfaction of the Associate Administrator that risk mitigations will be applied that will ensure that risk of a release of PIH materials is negligible.

(D) Failure to submit sufficient information will result in the denial of any request under this paragraph (b)(4)(ii). If the request is granted, on and after the date the line would have otherwise been required to be equipped under the schedule contained in the PTCIP and approved by FRA, operations on the line shall be conducted in accordance with any conditions attached to the grant, including implementation of proposed mitigations as applicable.

(5) *Line sales.* FRA does not approve removal of a line from the PTCIP exclusively based upon a representation that a track segment will be abandoned or sold to another railroad. In the event a track segment is approved for abandonment or transfer by the Surface Transportation Board, FRA will review at the request of the transferring and acquiring railroads whether the requirement to install PTC on the line should be removed given all of the circumstances, including expected traffic and hazardous materials levels, reservation of trackage or haulage rights by the transferring railroad, routing analysis under part 172 of this chapter, commercial and real property arrangements affecting the transferring and acquiring railroads post-transfer, and such other factors as may be relevant to continue safe operations on the line. If FRA denies the request, the acquiring railroad shall install the PTC system on the schedule provided in the transferring railroad's PTCIP, without regard to whether it is a Class I railroad.

(6) *New rail passenger service.* No new intercity or commuter rail passenger service shall commence after December 31, 2015, until a PTC system certified under this subpart has been installed and made operative.

(c) *Hazard detectors.* (1) All hazard detectors integrated into a signal or train control system on or after October 16, 2008, shall be integrated into PTC systems required by this subpart; and their warnings shall be appropriately and timely enforced as described in the applicable PTCSP.

(2) The applicable PTCSP must provide for receipt and presentation to the locomotive engineer and other train crew members of warnings from any additional hazard detectors using the PTC data network, onboard displays, and audible alerts. If the PTCSP so provides, the action to be taken by the system and by the crew members shall be specified.

(3) The PTCDP (as applicable) and PTCSP for any new service described in § 236.1007 to be conducted above 90 miles per hour shall include a hazard analysis describing the hazards relevant to the specific route(s) in question (e.g., potential for track obstruction due to events such as falling rock or undermining of the track structure due to high water or displacement of a bridge over navigable waters), the basis for decisions concerning hazard detectors provided, and the manner in which such additional hazard detectors will be interfaced with the PTC system.

(d) *Event recorders.* (1) Each lead locomotive, as defined in part 229, of a train equipped and operating with a

PTC system required by this subpart must be equipped with an operative event recorder, which shall:

(i) Record safety-critical train control data routed to the locomotive engineer's display that the engineer is required to comply with;

(ii) Specifically include text messages conveying mandatory directives, maximum authorized speeds, PTC system brake warnings, PTC system brake enforcements, and the state of the PTC system (e.g., cut in, cut out, active, or failed); and

(iii) Include examples of how the captured data will be displayed during playback along with the format, content, and data retention duration requirements specified in the PTCSP submitted and approved pursuant to this paragraph. If such train control data can be calibrated against other data required by this part, it may, at the election of the railroad, be retained in a separate memory module.

(2) Each lead locomotive, as defined in part 229, manufactured and in service after October 1, 2009, that is equipped and operating with a PTC system required by this subpart, shall be equipped with an event recorder memory module meeting the crash hardening requirements of § 229.135 of this chapter.

(3) Nothing in this subpart excepts compliance with any of the event recorder requirements contained in § 229.135 of this chapter.

(e) *Switch position.* The following requirements apply with respect to determining proper switch position under this section. When a main line switch position is unknown or improperly aligned for a train's route in advance of the train's movement, the PTC system will provide warning of the condition associated with the following enforcement:

(1) A PTC system shall enforce restricted speed over any switch:

(i) Where train movements are made with the benefit of the indications of a wayside or cab signal system or other similar appliance, method, device, or system of equivalent safety proposed to FRA and approved by the Associate Administrator in accordance with this part; and

(ii) Where wayside or cab signal system or other similar appliance, method, device, or system of equivalent safety, requires the train to be operated at restricted speed.

(2) A PTC system shall enforce a positive stop short of any main line switch, and any switch on a siding where the allowable speed is in excess of 20 miles per hour, if movement of the train over the switch:

(i) Is made without the benefit of the indications of a wayside or cab signal system or other similar appliance, method, device, or system of equivalent safety proposed to FRA and approved by the Associate Administrator in accordance with this part; or

(ii) Would create an unacceptable risk. Unacceptable risk includes conditions when traversing the switch, even at low speeds, could result in direct conflict with the movement of another train (including a hand-operated crossover between main tracks, a hand-operated crossover between a main track and an adjoining siding or auxiliary track, or a hand-operated switch providing access to another subdivision or branch line, etc.).

(3) A PTC system required by this subpart shall be designed, installed, and maintained to perform the switch position detection and enforcement described in paragraphs (e)(1) and (e)(2) of this section, except as provided for and justified in the applicable, FRA approved PTCDP or PTCSP.

(4) The control circuit or electronic equivalent for all movement authorities over any switches, movable-point frogs, or derails shall be selected through circuit controller or functionally equivalent device operated directly by the switch points, derail, or by switch locking mechanism, or through relay or electronic device controlled by such circuit controller or functionally equivalent device, for each switch, movable-point frog, or derail in the route governed. Circuits or electronic equivalent shall be arranged so that any movement authorities less restrictive than those prescribed in paragraphs (e)(1) and (e)(2) of this section can only be provided when each switch, movable-point frog, or derail in the route governed is in proper position, and shall be in accordance with subparts A through G of this part, unless it is otherwise provided in a PTCSP approved under this subpart.

(f) *Train-to-train collision.* A PTC system shall be considered to be configured to prevent train-to-train collisions within the meaning of paragraph (a) of this section if trains are required to be operated at restricted speed and if the onboard PTC equipment enforces the upper limits of the railroad's restricted speed rule (15 or 20 miles per hour). This application applies to:

(1) Operating conditions under which trains are required by signal indication or operating rule to:

(i) Stop before continuing; or

(ii) Reduce speed to restricted speed and continue at restricted speed until encountering a more favorable indication or as provided by operating rule.

(2) Operation of trains within the limits of a joint mandatory directive.

(g) *Temporary rerouting.* A train equipped with a PTC system as required by this subpart may be temporarily rerouted onto a track not equipped with a PTC system and a train not equipped with a PTC system may be temporarily rerouted onto a track equipped with a PTC system as required by this subpart in the following circumstances:

(1) *Emergencies.* In the event of an emergency—including conditions such as derailment, flood, fire, tornado, hurricane, earthquake, or other similar circumstance outside of the railroad's control—that would prevent usage of the regularly used track if:

(i) The rerouting is applicable only until the emergency condition ceases to exist and for no more than 14 consecutive calendar days, unless otherwise extended by approval of the Associate Administrator;

(ii) The railroad provides written or telephonic notification to the applicable Regional Administrator of the information listed in paragraph (i) of this section within one business day of the beginning of the rerouting made in accordance with this paragraph; and

(iii) The conditions contained in paragraph (j) of this section are followed.

(2) *Planned maintenance.* In the event of planned maintenance that would prevent usage of the regularly used track if:

(i) The maintenance period does not exceed 30 days;

(ii) A request is filed with the applicable Regional Administrator in accordance with paragraph (i) of this section no less than 10 business days prior to the planned rerouting; and

(iii) The conditions contained in paragraph (j) of this section are followed.

(h) *Rerouting requests.* (1) For the purposes of paragraph (g)(2) of this section, the rerouting request shall be self-executing unless the applicable Regional Administrator responds with a notice disapproving of the rerouting or providing instructions to allow rerouting. Such instructions may include providing additional information to the Regional Administrator or Associate Administrator prior to the commencement of rerouting. Once the Regional Administrator responds with a notice under this paragraph, no rerouting may occur until the Regional Administrator or Associate Administrator provides his or her approval.

(2) In the event the temporary rerouting described in paragraph (g)(2) of this section is to exceed 30 consecutive calendar days:

(i) The railroad shall provide a request in accordance with paragraphs (i) and (j) of this section with the Associate Administrator no less than 10 business days prior to the planned rerouting; and

(ii) The rerouting shall not commence until receipt of approval from the Associate Administrator.

(i) *Content of rerouting request.* Each notice or request referenced in paragraph (g) and (h) of this section must indicate:

(1) The dates that such temporary rerouting will occur;

(2) The number and types of trains that will be rerouted;

(3) The location of the affected tracks; and

(4) A description of the necessity for the temporary rerouting.

(j) *Rerouting conditions.* Rerouting of operations under paragraph (g) of this section may occur under the following conditions:

(1) Where a train not equipped with a PTC system is rerouted onto a track equipped with a PTC system, or a train not equipped with a PTC system that is compatible and functionally responsive to the PTC system utilized on the line to which the train is being rerouted, the train shall be operated in accordance with § 236.1029; or

(2) Where any train is rerouted onto a track not equipped with a PTC system, the train shall be operated in accordance with the operating rules applicable to the line on which the train is rerouted.

(k) *Rerouting cessation.* The applicable Regional Administrator may order a railroad to cease any rerouting provided under paragraph (g) or (h) of this section.

§ 236.1006 Equipping locomotives operating in PTC territory.

(a) Except as provided in paragraph (b) of this section, each train operating on any track segment equipped with a PTC system shall be controlled by a locomotive equipped with an onboard PTC apparatus that is fully operative and functioning in accordance with the applicable PTCSP approved under this subpart.

(b) *Exceptions.* (1) Prior to December 31, 2015, each railroad required to install PTC shall include in its PTCIP specific goals for progressive implementation of onboard systems and deployment of PTC-equipped locomotives such that the safety benefits of PTC are achieved through incremental growth in the percentage of controlling locomotives operating on PTC lines that are equipped with operative PTC onboard equipment. The PTCIP shall include a brief but sufficient explanation of how those goals will be achieved, including assignment of responsibilities within the organization. The goals shall be expressed as the percentage of trains operating on PTC-equipped lines that are equipped with operative onboard PTC apparatus responsive to the wayside, expressed as an annualized (calendar year) percentage for the railroad as a whole.

(2) Each railroad shall adhere to its PTCIP and shall report, on April 16, of 2011, 2012, 2013, and 2014, its progress toward achieving the goals set under paragraph (b)(1) of this section. In the event any annual goal is not achieved, the railroad shall further report the actions it is taking to ensure achievement of subsequent annual goals.

(3) On and after December 31, 2015, a train controlled by a locomotive with an onboard PTC apparatus that has failed en route is permitted to operate in accordance with § 236.1029.

(4) A train operated by a Class II or Class III railroad, including a tourist or excursion railroad, and controlled by a locomotive not equipped with an onboard PTC apparatus is permitted to operate on a PTC-operated track segment:

(i) That either:

(A) Has no regularly scheduled intercity or commuter passenger rail traffic; or

(B) Has regularly scheduled intercity or commuter passenger rail traffic and the applicable PTCIP permits the operation of a train operated by a Class II or III railroad and controlled by a locomotive not equipped with an onboard PTC apparatus;

(ii) Where operations are restricted to four or less such unequipped trains per day, whereas a train conducting a "turn" operation (e.g., moving to a point of interchange to drop off or pick up cars and returning to the track owned by a Class II or III railroad) is considered two trains for this purpose; and

(iii) Where each movement shall either:

(A) Not exceed 20 miles in length; or

(B) To the extent any movement exceeds 20 miles in length, such movement is not permitted without the controlling locomotive being equipped with an onboard PTC system after December 31, 2020, and each applicable Class II or III railroad shall report to FRA its progress in equipping each necessary locomotive with an onboard PTC apparatus to facilitate continuation of the movement. The progress reports shall be filed not later than December 31, 2017 and, if all necessary locomotives are not yet equipped, on December 31, 2019.

(c) When a train movement is conducted under the exceptions described in paragraph (b)(4) of this section, that movement shall be made in accordance with § 236.1029.

§ 236.1007 Additional requirements for high-speed service.

(a) A PTC railroad that conducts a passenger operation at or greater than 60 miles per hour or a freight operation at or greater than 50 miles per hour shall have installed a PTC system including or working in concert with technology that includes all of the safety-critical functional attributes of a block signal system meeting the requirements of this part, including appropriate fouling circuits and broken rail detection (or equivalent safeguards).

(b) In addition to the requirements of paragraph (a) of this section, a host railroad that conducts a freight or passenger operation at more than 90 miles per hour shall:

(1) Have an approved PTCSP establishing that the system was designed and will be operated to meet the fail-safe operation criteria described in Appendix C to this part; and

(2) Prevent unauthorized or unintended entry onto the main line from any track not equipped with a PTC system compliant with this subpart by placement of split-point derails or equivalent means integrated into the PTC system; and

(3) Comply with § 236.1029(c).

(c) In addition to the requirements of paragraphs (a) and (b) of this section, a host railroad that conducts a freight or passenger operation at more than 125 miles per hour shall have an approved PTCSP accompanied by a document ("HSR–125") establishing that the system:

(1) Will be operated at a level of safety comparable to that achieved over the 5 year period prior to the submission of the PTCSP by other train control systems that perform PTC functions required by this subpart, and which have been utilized on high-speed rail systems with similar technical and operational characteristics in the United States or in foreign service, provided that the use of foreign service data must be approved by the Associate Administrator before submittal of the PTCSP; and

(2) Has been designed to detect incursions into the right-of-way, including incidents involving motor vehicles diverting from adjacent roads and bridges, where conditions warrant.

(d) In addition to the requirements of paragraphs (a) through (c) of this section, a host railroad that conducts a freight or passenger operation at more than 150 miles per hour, which is governed by a Rule of Particular Applicability, shall have an approved PTCSP accompanied by a HSR–125 developed as part of an overall system safety plan approved by the Associate Administrator.

(e) A railroad providing existing high-speed passenger service may request in its PTCSP that the Associate Administrator excuse compliance with one or more requirements of this section upon a showing that the subject service has been conducted with a high level of safety.

§ 236.1009 Procedural requirements.

(a) *PTC Implementation Plan (PTCIP).* (1) By April 16, 2010, each host railroad that is required to implement and operate a PTC system in accordance with § 236.1005(b) shall develop and submit in accordance with § 236.1011(a) a PTCIP for implementing a PTC system required under § 236.1005. Filing of the PTCIP shall not exempt the required filings of an NPI, PTCSP, PTCDP, or Type Approval.

(2) After April 16, 2010, a host railroad shall file:

(i) A PTCIP if it becomes a host railroad of a main line track segment for which it is required to implement and operate a PTC system in accordance with § 236.1005(b); or

(ii) A request for amendment ("RFA") of its current and approved PTCIP in accordance with § 236.1021 if it intends to:

(A) Initiate a new category of service (i.e., passenger or freight); or

(B) Add, subtract, or otherwise materially modify one or more lines of railroad for which installation of a PTC system is required.

(3) The host and tenant railroad(s) shall jointly file a PTCIP that addresses shared track:

(i) If the host railroad is required to install and operate a PTC system on a segment of its track; and

(ii) If the tenant railroad that shares the same track segment would have been required to install a PTC system if the host railroad had not otherwise been required to do so.

(4) If railroads required to file a joint PTCIP are unable to jointly file a PTCIP in accordance with paragraphs (a)(1) and (a)(3) of this section, then each railroad shall:

(i) Separately file a PTCIP in accordance with paragraph (a)(1);

(ii) Notify the Associate Administrator that the subject railroads were unable to agree on a PTCIP to be jointly filed;

(iii) Provide the Associate Administrator with a comprehensive list of all issues not in agreement between the railroads that would prevent the subject railroads from jointly filing the PTCIP; and

(iv) Confer with the Associate Administrator to develop and submit a PTCIP mutually acceptable to all subject railroads.

(b) *Type Approval.* Each host railroad, individually or jointly with others such as a tenant railroad or system supplier, shall file prior to or simultaneously with the filing made in accordance with paragraph (a) of this section:

(1) An unmodified Type Approval previously issued by the Associate Administrator in accordance with § 236.1013 or § 236.1031(b) with its associated docket number;

(2) A PTCDP requesting a Type Approval for:

(i) A PTC system that does not have a Type Approval; or

(ii) A PTC system with a previously issued Type Approval that requires one or more variances;

(3) A PTCSP subject to the conditions set forth in paragraph (c) of this section, with or without a Type Approval; or

(4) A document attesting that a Type Approval is not necessary since the host railroad has no territory for which a PTC system is required under this subpart.

(c) *Notice of Product Intent (NPI).* A railroad may, in lieu of submitting a PTCDP, or referencing an already issued Type Approval, submit an NPI describing the functions of the proposed PTC system. If a railroad elects to file an NPI in lieu of a PTCDP or referencing an existing Type Approval with the PTCIP, and the PTCIP is otherwise acceptable to the Associate Administrator, the Associate Administrator may grant provisional approval of the PTCIP.

(1) A provisional approval of a PTCIP, unless otherwise extended by the Associate Administrator, is valid for a period of 270 days from the date of approval by the Associate Administrator.

(2) The railroad must submit an updated PTCIP with either a complete PTCDP as defined in § 236.1013(a), an updated PTCIP referencing an already approved Type Approval, or a full PTCSP within 270 days after the "Provisional Approval."

(i) Within 90 days of receipt of an updated PTCIP that was submitted with an NPI, the Associate Administrator will approve or disapprove of the updated PTCIP and notify in writing the affected railroad. If the updated PTCIP is not approved, the notification will include the plan's deficiencies. Within 30 days of receipt of that notification, the railroad or other entity that submitted the plan shall correct all deficiencies and resubmit the plan in accordance with this section and § 236.1011, as applicable.

(ii) If an update to a "Provisionally Approved" PTCIP is not received by the Associate Administrator by the end of the period indicated in this paragraph, the "Provisional Approval" given to the PTCIP is automatically revoked. The revocation is retroactive to the date the original PTCIP and NPI were first submitted to the Associate Administrator.

(d) *PTCSP and PTC System Certification.* The following apply to each PTCSP and PTC System Certification.

(1) A PTC System Certification for a PTC system may be obtained by submitting an acceptable PTCSP. If the PTC system is the subject of a Type Approval, the safety case elements contained in the PTCDP may be incorporated by reference into the PTCSP, subject to finalization of the human factors analysis contained in the PTCDP.

(2) Each PTCSP requirement under § 236.1015 shall be supported by information and analysis sufficient to establish that the requirements of this subpart have been satisfied.

(3) If the Associate Administrator finds that the PTCSP and supporting documentation support a finding that the system complies with this part, the Associate Administrator may approve the PTCSP. If the Associate Administrator approves the PTCSP, the railroad shall receive PTC System Certification for the subject PTC system and shall implement the PTC system according to the PTCSP.

(4) A required PTC system shall not:

(i) Be used in service until it receives from FRA a PTC System Certification; and

(ii) Receive a PTC System Certification unless FRA receives and approves an applicable:

(A) PTCSP; or

(B) Request for Expedited Certification (REC) as defined by § 236.1031(a).

(e) *Plan contents.* (1) No PTCIP shall receive approval unless it complies with § 236.1011. No railroad shall receive a Type Approval or PTC System Certification unless the applicable PTCDP or PTCSP, respectively, comply with §§ 236.1013 and 236.1015, respectively.

(2) All materials filed in accordance with this subpart must be in the English language, or have been translated into English and attested as true and correct.

(3) Each filing referenced in this section may include a request for full or partial confidentiality in accordance with § 209.11 of this chapter. If confidentiality is requested as to a portion of any applicable document, then in addition to the filing requirements under § 209.11 of this chapter, the person filing the document shall also file a copy of the original unredacted document, marked to indicate which portions are redacted in the document's confidential version without obscuring the original document's contents.

(f) *Supporting documentation and information.* (1) Issuance of a Type Approval or PTC System Certification is contingent upon FRA's confidence in the implementation and operation of the subject PTC system. This confidence may be based on FRA-monitored field testing or an independent assessment performed in accordance with § 236.1035 or § 236.1017, respectively.

(2) Upon request by FRA, the railroad requesting a Type Approval or PTC System Certification must engage in field testing or independent assessment performed in accordance with § 236.1035 or § 236.1017, respectively, to support the assertions made in any of the plans submitted under this subpart. These assertions include any of the plans' content requirements under this subpart.

(g) *FRA conditions, reconsiderations, and modifications.* (1) As necessary to ensure safety, FRA may attach special conditions to approving a PTCIP or issuing a Type Approval or PTC System Certification.

(2) After granting a Type Approval or PTC System Certification, FRA may reconsider the Type Approval or PTC System Certification upon revelation of any of the following factors concerning the contents of the PTCDP or PTCSP:

(i) Potential error or fraud;

(ii) Potentially invalidated assumptions determined as a result of in-service experience or one or more unsafe events calling into question the safety analysis supporting the approval.

(3) During FRA's reconsideration in accordance with this paragraph, the PTC system may remain in use if otherwise consistent with the applicable law and regulations and FRA may impose special conditions for use of the PTC system.

(4) After FRA's reconsideration in accordance with this paragraph, FRA may:

(i) Dismiss its reconsideration and continue to recognize the existing FRA approved Type Approval or PTC System Certification;

(ii) Allow continued operations under such conditions the Associate Administrator deems necessary to ensure safety; or

(iii) Revoke the Type Approval or PTC System Certification and direct the railroad to cease operations where PTC systems are required under this subpart.

(h) *FRA access.* The Associate Administrator, or that person's designated representatives, shall be afforded reasonable access to monitor, test, and inspect processes, procedures, facilities, documents, records, design and testing materials, artifacts, training materials and programs, and any other information used in the design, development, manufacture, test, implementation, and operation of the system, as well as interview any personnel:

(1) Associated with a PTC system for which a Type Approval or PTC System Certification has been requested or provided; or

(2) To determine whether a railroad has been in compliance with this subpart.

(i) *Foreign regulatory entity verification.* Information that has been certified under the auspices of a foreign regulatory entity recognized by the Associate Administrator may, at the Associate Administrator's sole discretion, be accepted as independently Verified and Validated and used to support each railroad's development of the PTCSP.

(j) *Processing times for PTCDP and PTCSP.*

(1) Within 30 days of receipt of a PTCDP or PTCSP, the Associate Administrator will either acknowledge receipt or acknowledge receipt and request more information.

(2) To the extent practicable, considering the scope, complexity, and novelty of the product or change:

(i) FRA will approve, approve with conditions, or deny the PTCDP within 60 days of the date on which the PTCDP was filed;

(ii) FRA will approve, approve with conditions, or deny the PTCSP within 180 days of the date on which the PTCSP was filed;

(iii) If FRA has not approved, approved with conditions, or denied the PTCDP or PTCSP within the 60-day or 180-day window, as applicable, FRA will provide the submitting party with a statement of reasons as to why the submission has not yet been acted upon and a projected deadline by which an approval or denial will be issued and any further consultations or inquiries will be resolved.

§ 236.1011 PTC Implementation Plan content requirements.

(a) *Contents.* A PTCIP filed pursuant to this subpart shall, at a minimum, describe:

(1) The functional requirements that the proposed system must meet;

(2) How the PTC railroad intends to comply with §§ 236.1009(c) and (d);

(3) How the PTC system will provide for interoperability of the system between the host and all tenant railroads on the track segments required to be equipped with PTC systems under this subpart and:

(i) Include relevant provisions of agreements, executed by all applicable railroads, in place to achieve interoperability;

(ii) List all methods used to obtain interoperability; and

(iii) Identify any railroads with respect to which interoperability agreements have not been achieved as of the time the plan is filed, the practical obstacles that were encountered that prevented resolution, and the further steps planned to overcome those obstacles;

(4) How, to the extent practical, the PTC system will be implemented to address areas of greater risk to the public and railroad employees before areas of lesser risk;

(5) The sequence and schedule in which track segments will be equipped and the basis for those decisions, and shall at a minimum address the following risk factors by track segment:

(i) Segment traffic characteristics such as typical annual passenger and freight train volume and volume of poison- or toxic-by-inhalation (PIH or TIH) shipments (loads, residue);

(ii) Segment operational characteristics such as current method of operation (including presence or absence of a block signal system), number of tracks, and maximum allowable train speeds, including planned modifications; and

(iii) Route attributes bearing on risk, including ruling grades and extreme curvature;

(6) The following information relating to rolling stock:

(i) What rolling stock will be equipped with PTC technology;

(ii) The schedule to equip that rolling stock by December 31, 2015;

(iii) All documents and information required by § 236.1006; and

(iv) Unless the tenant railroad is filing its own PTCIP, the host railroad's PTCIP shall:

(A) Attest that the host railroad has made a formal written request to each tenant railroad requesting identification of each item of rolling stock to be PTC

system equipped and the date each will be equipped; and

(B) Include each tenant railroad's response to the host railroad's written request made in accordance with paragraph (a)(6)(iii)(A) of this section;

(7) The number of wayside devices required for each track segment and the installation schedule to complete wayside equipment installation by December 31, 2015;

(8) Identification of each track segment on the railroad as mainline or non-mainline track. If the PTCIP includes an MTEA, as defined by § 236.1019, the PTCIP should identify the tracks included in the MTEA as main line track with a reference to the MTEA;

(9) To the extent the railroad determines that risk-based prioritization required by paragraph (a)(4) of this section is not practical, the basis for this determination; and

(10) The dates the associated PTCDP and PTCSP, as applicable, will be submitted to FRA in accordance with § 236.1009.

(b) *Additional Class I railroad PTCIP requirements.* Each Class I railroad shall include:

(1) In its PTCIP a strategy for full deployment of its PTC system, describing the criteria that it will apply in identifying additional rail lines on its own network, and rail lines of entities that it controls or engages in joint operations with, for which full or partial deployment of PTC technologies is appropriate, beyond those required to be equipped under this subpart. Such criteria shall include consideration of the policies established by 49 U.S.C. 20156 (railroad safety risk reduction program), and regulations issued thereunder, as well as non-safety business benefits that may accrue.

(2) In the Technology Implementation Plan of its Risk Reduction Program, when first required to be filed in accordance with 49 U.S.C. 20156 and any regulation promulgated thereunder, a specification of rail lines selected for full or partial deployment of PTC under the criteria identified in its PTCIP.

(3) Nothing in this paragraph shall be construed to create an expectation or requirement that additional rail lines beyond those required to be equipped by this subpart must be equipped or that such lines will be equipped during the period of primary implementation ending December 31, 2015.

(4) As used in this paragraph, "partial implementation" of a PTC system refers to use, pursuant to subpart H of this part, of technology embedded in PTC systems that does not employ all of the functionalities required by this subpart.

(c) *FRA review.* Within 90 days of receipt of a PTCIP, the Associate Administrator will approve or disapprove of the plan and notify in writing the affected railroad or other entity. If the PTCIP is not approved, the notification will include the plan's deficiencies. Within 30 days of receipt of that notification, the railroad or other entity that submitted the plan shall correct all deficiencies and resubmit the plan in accordance with § 236.1009 and paragraph (a) of this section, as applicable.

(d) *Subpart H.* A railroad that elects to install a PTC system when not required to do so may elect to proceed under this subpart or under subpart H of this part.

(e) Upon receipt of a PTCIP, NPI, PTCDP, or PTCSP, FRA posts on its public web site notice of receipt and reference to the public docket in which a copy of the filing has been placed. FRA may consider any public comment on each document to the extent practicable within the time allowed by law and without delaying implementation of PTC systems.

(f) The PTCIP shall be maintained to reflect the railroad's most recent PTC deployment plans until all PTC system deployments required under this subpart are complete.

§ 236.1013 PTC Development Plan and Notice of Product Intent content requirements and Type Approval.

(a) For a PTC system to obtain a Type Approval from FRA, the PTCDP shall be filed in accordance with § 236.1009 and shall include:

(1) A complete description of the PTC system, including a list of all PTC system components and their physical relationships in the subsystem or system;

(2) A description of the railroad operation or categories of operations on which the PTC system is designed to be used, including train movement density (passenger, freight), operating speeds (including a thorough explanation of intended compliance with § 236.1007), track characteristics, and railroad operating rules;

(3) An operational concepts document, including a list with complete descriptions of all functions which the PTC system will perform to enhance or preserve safety;

(4) A document describing the manner in which the PTC system architecture satisfies safety requirements;

(5) A preliminary human factors analysis, including a complete description of all human-machine interfaces and the impact of interoperability requirements on the same;

(6) An analysis of the applicability to the PTC system of the requirements of subparts A through G of this part that may no longer apply or are satisfied by the PTC system using an alternative method, and a complete explanation of the manner in which those requirements are otherwise fulfilled;

(7) A prioritized service restoration and mitigation plan and a description of the necessary security measures for the system;

(8) A description of target safety levels (e.g., MTTHE for major subsystems as defined in subpart H of this part), including requirements for system availability and a description of all backup methods of operation and any critical assumptions associated with the target levels;

(9) A complete description of how the PTC system will enforce authorities and signal indications;

(10) A description of the deviation which may be proposed under § 236.1029(c), if applicable; and

(11) A complete description of how the PTC system will appropriately and timely enforce all integrated hazard detectors in accordance with § 236.1005(c)(3), if applicable.

(b) If the Associate Administrator finds that the system described in the PTCDP would satisfy the requirements for PTC systems under this subpart and that the applicant has made a reasonable showing that a system built to the stated requirements would achieve the level of safety mandated for such a system under § 236.1015, the Associate Administrator may grant a numbered Type Approval for the system.

(c) Each Type Approval shall be valid for a period of 5 years, subject to automatic and indefinite extension provided that at least one PTC System Certification using the subject PTC system has been issued within that period and not revoked.

(d) The Associate Administrator may prescribe special conditions, amendments, and restrictions to any Type Approval as necessary for safety.

(e) If submitted, an NPI must contain the following information:

(1) A description of the railroad operation or categories of operations on which the proposed PTC system is designed to be used, including train movement density (passenger, freight), operating speeds (including a thorough explanation of intended compliance with § 236.1007), track characteristics, and railroad operating rules;

(2) An operational concepts document, including a list with complete descriptions of all functions

that the proposed PTC system will perform to enhance or preserve safety;

(3) A description of target safety levels (e.g., MTTHE for major subsystems as defined in subpart H of this part), including requirements for system availability and a description of all backup methods of operation and any critical assumptions associated with the target levels;

(4) A complete description of how the proposed PTC system will enforce authorities and signal indications; and

(5) A complete description of how the proposed PTC system will appropriately and timely enforce all integrated hazard detectors in accordance with § 236.1005(c)(3), if applicable.

§ 236.1015 PTC Safety Plan content requirements and PTC System Certification.

(a) Before placing a PTC system required under this part in service, the host railroad must submit to FRA a PTCSP and receive a PTC System Certification. If the Associate Administrator finds that the PTCSP and supporting documentation support a finding that the system complies with this part, the Associate Administrator approves the PTCSP and issues a PTC System Certification. Receipt of a PTC System Certification affirms that the PTC system has been reviewed and approved by FRA in accordance with, and meets the requirements of, this part.

(b) A PTCSP submitted under this subpart may reference and utilize in accordance with this subpart any Type Approval previously issued by the Associate Administrator to any railroad, provided that the railroad:

(1) Maintains a continually updated PTCPVL pursuant to § 236.1023;

(2) Shows that the supplier from which they are procuring the PTC system has established and can maintain a quality control system for PTC system design and manufacturing acceptable to the Associate Administrator. The quality control system must include the process for the product supplier or vendor to promptly and thoroughly report any safety-relevant failure and previously unidentified hazards to each railroad using the product; and

(3) Provides the applicable licensing information.

(c) A PTCSP submitted in accordance with this subpart shall:

(1) Include the FRA approved PTCDP or, if applicable, the FRA issued Type Approval;

(2)(i) Specifically and rigorously document each variance, including the significance of each variance between the PTC system and its applicable operating conditions as described in the applicable PTCDP from that as described in the PTCSP, and attest that there are no other such variances; or

(ii) Attest that there are no variances between the PTC system and its applicable operating conditions as described in the applicable PTCDP from that as described in the PTCSP; and

(3) Attest that the system was otherwise built in accordance with the applicable PTCDP and PTCSP and achieves the level of safety represented therein.

(d) A PTCSP shall include the same information required for a PTCDP under § 236.1013(a). If a PTCDP has been filed and approved prior to filing of the PTCSP, the PTCSP may incorporate the PTCDP by reference, with the exception that a final human factors analysis shall be provided. The PTCSP shall contain the following additional elements:

(1) A hazard log consisting of a comprehensive description of all safety-relevant hazards not previously addressed by the vendor or supplier to be addressed during the life-cycle of the PTC system, including maximum threshold limits for each hazard (for unidentified hazards, the threshold shall be exceeded at one occurrence);

(2) A description of the safety assurance concepts that are to be used for system development, including an explanation of the design principles and assumptions;

(3) A risk assessment of the as-built PTC system described;

(4) A hazard mitigation analysis, including a complete and comprehensive description of each hazard and the mitigation techniques used;

(5) A complete description of the safety assessment and Verification and Validation processes applied to the PTC system, their results, and whether these processes address the safety principles described in Appendix C to this part directly, using other safety criteria, or not at all;

(6) A complete description of the railroad's training plan for railroad and contractor employees and supervisors necessary to ensure safe and proper installation, implementation, operation, maintenance, repair, inspection, testing, and modification of the PTC system;

(7) A complete description of the specific procedures and test equipment necessary to ensure the safe and proper installation, implementation, operation, maintenance, repair, inspection, testing, and modification of the PTC system on the railroad and establish safety-critical hazards are appropriately mitigated. These procedures, including calibration requirements, shall be consistent with or explain deviations from the equipment manufacturer's recommendations;

(8) A complete description of any additional warning to be placed in the Operations and Maintenance Manual in the same manner specified in § 236.919 and all warning labels to be placed on equipment as necessary to ensure safety;

(9) A complete description of the configuration or revision control measures designed to ensure that the railroad or its contractor does not adversely affect the safety-functional requirements and that safety-critical hazard mitigation processes are not compromised as a result of any such change;

(10) A complete description of all initial implementation testing procedures necessary to establish that safety-functional requirements are met and safety-critical hazards are appropriately mitigated;

(11) A complete description of all post-implementation testing (validation) and monitoring procedures, including the intervals necessary to establish that safety-functional requirements, safety-critical hazard mitigation processes, and safety-critical tolerances are not compromised over time, through use, or after maintenance (adjustment, repair, or replacement) is performed;

(12) A complete description of each record necessary to ensure the safety of the system that is associated with periodic maintenance, inspections, tests, adjustments, repairs, or replacements, and the system's resulting conditions, including records of component failures resulting in safety-relevant hazards (*see* § 236.1037);

(13) A safety analysis to determine whether, when the system is in operation, any risk remains of an unintended incursion into a roadway work zone due to human error. If the analysis reveals any such risk, the PTCDP and PTCSP shall describe how that risk will be mitigated;

(14) A more detailed description of any alternative arrangements as already provided under § 236.1005(a)(1)(i).

(15) A complete description of how the PTC system will enforce authorities and signal indications, unless already completely provided for in the PTCDP;

(16) A description of how the PTCSP complies with § 236.1019(f), if applicable;

(17) A description of any deviation in operational requirements for en route failures as specified under § 236.1029(c), if applicable and unless already completely provided for in the PTCDP;

(18) A complete description of how the PTC system will appropriately and

timely enforce all integrated hazard detectors in accordance with § 236.1005;

(19) An emergency and planned maintenance temporary rerouting plan indicating how operations on the subject PTC system will take advantage of the benefits provided under § 236.1005(g) through (k); and

(20) The documents and information required under § 236.1007 and § 236.1033.

(e) The following additional requirements apply to:

(1) *Non-vital overlay.* A PTC system proposed as an overlay on the existing method of operation and not built in accordance with the safety assurance principles set forth in Appendix C of this part must, to the satisfaction of the Associate Administrator, be shown to:

(i) Reliably execute the functions set forth in § 236.1005;

(ii) Obtain at least 80 percent reduction of the risk associated with accidents preventable by the functions set forth in § 236.1005, when all effects of the change associated with the PTC system are taken into account. The supporting risk assessment shall evaluate all intended changes in railroad operations coincident with the introduction of the new system; and

(iii) Maintain a level of safety for each subsequent system modification that is equal to or greater than the level of safety for the previous PTC systems.

(2) *Vital overlay.* A PTC system proposed on a newly constructed track or as an overlay on the existing method of operation and built in accordance with the safety assurance principles set forth in Appendix C of this part must, to the satisfaction of the Associate Administrator, be shown to:

(i) Reliably execute the functions set forth in § 236.1005; and

(ii) Have sufficient documentation to demonstrate that the PTC system, as built, fulfills the safety assurance principles set forth in Appendix C of this part. The supporting risk assessment may be abbreviated as that term is used in subpart H of this part.

(3) *Stand-alone.* A PTC system proposed on a newly constructed track, an existing track for which no signal system exists, as a replacement for an existing signal or train control system, or otherwise to replace or materially modify the existing method of operation, shall:

(i) Reliably execute the functions required by § 236.1005 and be demonstrated to do so to FRA's satisfaction; and

(ii) Have a PTCSP establishing, with a high degree of confidence, that the system will not introduce new hazards that have not been mitigated. The supporting risk assessment shall evaluate all intended changes in railroad operations in relation to the introduction of the new system and shall examine in detail the direct and indirect effects of all changes in the method of operations.

(4) *Mixed systems.* If a PTC system combining overlay, stand-alone, vital, or non-vital characteristics is proposed, the railroad shall confer with the Associate Administrator regarding appropriate structuring of the safety case and analysis.

(f) When determining whether the PTCSP fulfills the requirements under paragraph (d) of this section, the Associate Administrator may consider all available evidence concerning the reliability and availability of the proposed system and any and all safety consequences of the proposed changes. In any case where the PTCSP lacks adequate data regarding safety impacts of the proposed changes, the Associate Administrator may request the necessary data from the applicant. If the requested data is not provided, the Associate Administrator may find that potential hazards could or will arise.

(g) If a PTCSP applies to a system designed to replace an existing certified PTC system, the PTCSP will be approved provided that the PTCSP establishes with a high degree of confidence that the new system will provide a level of safety not less than the level of safety provided by the system to be replaced.

(h) When reviewing the issue of the potential data errors (for example, errors arising from data supplied from other business systems needed to execute the braking algorithm, survey data needed for location determination, or mandatory directives issued through the computer-aided dispatching system), the PTCSP must include a careful identification of each of the risks and a discussion of each applicable mitigation. In an appropriate case, such as a case in which the residual risk after mitigation is substantial or the underlying method of operation will be significantly altered, the Associate Administrator may require submission of a quantitative risk assessment addressing these potential errors.

§ 236.1017 Independent third party Verification and Validation.

(a) The PTCSP must be supported by an independent third-party assessment when the Associate Administrator concludes that it is necessary based upon the criteria set forth in § 236.913, with the exception that consideration of the methodology used in the risk assessment (§ 236.913(g)(2)(vii)) shall apply only to the extent that a comparative risk assessment was required. To the extent practicable, FRA makes this determination not later than review of the PTCIP and the accompanying PTCDP or PTCSP. If an independent assessment is required, the assessment may apply to the entire system or a designated portion of the system.

(b) If a PTC system is to undergo an independent assessment in accordance with this section, the host railroad may submit to the Associate Administrator a written request that FRA confirm whether a particular entity would be considered an independent third party pursuant to this section. The request should include supporting information identified in paragraph (c) of this section. FRA may request further information to make a determination or provide its determination in writing.

(c) As used in this section, "independent third party" means a technically competent entity responsible to and compensated by the railroad (or an association on behalf of one or more railroads) that is independent of the PTC system supplier and vendor. An entity that is owned or controlled by the supplier or vendor, that is under common ownership or control with the supplier or vendor, or that is otherwise involved in the development of the PTC system is not considered "independent" within the meaning of this section.

(d) The independent third-party assessment shall, at a minimum, consist of the activities and result in the production of documentation meeting the requirements of Appendix F to this part, unless excepted by this part or by FRA order or waiver.

(e) Information provided that has been certified under the auspices of a foreign railroad regulatory entity recognized by the Associate Administrator may, at the Associate Administrator's discretion, be accepted as having been independently verified.

§ 236.1019 Main line track exceptions.

(a) *Scope and procedure.* This section pertains exclusively to exceptions from the rule that trackage over which scheduled intercity and commuter passenger service is provided is considered main line track requiring installation of a PTC system. One or more intercity or commuter passenger railroads, or freight railroads conducting joint passenger and freight operation over the same segment of track may file a main line track exclusion addendum ("MTEA") to its PTCIP requesting to designate track as not main line subject to the conditions set forth in paragraphs

(b) or (c) of this section. No track shall be designated as yard or terminal unless it is identified in an MTEA that is part of an FRA approved PTCIP.

(b) *Passenger terminal exception.* FRA will consider an exception in the case of trackage used exclusively as yard or terminal tracks by or in support of regularly scheduled intercity or commuter passenger service where the MTEA describes in detail the physical boundaries of the trackage in question, its use and characteristics (including track and signal charts) and all of the following apply:

(1) The maximum authorized speed for all movements is not greater than 20 miles per hour, and that maximum is enforced by any available onboard PTC equipment within the confines of the yard or terminal;

(2) Interlocking rules are in effect prohibiting reverse movements other than on signal indications without dispatcher permission; and

(3) Either of the following conditions exists:

(i) No freight operations are permitted; or

(ii) Freight operations are permitted but no passengers will be aboard passenger trains within the defined limits.

(c) *Limited operations exception.* FRA will consider an exception in the case of a track segment used for limited operations (at speeds not exceeding those permitted under § 236.0 of this part) under one of the following sets of conditions:

(1) The trackage is used for limited operations by at least one passenger railroad subject to at least one of the following conditions:

(i) All trains are limited to restricted speed;

(ii) Temporal separation of passenger and other trains is maintained as provided in paragraph (e) of this section; or

(iii) Passenger service is operated under a risk mitigation plan submitted by all railroads involved in the joint operation and approved by FRA. The risk mitigation plan must be supported by a risk assessment establishing that the proposed mitigations will achieve a level of safety not less than the level of safety that would obtain if the operations were conducted under paragraph (c)(1) or (c)(2) of this section.

(2) Passenger service is operated on a segment of track of a freight railroad that is not a Class I railroad on which less than 15 million gross tons of freight traffic is transported annually and on which one of the following conditions applies:

(i) If the segment is unsignaled and no more than four regularly scheduled passenger trains are operated during a calendar day, or

(ii) If the segment is signaled (e.g., equipped with a traffic control system, automatic block signal system, or cab signal system) and no more than 12 regularly scheduled passenger trains are operated during a calendar day.

(3) Not more than four passenger trains per day are operated on a segment of track of a Class I freight railroad on which less than 15 million gross tons of freight traffic is transported annually.

(d) A limited operations exception under paragraph (c) is subject to FRA review and approval. FRA may require a collision hazard analysis to identify hazards and may require that specific mitigations be undertaken. Operations under any such exception shall be conducted subject to the terms and conditions of the approval. Any main line track exclusion is subject to periodic review.

(e) *Temporal separation.* As used in this section, temporal separation means that limited passenger and freight operations do not operate on any segment of shared track during the same period and also refers to the processes or physical arrangements, or both, in place to ensure that temporal separation is established and maintained at all times. The use of exclusive authorities under mandatory directives is not, by itself, sufficient to establish that temporal separation is achieved. Procedures to ensure temporal separation shall include verification checks between passenger and freight operations and effective physical means to positively ensure segregation of passenger and freight operations in accordance with this paragraph.

(f) *PTCSP requirement.* No PTCSP—filed after the approval of a PTCIP with an MTEA—shall be approved by FRA unless it attests that no changes, except for those included in an FRA approved RFA, have been made to the information in the PTCIP and MTEA required by paragraph (b) or (c) of this section.

(g) *Designation modifications.* If subsequent to approval of its PTCIP or PTCSP the railroad seeks to modify which track or tracks should be designated as main line or not main line, it shall request modification of its PTCIP or PTCSP, as applicable, in accordance with § 236.1021.

§ 236.1021 Discontinuances, material modifications, and amendments.

(a) No changes, as defined by this section, to a PTC system, PTCIP, PTCDP, or PTCSP, shall be made unless:

(1) The railroad files a request for amendment ("RFA") to the applicable PTCIP, PTCDP, or PTCSP with the Associate Administrator; and

(2) The Associate Administrator approves the RFA.

(b) After approval of an RFA in accordance with paragraph (a) of this section, the railroad shall immediately adopt and comply with the amendment.

(c) In lieu of a separate filing under part 235 of this chapter, a railroad may request approval of a discontinuance or material modification of a signal or train control system by filing an RFA to its PTCIP, PTCDP, or PTCSP with the Associate Administrator.

(d) An RFA made in accordance with this section will not be approved by FRA unless the request includes:

(1) The information listed in § 235.10 of this chapter and the railroad provides FRA upon request any additional information necessary to evaluate the RFA (see § 235.12), including:

(2) The proposed modifications;

(3) The reasons for each modification;

(4) The changes to the PTCIP, PTCDP, or PTCSP, as applicable;

(5) Each modification's effect on PTC system safety;

(6) An approximate timetable for filing of the PTCDP, PTCSP, or both, if the amendment pertains to a PTCIP; and

(7) An explanation of whether each change to the PTCSP is planned or unplanned.

(i) Unplanned changes that affect the Type Approval's PTCDP require submission and approval in accordance with § 236.1013 of a new PTCDP, followed by submission and approval in accordance with § 236.1015 of a new PTCSP for the PTC system.

(ii) Unplanned changes that do not affect the Type Approval's PTCDP require submission and approval of a new PTCSP.

(iii) Unplanned changes are changes affecting system safety that have not been documented in the PTCSP. The impact of unplanned changes on PTC system safety has not yet been determined.

(iv) Planned changes may be implemented after they have undergone suitable regression testing to demonstrate, to the satisfaction of the Associate Administrator, they have been correctly implemented and their implementation does not degrade safety.

(v) Planned changes are changes affecting system safety in the PTCSP and have been included in all required analysis under § 236.1015. The impact of these changes on the PTC system's safety has been incorporated as an integral part of the approved PTCSP safety analysis.

(e) If the RFA includes a request for approval of a discontinuance or material modification of a signal or train control system, FRA will publish a notice in the **Federal Register** of the application and will invite public comment in accordance with part 211 of this chapter.

(f) When considering the RFA, FRA will review the issue of the discontinuance or material modification and determine whether granting the request is in the public interest and consistent with railroad safety, taking into consideration all changes in the method of operation and system functionalities, both within normal PTC system availability and in the case of a system failed state (unavailable), contemplated in conjunction with installation of the PTC system. The railroad submitting the RFA must, at FRA's request, perform field testing in accordance with § 236.1035 or engage in Verification and Validation in accordance with § 236.1017.

(g) FRA may issue at its discretion a new Type Approval number for a PTC system modified under this section.

(h) *Changes requiring filing of an RFA.* Except as provided by paragraph (i), an RFA shall be filed to request the following:

(1) Discontinuance of a PTC system, or other similar appliance or device;

(2) Decrease of the PTC system's limits (e.g., exclusion or removal of a PTC system on a track segment);

(3) Modification of a safety critical element of a PTC system; or

(4) Modification of a PTC system that affects the safety critical functionality of any other PTC system with which it interoperates.

(i) *Discontinuances not requiring the filing of an RFA.* It is not necessary to file an RFA for the following discontinuances:

(1) Removal of a PTC system from track approved for abandonment by formal proceeding;

(2) Removal of PTC devices used to provide protection against unusual contingencies such as landslide, burned bridge, high water, high and wide load, or tunnel protection when the unusual contingency no longer exists;

(3) Removal of the PTC devices that are used on a movable bridge that has been permanently closed by the formal approval of another government agency and is mechanically secured in the closed position for rail traffic; or

(4) Removal of the PTC system from service for a period not to exceed 6 months that is necessitated by catastrophic occurrence such as derailment, flood, fire, or hurricane, or earthquake.

(j) *Changes not requiring the filing of an RFA.* When the resultant change to the PTC system will comply with an approved PTCSP of this part, it is not necessary to file for approval to decrease the limits of a system when it involves the:

(1) Decrease of the limits of a PTC system when interlocked switches, derails, or movable-point frogs are not involved;

(2) Removal of an electric or mechanical lock, or signal used in lieu thereof, from hand-operated switch in a PTC system where train speed over such switch does not exceed 20 miles per hour, and use of those devices has not been part of the considerations for approval of a PTCSP; or

(3) Removal of an electric or mechanical lock, or signal used in lieu thereof, from a hand-operated switch in a PTC system where trains are not permitted to clear the main track at such switch and use of those devices has not been a part of the considerations for approval of a PTCSP.

(k) *Modifications not requiring the filing of an RFA.* When the resultant arrangement will comply with an approved PTCSP of this part, it is not necessary to file an application for approval of the following modifications:

(1) A modification that is required to comply with an order of the Federal Railroad Administration or any section of part 236 of this title;

(2) Installation of devices used to provide protection against unusual contingencies such as landslide, burned bridges, high water, high and wide loads, or dragging equipment;

(3) Elimination of existing track other than a second main track;

(4) Extension or shortening of a passing siding; or

(5) The temporary or permanent arrangement of existing systems necessitated by highway-rail grade separation construction. Temporary arrangements shall be removed within six months following completion of construction.

§ 236.1023 Errors and malfunctions.

(a) Each railroad implementing a PTC system on its property shall establish and continually update a PTC Product Vendor List (PTCPVL) that includes all vendors and suppliers of each PTC system, subsystem, component, and associated product, and process in use system-wide. The PTCPVL shall be made available to FRA upon request.

(b)(1) The railroad shall specify within its PTCSP all contractual arrangements with hardware and software suppliers or vendors for immediate notification between the parties of any and all safety-critical software failures, upgrades, patches, or revisions, as well as any hardware repairs, replacements, or modifications for their PTC system, subsystems, or components.

(2) A vendor or supplier, on receipt of a report of any safety-critical failure to their product, shall promptly notify all other railroads that are using that product, whether or not the other railroads have experienced the reported failure of that safety-critical system, subsystem, or component.

(3) The notification from a supplier to any railroad shall include explanation from the supplier of the reasons for such notification, the circumstances associated with the failure, and any recommended mitigation actions to be taken pending determination of the root cause and final corrective actions.

(c) The railroad shall:

(1) Specify the railroad's process and procedures in its PTCSP for action upon their receipt of notification of safety-critical failure, as well as receipt of a safety-critical upgrade, patch, revision, repair, replacement, or modification.

(2) Identify configuration/revision control measures in its PTCSP that are designed to ensure the safety-functional requirements and the safety-critical hazard mitigation processes are not compromised as a result of any change and that such a change can be audited.

(d) The railroad shall provide to the applicable vendor or supplier the railroad's procedures for action upon notification of a safety-critical failure, upgrade, patch, or revision for the PTC system, subsystem, component, product, or process, and actions to be taken until the faulty system, subsystem, or component has been adjusted, repaired or replaced.

(e) After the product is placed in service, the railroad shall maintain a database of all safety-relevant hazards as set forth in the PTCSP and those that had not previously been identified in the PTCSP. If the frequency of the safety-relevant hazard exceeds the thresholds set forth in the PTCSP, or has not been previously identified in the appropriate risk analysis, the railroad shall:

(1) Notify the applicable vendor or supplier and FRA of the failure, malfunction, or defective condition that decreased or eliminated the safety functionality;

(2) Keep the applicable vendor or supplier and FRA apprised on a continual basis of the status of any and all subsequent failures; and

(3) Take prompt counter measures to reduce or eliminate the frequency of the

safety-relevant hazards below the threshold identified in the PTCSP.

(f) Each notification to FRA required by this section shall:

(1) Be made within 15 days after the vendor, supplier, or railroad discovers the failure, malfunction, or defective condition. However, a report that is due on a Saturday or a Sunday may be delivered on the following Monday and one that is due on a holiday may be delivered on the next business day;

(2) Be transmitted in a manner and form acceptable to the Associate Administrator and by the most expeditious method available; and

(3) Include as much available and applicable information as possible, including:

(i) PTC system name and model;

(ii) Identification of the part, component, or system involved, including the part number as applicable;

(iii) Nature of the failure, malfunctions, or defective condition;

(iv) Mitigation taken to ensure the safety of train operation, railroad employees, and the public; and

(v) The estimated time to correct the failure.

(4) In the event that all information required by paragraph (f)(3) of this section is not immediately available, the non-available information shall be forwarded to the Associate Administrator as soon as practicable in supplemental reports.

(g) Whenever any investigation of an accident or service difficulty report shows that a PTC system or product is unsafe because of a manufacturing or design defect, the railroad and its vendor or supplier shall, upon request of the Associate Administrator, report to the Associate Administrator the results of its investigation and any action taken or proposed to correct that defect.

(h) PTC system and product suppliers and vendors shall:

(1) Promptly report any safety-relevant failures or defective conditions, previously unidentified hazards, and recommended mitigation actions in their PTC system, subsystem, or component to each railroad using the product; and

(2) Notify FRA of any safety-relevant failure, defective condition, or previously unidentified hazard discovered by the vendor or supplier and the identity of each affected and notified railroad.

(i) The requirements of this section do not apply to failures, malfunctions, or defective conditions that:

(1) Are caused by improper maintenance or improper usage; or

(2) Have been previously identified to the FRA, vendor or supplier, and applicable user railroads.

(j) When any safety-critical PTC system, subsystem, or component fails to perform its intended function, the cause shall be determined and the faulty product adjusted, repaired, or replaced without undue delay. Until corrective action is completed, a railroad shall take appropriate action to ensure safety and reliability as specified within its PTCSP.

(k) Any railroad experiencing a failure of a system resulting in a more favorable aspect than intended or other condition hazardous to the movement of a train shall comply with the reporting requirements, including the making of a telephonic report of an accident or incident involving such failure, under part 233 of this chapter. Filing of one or more reports under part 233 of this chapter does not exempt a railroad, vendor, or supplier from the reporting requirements contained in this section.

§ 236.1025 [Reserved]

§ 236.1027 PTC system exclusions.

(a) The requirements of this subpart apply to each office automation system that performs safety-critical functions within, or affects the safety performance of, the PTC system. For purposes of this section, "office automation system" means any centralized or distributed computer-based system that directly or indirectly controls the active movement of trains in a rail network.

(b) Changes or modifications to PTC systems otherwise excluded from the requirements of this subpart by this section do not exclude those PTC systems from the requirements of this subpart if the changes or modifications result in a degradation of safety or a material decrease in safety-critical functionality.

(c) Primary train control systems cannot be integrated with locomotive electronic systems unless the complete integrated systems:

(1) Have been shown to be designed on fail-safe principles;

(2) Have demonstrated to operate in a fail-safe mode;

(3) Have a manual fail-safe fallback and override to allow the locomotive to be brought to a safe stop in the event of any loss of electronic control; and

(4) Are included in the approved and applicable PTCDP and PTCSP.

(d) PTC systems excluded by this section from the requirements of this subpart remain subject to subparts A through H of this part as applicable.

§ 236.1029 PTC system use and en route failures.

(a) When any safety-critical PTC system component fails to perform its intended function, the cause must be determined and the faulty component adjusted, repaired, or replaced without undue delay. Until repair of such essential components are completed, a railroad shall take appropriate action as specified in its PTCSP.

(b) Where a PTC onboard apparatus on a controlling locomotive that is operating in or is to be operated within a PTC system fails or is otherwise cut-out while en route (i.e, after the train has departed its initial terminal), the train may only continue in accordance with the following:

(1) The train may proceed at restricted speed, or if a block signal system is in operation according to signal indication at medium speed, to the next available point where communication of a report can be made to a designated railroad officer of the host railroad;

(2) Upon completion and communication of the report required in paragraph (b)(1) of this section, or where immediate electronic report of said condition is appropriately provided by the PTC system itself, a train may continue to a point where an absolute block can be established in advance of the train in accordance with the following:

(i) Where no block signal system is in use, the train may proceed at restricted speed, or

(ii) Where a block signal system is in operation according to signal indication, the train may proceed at a speed not to exceed medium speed.

(3) Upon reaching the location where an absolute block has been established in advance of the train, as referenced in paragraph (b)(2) of this section, the train may proceed in accordance with the following:

(i) Where no block signal system is in use, the train may proceed at medium speed; however, if the involved train is a passenger train or a train hauling any amount of PIH material, it may only proceed at a speed not to exceed 30 miles per hour.

(ii) Where a block signal system is in use, a passenger train may proceed at a speed not to exceed 59 miles per hour and a freight train may proceed at a speed not to exceed 49 miles per hour.

(iii) Except as provided in paragraph (c), where a cab signal system with an automatic train control system is in operation, the train may proceed at a speed not to exceed 79 miles per hour.

(c) In order for a train equipped with PTC traversing a track segment equipped with PTC to deviate from the operating limitations contained in paragraph (b) of this section, the deviation must be described and justified in the FRA approved PTCDP or PTCSP, or the Order of Particular Applicability, as applicable.

(d) Each railroad shall comply with all provisions in the applicable PTCDP and PTCSP for each PTC system it uses and shall operate within the scope of initial operational assumptions and predefined changes identified.

(e) The normal functioning of any safety-critical PTC system must not be interfered with in testing or otherwise without first taking measures to provide for the safe movement of trains, locomotives, roadway workers, and on-track equipment that depend on the normal functioning of the system.

(f) The PTC system's onboard apparatus shall be so arranged that each member of the crew assigned to perform duties in the locomotive can receive the same PTC information displayed in the same manner and execute any functions necessary to that crew member's duties. The locomotive engineer shall not be required to perform functions related to the PTC system while the train is moving that have the potential to distract the locomotive engineer from performance of other safety-critical duties.

§ 236.1031 Previously approved PTC systems.

(a) Any PTC system fully implemented and operational prior to March 16, 2010, may receive PTC System Certification if the applicable PTC railroad, or one or more system suppliers and one or more PTC railroads, submits a Request for Expedited Certification (REC) letter to the Associate Administrator. The REC letter must do one of the following:

(1) Reference a product safety plan (PSP) approved by FRA under subpart H of this part and include a document fulfilling the requirements under §§ 236.1011 and 236.1013 not already included in the PSP;

(2) Attest that the PTC system has been approved by FRA and in operation for at least 5 years and has already received an assessment of Verification and Validation from an independent third party under part 236 or a waiver supporting such operation; or

(3) Attest that the PTC system is recognized under an Order issued prior to March 16, 2010.

(b) If an REC letter conforms to paragraph (a)(1) of this section, the Associate Administrator, at his or her sole discretion, may also issue a new Type Approval for the PTC system.

(c) In order to receive a Type Approval or PTC System Certification under paragraph (a) or (b) of this section, the PTC system must be shown to reliably execute the functionalities required by §§ 236.1005 and 236.1007 and otherwise conform to this subpart.

(d) Previous approval or recognition of a train control system, together with an established service history, may, at the request of the PTC railroad, and consistent with available safety data, be credited toward satisfaction of the safety case requirements set forth in this part for the PTCSP with respect to all functionalities and implementations contemplated by the approval or recognition.

(e) To the extent that the PTC system proposed for implementation under this subpart is different in significant detail from the system previously approved or recognized, the changes shall be fully analyzed in the PTCDP or PTCSP as would be the case absent prior approval or recognition.

(f) As used in this section—

(1) *Approved* refers to approval of a Product Safety Plan under subpart H of this part.

(2) *Recognized* refers to official action permitting a system to be implemented for control of train operations under an FRA order or waiver, after review of safety case documentation for the implementation.

(g) Upon receipt of an REC, FRA will consider all safety case information to the extent feasible and appropriate, given the specific facts before the agency. Nothing in this section limits re-use of any applicable safety case information by a party other than the party receiving:

(1) A prior approval or recognition referred to in this section; or

(2) A Type Approval or PTC System Certification under this subpart.

§ 236.1033 Communications and security requirements.

(a) All wireless communications between the office, wayside, and onboard components in a PTC system shall provide cryptographic message integrity and authentication.

(b) Cryptographic keys required under paragraph (a) of this section shall:

(1) Use an algorithm approved by the National Institute of Standards (NIST) or a similarly recognized and FRA approved standards body;

(2) Be distributed using manual or automated methods, or a combination of both; and

(3) Be revoked:

(i) If compromised by unauthorized disclosure of the cleartext key; or

(ii) When the key algorithm reaches its lifespan as defined by the standards body responsible for approval of the algorithm.

(c) The cleartext form of the cryptographic keys shall be protected from unauthorized disclosure, modification, or substitution, except during key entry when the cleartext keys and key components may be temporarily displayed to allow visual verification. When encrypted keys or key components are entered, the cryptographically protected cleartext key or key components shall not be displayed.

(d) Access to cleartext keys shall be protected by a tamper resistant mechanism.

(e) Each railroad electing to also provide cryptographic message confidentiality shall:

(1) Comply with the same requirements for message integrity and authentication under this section; and

(2) Only use keys meeting or exceeding the security strength required to protect the data as defined in the railroad's PTCSP and required under § 236.1013(a)(7).

(f) Each railroad, or its vendor or supplier, shall have a prioritized service restoration and mitigation plan for scheduled and unscheduled interruptions of service. This plan shall be included in the PTCDP or PTCSP as required by §§ 236.1013 or 236.1015, as applicable, and made available to FRA upon request, without undue delay, for restoration of communication services that support PTC system services.

(g) Each railroad may elect to impose more restrictive requirements than those in this section, consistent with interoperability requirements specified in the PTCSP for the system.

§ 236.1035 Field testing requirements.

(a) Before any field testing of an uncertified PTC system, or a product of an uncertified PTC system, or any regression testing of a certified PTC system is conducted on the general rail system, the railroad requesting the testing must provide:

(1) A complete description of the PTC system;

(2) An operational concepts document;

(3) A complete description of the specific test procedures, including the measures that will be taken to protect trains and on-track equipment;

(4) An analysis of the applicability of the requirements of subparts A through G of this part to the PTC system that will not apply during testing;

(5) The date the proposed testing shall begin;

(6) The test locations; and

(7) The effect on the current method of operation the PTC system will or may have under test.

(b) FRA may impose additional testing conditions that it believes may be necessary for the safety of train operations.

(c) Relief from regulations other than from subparts A through G of this part that the railroad believes are necessary to support the field testing, must be requested in accordance with part 211 of this title.

§ 236.1037 Records retention.

(a) Each railroad with a PTC system required to be installed under this subpart shall maintain at a designated office on the railroad:

(1) A current copy of each FRA approved Type Approval, if any, PTCDP, and PTCSP that it holds;

(2) Adequate documentation to demonstrate that the PTCSP and PTCDP meet the safety requirements of this subpart, including the risk assessment;

(3) An Operations and Maintenance Manual, pursuant to § 236.1039; and

(4) Training and testing records pursuant to § 236.1043(b).

(b) Results of inspections and tests specified in the PTCSP and PTCDP must be recorded pursuant to § 236.110.

(c) Each contractor providing services relating to the testing, maintenance, or operation of a PTC system required to be installed under this subpart shall maintain at a designated office training records required under § 236.1039(b).

(d) After the PTC system is placed in service, the railroad shall maintain a database of all safety-relevant hazards as set forth in the PTCSP and PTCDP and those that had not been previously identified in either document. If the frequency of the safety-relevant hazards exceeds the threshold set forth in either of these documents, then the railroad shall:

(1) Report the inconsistency in writing by mail, facsimile, e-mail, or hand delivery to the Director, Office of Safety Assurance and Compliance, FRA, 1200 New Jersey Ave, SE, Mail Stop 25, Washington, DC 20590, within 15 days of discovery. Documents that are hand delivered must not be enclosed in an envelope;

(2) Take prompt countermeasures to reduce the frequency of each safety-relevant hazard to below the threshold set forth in the PTCSP and PTCDP; and

(3) Provide a final report when the inconsistency is resolved to the FRA Director, Office of Safety Assurance and Compliance, on the results of the analysis and countermeasures taken to reduce the frequency of the safety-relevant hazard(s) below the threshold set forth in the PTCSP and PTCDP.

§ 236.1039 Operations and Maintenance Manual.

(a) The railroad shall catalog and maintain all documents as specified in the PTCDP and PTCSP for the installation, maintenance, repair, modification, inspection, and testing of the PTC system and have them in one Operations and Maintenance Manual, readily available to persons required to perform such tasks and for inspection by FRA and FRA-certified state inspectors.

(b) Plans required for proper maintenance, repair, inspection, and testing of safety-critical PTC systems must be adequate in detail and must be made available for inspection by FRA and FRA-certified state inspectors where such PTC systems are deployed or maintained. They must identify all software versions, revisions, and revision dates. Plans must be legible and correct.

(c) Hardware, software, and firmware revisions must be documented in the Operations and Maintenance Manual according to the railroad's configuration management control plan and any additional configuration/revision control measures specified in the PTCDP and PTCSP.

(d) Safety-critical components, including spare equipment, must be positively identified, handled, replaced, and repaired in accordance with the procedures specified in the PTCDP and PTCSP.

(e) Each railroad shall designate in its Operations and Maintenance Manual an appropriate railroad officer responsible for issues relating to scheduled interruptions of service contemplated by § 236.1029.

§ 236.1041 Training and qualification program, general.

(a) *Training program for PTC personnel.* Employers shall establish and implement training and qualification programs for PTC systems subject to this subpart. These programs must meet the minimum requirements set forth in the PTCDP and PTCSP in §§ 236.1039 through 236.1045, as appropriate, for the following personnel:

(1) Persons whose duties include installing, maintaining, repairing, modifying, inspecting, and testing safety-critical elements of the railroad's PTC systems, including central office, wayside, or onboard subsystems;

(2) Persons who dispatch train operations (issue or communicate any mandatory directive that is executed or enforced, or is intended to be executed or enforced, by a train control system subject to this subpart);

(3) Persons who operate trains or serve as a train or engine crew member subject to instruction and testing under part 217 of this chapter, on a train operating in territory where a train control system subject to this subpart is in use;

(4) Roadway workers whose duties require them to know and understand how a train control system affects their safety and how to avoid interfering with its proper functioning; and

(5) The direct supervisors of persons listed in paragraphs (a)(1) through (a)(4) of this section.

(b) *Competencies.* The employer's program must provide training for persons who perform the functions described in paragraph (a) of this section to ensure that they have the necessary knowledge and skills to effectively complete their duties related to operation and maintenance of the PTC system.

§ 236.1043 Task analysis and basic requirements.

(a) *Training structure and delivery.* As part of the program required by § 236.1041, the employer shall, at a minimum:

(1) Identify the specific goals of the training program with regard to the target population (craft, experience level, scope of work, etc.), task(s), and desired success rate;

(2) Based on a formal task analysis, identify the installation, maintenance, repair, modification, inspection, testing, and operating tasks that must be performed on a railroad's PTC systems. This includes the development of failure scenarios and the actions expected under such scenarios;

(3) Develop written procedures for the performance of the tasks identified;

(4) Identify the additional knowledge, skills, and abilities above those required for basic job performance necessary to perform each task;

(5) Develop a training and evaluation curriculum that includes classroom, simulator, computer-based, hands-on, or other formally structured training designed to impart the knowledge, skills, and abilities identified as necessary to perform each task;

(6) Prior to assignment of related tasks, require all persons mentioned in § 236.1041(a) to successfully complete a training curriculum and pass an examination that covers the PTC system and appropriate rules and tasks for which they are responsible (however, such persons may perform such tasks under the direct onsite supervision of a qualified person prior to completing such training and passing the examination);

(7) Require periodic refresher training and evaluation at intervals specified in the PTCDP and PTCSP that includes classroom, simulator, computer-based, hands-on, or other formally structured

training and testing, except with respect to basic skills for which proficiency is known to remain high as a result of frequent repetition of the task; and

(8) Conduct regular and periodic evaluations of the effectiveness of the training program specified in § 236.1041(a)(1) verifying the adequacy of the training material and its validity with respect to current railroads PTC systems and operations.

(b) *Training records.* Employers shall retain records which designate persons who are qualified under this section until new designations are recorded or for at least one year after such persons leave applicable service. These records shall be kept in a designated location and be available for inspection and replication by FRA and FRA-certified State inspectors

§ 236.1045 Training specific to office control personnel.

(a) Any person responsible for issuing or communicating mandatory directives in territory where PTC systems are or will be in use shall be trained in the following areas, as applicable:

(1) Instructions concerning the interface between the computer-aided dispatching system and the train control system, with respect to the safe movement of trains and other on-track equipment;

(2) Railroad operating rules applicable to the train control system, including provision for movement and protection of roadway workers, unequipped trains, trains with failed or cut-out train control onboard systems, and other on-track equipment; and

(3) Instructions concerning control of trains and other on-track equipment in case the train control system fails, including periodic practical exercises or simulations, and operational testing under part 217 of this chapter to ensure the continued capability of the personnel to provide for safe operations under the alternative method of operation.

(b) [Reserved]

§ 236.1047 Training specific to locomotive engineers and other operating personnel.

(a) *Operating personnel.* Training provided under this subpart for any locomotive engineer or other person who participates in the operation of a train in train control territory shall be defined in the PTCDP as well as the PTCSP. The following elements shall be addressed:

(1) Familiarization with train control equipment onboard the locomotive and the functioning of that equipment as part of the system and in relation to other onboard systems under that person's control;

(2) Any actions required of the onboard personnel to enable, or enter data to, the system, such as consist data, and the role of that function in the safe operation of the train;

(3) Sequencing of interventions by the system, including pre-enforcement notification, enforcement notification, penalty application initiation and post-penalty application procedures;

(4) Railroad operating rules and testing (part 217) applicable to the train control system, including provisions for movement and protection of any unequipped trains, or trains with failed or cut-out train control onboard systems and other on-track equipment;

(5) Means to detect deviations from proper functioning of onboard train control equipment and instructions regarding the actions to be taken with respect to control of the train and notification of designated railroad personnel; and

(6) Information needed to prevent unintentional interference with the proper functioning of onboard train control equipment.

(b) *Locomotive engineer training.* Training required under this subpart for a locomotive engineer, together with required records, shall be integrated into the program of training required by part 240 of this chapter.

(c) *Full automatic operation.* The following special requirements apply in the event a train control system is used to effect full automatic operation of the train:

(1) The PTCDP and PTCSP shall identify all safety hazards to be mitigated by the locomotive engineer.

(2) The PTCDP and PTCSP shall address and describe the training required with provisions for the maintenance of skills proficiency. As a minimum, the training program must:

(i) As described in § 236.1043(a)(2), develop failure scenarios which incorporate the safety hazards identified in the PTCDP and PTCSP including the return of train operations to a fully manual mode;

(ii) Provide training, consistent with § 236.1047(a), for safe train operations under all failure scenarios and identified safety hazards that affect train operations;

(iii) Provide training, consistent with § 236.1047(a), for safe train operations under manual control; and

(iv) Consistent with § 236.1047(a), ensure maintenance of manual train operating skills by requiring manual starting and stopping of the train for an appropriate number of trips and by one or more of the following methods:

(A) Manual operation of a train for a 4-hour work period;

(B) Simulated manual operation of a train for a minimum of 4 hours in a Type I simulator as required; or

(C) Other means as determined following consultation between the railroad and designated representatives of the affected employees and approved by FRA. The PTCDP and PTCSP shall designate the appropriate frequency when manual operation, starting, and stopping must be conducted, and the appropriate frequency of simulated manual operation.

(d) *Conductor training.* Training required under this subpart for a conductor, together with required records, shall be integrated into the program of training required under this chapter.

§ 236.1049 Training specific to roadway workers.

(a) *Roadway worker training.* Training required under this subpart for a roadway worker shall be integrated into the program of instruction required under part 214, subpart C of this chapter ("Roadway Worker Protection"), consistent with task analysis requirements of § 236.1043. This training shall provide instruction for roadway workers who provide protection for themselves or roadway work groups.

(b) *Training subject areas.* (1) Instruction for roadway workers shall ensure an understanding of the role of processor-based signal and train control equipment in establishing protection for roadway workers and their equipment.

(2) Instruction for all roadway workers working in territories where PTC is required under this subpart shall ensure recognition of processor-based signal and train control equipment on the wayside and an understanding of how to avoid interference with its proper functioning.

(3) Instructions concerning the recognition of system failures and the provision of alternative methods of on-track safety in case the train control system fails, including periodic practical exercises or simulations and operational testing under part 217 of this chapter to ensure the continued capability of roadway workers to be free from the danger of being struck by a moving train or other on-track equipment.

■ 12. Amend Appendix A to part 236 by adding entries for subpart I as follows:

Appendix A to Part 236—Civil Penalties [1]

Section	Violation	Willful violation
* * * * * * *		
Subpart I—Positive Train Control Systems		
236.1005 Positive Train Control System Requirements:		
Failure to complete PTC system installation on track segment where PTC is required prior to 12/31/2015	16,000	25,000
Commencement of revenue service prior to obtaining PTC System Certification	16,000	25,000
Failure of the PTC system to perform a safety-critical function required by this section	5,000	7,500
Failure to provide notice, obtain approval, or follow a condition for temporary rerouting when required	5,000	7,500
Exceeding the allowed percentage of controlling locomotives operating out of an initial terminal after receiving a failed initialization	5,000	7,500
236.1006 Equipping locomotives operating in PTC territory:		
Operating in PTC territory a controlling locomotive without a required and operative PTC onboard apparatus	15,000	25,000
Failure to report as prescribed by this section	5,000	7,500
Non-compliant operation of unequipped trains in PTC territory	15,000	25,000
236.1007 Additional requirements for high-speed service:		
Operation of passenger trains at speed equal to or greater than 60 mph on non-PTC-equipped territory where required	15,000	25,000
Operation of freight trains at speed equal to or greater than 50 mph on non-PTC-equipped territory where required	15,000	25,000
Failure to fully implement incursion protection where required	5,000	7,500
236.1009 Procedural requirements:		
Failure to file PTCIP when required	5,000	7,500
Failure to amend PTCIP when required	5,000	7,500
Failure to obtain Type Approval when required	5,000	7,500
Failure to update NPI	5,000	7,500
Operation of PTC system prior to system certification	16,000	25,000
236.1011 PTCIP content requirements:		
Failure to install a PTC system in accordance with subpart I when so required	11,000	16,000
236.1013 PTCDP content requirements and Type Approval:		
Failure to maintain quality control system	5,000	7,500
Inappropriate use of Type Approval	5,000	7,500
236.1015 PTCSP content requirements and PTC System Certification:		
Failure to implement PTC system in accordance with the associated PTCSP and resultant system certification	16,000	25,000
Failure to maintain PTC system in accordance with the associated PTCSP and resultant system certification	16,000	25,000
Failure to maintain required supporting documentation	2,500	5,000
236.1017 Independent third party Verification and Validation:		
Failure to conduct independent third party Verification and Validation when ordered	11,000	16,000
236.1019 Main line track exceptions:		
Revenue operations conducted in non-compliance with the passenger terminal exception	16,000	25,000
Revenue operations conducted in non-compliance with the limited operations exception	16,000	25,000
Failure to request modification of the PTCIP or PTCSP when required	11,000	16,000
Revenue operations conducted in violation of (c)(2)	16,000	25,000
Revenue operations conducted in violation of (c)(3)	25,000	25,000
236.1021 Discontinuances, material modifications, and amendments:		
Failure to update PTCDP when required	5,000	7,500
Failure to update PTCSP when required	5,000	7,500
Failure to immediately adopt and comply with approved RFA	5,000	7,500
Discontinuance or modification of a PTC system without approval when required	11,000	16,000
236.1023 Errors and malfunctions:		
Railroad failure to provide proper notification of PTC system error or malfunction	5,000	7,500
Failure to maintain PTCPVL	2,500	5,000
Supplier failure to provide proper notification of previously identified PTC system error or malfunction	5,000	7,500
Failure to provide timely notification	5,000	7,500
Failure to provide appropriate protective measures in the event of PTC system failure	15,000	25,000
236.1027 Exclusions:		
Integration of primary train control system with locomotive electronic system without approval	5,000	7,500
236.1029 PTC system use and en route failures:		
Failure to determine cause of PTC system component failure without undue delay	5,000	7,500
Failure to adjust, repair, or replace faulty PTC system component without undue delay	5,000	7,500
Failure to take appropriate action pending adjustment, repair, or replacement of faulty PTC system component	15,000	25,000
Non-compliant train operation within PTC-equipped territory with inoperative PTC onboard apparatus	5,000	7,500
Interference with the normal functioning of safety-critical PTC system	15,000	25,000
Improper arrangement of the PTC system onboard apparatus	2,500	5,000

[1] The Administrator reserves the right to assess a civil penalty of up to $100,000 per day for any violation where circumstances warrant. *See* 459 CFR part 209, Appendix A.

Section	Violation	Willful violation
236.1033 Communications and security requirements:		
Failure to provide cryptographic message integrity and authentication	5,000	7,500
Improper use of revoked cryptographic key	5,000	15,000
Failure to protect cryptographic keys from unauthorized disclosure, modification, or substitution	5,000	15,000
Failure to establish prioritized service restoration and mitigation plan for communication services	5,000	7,500
236.1035 Field testing requirements:		
Field testing without authorization or approval	10,000	20,000
236.1037 Records retention:		
Failure to maintain records and databases as required	7,500	15,000
Failure to report inconsistency	10,000	20,000
Failure to take prompt countermeasures	10,000	20,000
Failure to provide final report	2,500	5,000
236.1039 Operations and Maintenance Manual:		
Failure to implement and maintain Operations and Maintenance Manual as required	3,000	6,000
236.1043 Task analysis and basic requirements:		
Failure to develop and maintain an acceptable training program	10,000	20,000
Failure to train persons as required	2,500	5,000
Failure to conduct evaluation of training program as required	2,500	5,000
Failure to maintain records as required	1,500	3,000
236.1045 Training specific to office control personnel:		
Failure to conduct training unique to office control personnel	2,500	5,000
236.1047 Training specific to locomotive engineers and other operating personnel:		
Failure to conduct training unique to locomotive engineers and other operating personnel	2,500	5,000
236.1049 Training specific to roadway workers:		
Failure to conduct training unique to roadway workers	2,500	5,000

■ 13. Revise Appendix B to part 236 to read as follows:

Appendix B to Part 236—Risk Assessment Criteria

The safety-critical performance of each product for which risk assessment is required under this part must be assessed in accordance with the following minimum criteria or other criteria if demonstrated to the Associate Administrator for Safety to be equally suitable:

(a) *How are risk metrics to be expressed?* The risk metric for the proposed product must describe with a high degree of confidence the accumulated risk of a train control system that operates over the designated life-cycle of the product. Each risk metric for the proposed product must be expressed with an upper bound, as estimated with a sensitivity analysis, and the risk value selected must be demonstrated to have a high degree of confidence.

(b) *How does the risk assessment handle interaction risks for interconnected subsystems/components?* The risk assessment of each safety-critical system (product) must account not only for the risks associated with each subsystem or component, but also for the risks associated with interactions (interfaces) between such subsystems.

(c) *What is the main principle in computing risk for the previous and current conditions?* The risk for the previous condition must be computed using the same metrics as for the new system being proposed. A full risk assessment must consider the entire railroad environment where the product is being applied, and show all aspects of the previous condition that are affected by the installation of the product, considering all faults, operating errors, exposure scenarios, and consequences that are related as described in this part. For the full risk assessment, the total societal cost of the potential numbers of accidents assessed for both previous and new system conditions must be computed for comparison. An abbreviated risk assessment must, as a minimum, clearly compute the MTTHE for all of the hazardous events identified for both previous and current conditions. The comparison between MTTHE for both conditions is to determine whether the product implementation meets the safety criteria as required by subpart H or subpart I of this part as applicable.

(d) *What major system characteristics must be included when relevant to risk assessment?* Each risk calculation must consider the total signaling and train control system and method of operation, as subjected to a list of hazards to be mitigated by the signaling and train control system. The methodology requirements must include the following major characteristics, when they are relevant to the product being considered:

(1) Track plan infrastructure, switches, rail crossings at grade and highway-rail grade crossings as applicable;

(2) Train movement density for freight, work, and passenger trains where applicable and computed over a time span of not less than 12 months;

(3) Train movement operational rules, as enforced by the dispatcher, roadway worker/Employee in Charge, and train crew behaviors;

(4) Wayside subsystems and components;

(5) Onboard subsystems and components;

(6) Consist contents such as hazardous material, oversize loads; and

(7) Operating speeds if the provisions of part 236 cite additional requirements for certain type of train control systems to be used at such speeds for freight and passenger trains.

(e) *What other relevant parameters must be determined for the subsystems and components?* In order to derive the frequency of hazardous events (or MTTHE) applicable for a product, subsystem or component included in the risk assessment, the railroad may use various techniques, such as reliability and availability calculations for subsystems and components, Fault Tree Analysis (FTA) of the subsystems, and results of the application of safety design principles as noted in Appendix C to this part. The MTTHE is to be derived for both fail-safe and non-fail-safe subsystems or components. The lower bounds of the MTTF or MTBF determined from the system sensitivity analysis, which account for all necessary and well justified assumptions, may be used to represent the estimate of MTTHE for the associated non-fail-safe subsystem or component in the risk assessment.

(f) *How are processor-based subsystems/components assessed?* (1) An MTTHE value must be calculated for each processor-based subsystem or component, or both, indicating the safety-critical behavior of the integrated hardware/software subsystem or component, or both. The human factor impact must be included in the assessment, whenever applicable, to provide the integrated MTTHE value. The MTTHE calculation must consider the rates of failures caused by permanent, transient, and intermittent faults accounting for the fault coverage of the integrated hardware/software subsystem or component, phased-interval maintenance, and restoration of the detected failures.

(2) Software fault/failure analysis must be based on the assessment of the design and implementation of all safety-related software including the application code, its operating/executive program, COTS software, and associated device drivers, as well as historical performance data, analytical methods and experimental safety-critical performance testing performed on the subsystem or component. The software assessment process must demonstrate through repeatable predictive results that all software defects have been identified and

corrected by process with a high degree of confidence.

(g) *How are non-processor-based subsystems/components assessed?* (1) The safety-critical behavior of all non-processor-based components, which are part of a processor-based system or subsystem, must be quantified with an MTTHE metric. The MTTHE assessment methodology must consider failures caused by permanent, transient, and intermittent faults, phase-interval maintenance and restoration of operation after failures and the effect of fault coverage of each non-processor-based subsystem or component.

(2) MTTHE compliance verification and validation must be based on the assessment of the design for adequacy by a documented verification and validation process, historical performance data, analytical methods and experimental safety-critical performance testing performed on the subsystem or component. The non-processor-based quantification compliance must be demonstrated to have a high degree of confidence.

(h) *What assumptions must be documented for risk assessment?* (1) The railroad shall document any assumptions regarding the derivation of risk metrics used. For example, for the full risk assessment, all assumptions made about each value of the parameters used in the calculation of total cost of accidents should be documented. For abbreviated risk assessment, all assumptions made for MTHHE derivation using existing reliability and availability data on the current system components should be documented. The railroad shall document these assumptions in such a form as to permit later comparisons with in-service experience.

(2) The railroad shall document any assumptions regarding human performance. The documentation shall be in such a form as to facilitate later comparisons with in-service experience.

(3) The railroad shall document any assumptions regarding software defects. These assumptions shall be in a form that permit the railroad to project the likelihood of detecting an in-service software defect. These assumptions shall be documented in such a form as to permit later comparisons with in-service experience.

(4) The railroad shall document all of the identified safety-critical fault paths to a mishap as predicted by the safety analysis methodology. The documentation shall be in such a form as to facilitate later comparisons with in-service faults.

■ 14. Revise Appendix C to part 236 to read as follows:

Appendix C to Part 236—Safety Assurance Criteria and Processes

(a) *What is the purpose of this appendix?* This appendix provides safety criteria and processes that the designer must use to develop and validate the product that meets safety requirements of this part. FRA uses the criteria and processes set forth in this appendix to evaluate the validity of safety targets and the results of system safety analyses provided in the RSPP, PSP, PTCIP, PTCDP, and PTCSP documents as appropriate. An analysis performed under this appendix must:

(1) Address each of the safety principles of paragraph (b) of this appendix, or explain why they are not relevant, and

(2) Employ a validation and verification process pursuant to paragraph (c) of this appendix.

(b) *What safety principles must be followed during product development?* The designer shall address each of the following safety considerations principles when designing and demonstrating the safety of products covered by subpart H or I of this part. In the event that any of these principles are not followed, the PSP or PTCDP or PTCSP shall state both the reason(s) for departure and the alternative(s) utilized to mitigate or eliminate the hazards associated with the design principle not followed.

(1) *System safety under normal operating conditions.* The system (all its elements including hardware and software) must be designed to assure safe operation with no hazardous events under normal anticipated operating conditions with proper inputs and within the expected range of environmental conditions. All safety-critical functions must be performed properly under these normal conditions. The system shall operate safely even in the absence of prescribed operator actions or procedures. The designer must identify and categorize all hazards that may lead to unsafe system operation. Hazards categorized as unacceptable, which are determined by hazard analysis, must be eliminated by design. Best effort shall also be made by the designer to eliminate by design the hazards categorized as undesirable. Those undesirable hazards that cannot be eliminated should be mitigated to the acceptable level as required by this part.

(2) *System safety under failures.*

(i) It must be shown how the product is designed to eliminate or mitigate unsafe systematic failures—those conditions which can be attributed to human error that could occur at various stages throughout product development. This includes unsafe errors in the software due to human error in the software specification, design, or coding phases; human errors that could impact hardware design; unsafe conditions that could occur because of an improperly designed human-machine interface; installation and maintenance errors; and errors associated with making modifications.

(ii) The product must be shown to operate safely under conditions of random hardware failures. This includes single hardware failures as well as multiple hardware failures that may occur at different times but remain undetected (latent) and react in combination with a subsequent failure at a later time to cause an unsafe operating situation. In instances involving a latent failure, a subsequent failure is similar to there being a single failure. In the event of a transient failure, and if so designed, the system should restart itself if it is safe to do so. Frequency of attempted restarts must be considered in the hazard analysis required by § 236.907(a)(8).

(iii) There shall be no single point failures in the product that can result in hazards categorized as unacceptable or undesirable. Occurrence of credible single point failures that can result in hazards must be detected and the product must achieve a known safe state that eliminates the possibility of false activation of any physical appliance.

(iv) If one non-self-revealing failure combined with a second failure can cause a hazard that is categorized as unacceptable or undesirable, then the second failure must be detected and the product must achieve a known safe state that eliminates the possibility of false activation of any physical appliance.

(v) Another concern of multiple failures involves common mode failures in which two or more subsystems or components intended to compensate one another to perform the same function all fail by the same mode and result in unsafe conditions. This is of particular concern in instances in which two or more elements (hardware or software, or both) are used in combination to ensure safety. If a common mode failure exists, then any analysis performed under this appendix cannot rely on the assumption that failures are independent. Examples include: The use of redundancy in which two or more elements perform a given function in parallel and when one (hardware or software) element checks/monitors another element (of hardware or software) to help ensure its safe operation. Common mode failure relates to independence, which must be ensured in these instances. When dealing with the effects of hardware failure, the designer shall address the effects of the failure not only on other hardware, but also on the execution of the software, since hardware failures can greatly affect how the software operates.

(3) *Closed loop principle.* System design adhering to the closed loop principle requires that all conditions necessary for the existence of any permissive state or action be verified to be present before the permissive state or action can be initiated. Likewise the requisite conditions shall be verified to be continuously present for the permissive state or action to be maintained. This is in contrast to allowing a permissive state or action to be initiated or maintained in the absence of detected failures. In addition, closed loop design requires that failure to perform a logical operation, or absence of a logical input, output or decision shall not cause an unsafe condition, i.e. system safety does not depend upon the occurrence of an action or logical decision.

(4) *Safety assurance concepts.* The product design must include one or more of the following Safety Assurance Concepts as described in IEEE–1483 standard to ensure that failures are detected and the product is placed in a safe state. One or more different principles may be applied to each individual subsystem or component, depending on the safety design objectives of that part of the product.

(i) *Design diversity and self-checking concept.* This concept requires that all critical functions be performed in diverse ways, using diverse software operations and/or diverse hardware channels, and that critical hardware be tested with Self-Checking routines. Permissive outputs are allowed only if the results of the diverse operations correspond, and the Self-Checking

process reveals no failures in either execution of software or in any monitored input or output hardware. If the diverse operations do not agree or if the checking reveals critical failures, safety-critical functions and outputs must default to a known safe state.

(ii) *Checked redundancy concept.* The Checked Redundancy concept requires implementation of two or more identical, independent hardware units, each executing identical software and performing identical functions. A means is to be provided to periodically compare vital parameters and results of the independent redundant units, requiring agreement of all compared parameters to assert or maintain a permissive output. If the units do not agree, safety-critical functions and outputs must default to a known safe state.

(iii) *N-version programming concept.* This concept requires a processor-based product to use at least two software programs performing identical functions and executing concurrently in a cycle. The software programs must be written by independent teams, using different tools. The multiple independently written software programs comprise a redundant system, and may be executed either on separate hardware units (which may or may not be identical) or within one hardware unit. A means is to be provided to compare the results and output states of the multiple redundant software systems. If the system results do not agree, then the safety-critical functions and outputs must default to a known safe state.

(iv) *Numerical assurance concept.* This concept requires that the state of each vital parameter of the product or system be uniquely represented by a large encoded numerical value, such that permissive results are calculated by pseudo-randomly combining the representative numerical values of each of the critical constituent parameters of a permissive decision. Vital algorithms must be entirely represented by data structures containing numerical values with verified characteristics, and no vital decisions are to be made in the executing software, only by the numerical representations themselves. In the event of critical failures, the safety-critical functions and outputs must default to a known safe state.

(v) *Intrinsic fail-safe design concept.* Intrinsically fail-safe hardware circuits or systems are those that employ discrete mechanical and/or electrical components. The fail-safe operation for a product or subsystem designed using this principle concept requires a verification that the effect of every relevant failure mode of each component, and relevant combinations of component failure modes, be considered, analyzed, and documented. This is typically performed by a comprehensive failure modes and effects analysis (FMEA) which must show no residual unmitigated failures. In the event of critical failures, the safety-critical functions and outputs must default to a known safe state.

(5) *Human factor engineering principle.* The product design must sufficiently incorporate human factors engineering that is appropriate to the complexity of the product; the educational, mental, and physical capabilities of the intended operators and maintainers; the degree of required human interaction with the component; and the environment in which the product will be used.

(6) *System safety under external influences.* The product must be shown to operate safely when subjected to different external influences, including:

(i) Electrical influences such as power supply anomalies/transients, abnormal/improper input conditions (e.g., outside of normal range inputs relative to amplitude and frequency, unusual combinations of inputs) including those related to a human operator, and others such as electromagnetic interference or electrostatic discharges, or both;

(ii) Mechanical influences such as vibration and shock; and

(iii) Climatic conditions such as temperature and humidity.

(7) *System safety after modifications.* Safety must be ensured following modifications to the hardware or software, or both. All or some of the concerns identified in this paragraph may be applicable depending upon the nature and extent of the modifications. Such modifications must follow all of the concept, design, implementation and test processes and principles as documented in the PSP for the original product. Regression testing must be comprehensive and documented to include all scenarios which are affected by the change made, and the operating modes of the changed product during normal and failure state (fallback) operation.

(c) *What standards are acceptable for Verification and Validation?* (1) The standards employed for Verification or Validation, or both, of products subject to this subpart must be sufficient to support achievement of the applicable requirements of subpart H and subpart I of this part.

(2) U.S. Department of Defense Military Standard (MIL–STD) 882C, "System Safety Program Requirements" (January 19, 1993), is recognized as providing appropriate risk analysis processes for incorporation into verification and validation standards.

(3) The following standards designed for application to processor-based signal and train control systems are recognized as acceptable with respect to applicable elements of safety analysis required by subpart H and subpart I of this part. The latest versions of the standards listed below should be used unless otherwise provided.

(i) IEEE standards as follows:

(A) IEEE 1483–2000, Standard for the Verification of Vital Functions in Processor-Based Systems Used in Rail Transit Control.

(B) IEEE 1474.2–2003, Standard for user interface requirements in communications based train control (CBTC) systems.

(C) IEEE 1474.1–2004, Standard for Communications-Based Train Control (CBTC) Performance and Functional Requirements.

(ii) CENELEC Standards as follows:

(A) EN50129: 2003, Railway Applications: Communications, Signaling, and Processing Systems-Safety Related Electronic Systems for Signaling; and

(B) EN50155:2001/A1:2002, Railway Applications: Electronic Equipment Used in Rolling Stock.

(iii) ATCS Specification 200 Communications Systems Architecture.

(iv) ATCS Specification 250 Message Formats.

(v) AREMA 2009 Communications and Signal Manual of Recommended Practices, Part 16, Part 17, 21, and 23.

(vi) Safety of High-Speed Ground Transportation Systems. Analytical Methodology for Safety Validation of Computer Controlled Subsystems. Volume II: Development of a Safety Validation Methodology. Final Report September 1995. Author: Jonathan F. Luedeke, Battelle. DOT/FRA/ORD–95/10.2.

(vii) IEC 61508 (International Electrotechnical Commission), Functional Safety of Electrical/Electronic/Programmable/Electronic Safety (E/E/P/ES) Related Systems, Parts 1–7 as follows:

(A) IEC 61508–1 (1998–12) Part 1: General requirements and IEC 61508–1 Corr. (1999–05) Corrigendum 1—Part 1: General Requirements.

(B) IEC 61508–2 (2000–05) Part 2: Requirements for electrical/electronic/programmable electronic safety-related systems.

(C) IEC 61508–3 (1998–12) Part 3: Software requirements and IEC 61508–3 Corr. 1 (1999–04) Corrigendum 1—Part 3: Software requirements.

(D) IEC 61508–4 (1998–12) Part 4: Definitions and abbreviations and IEC 61508–4 Corr. 1 (1999–04) Corrigendum 1—Part 4: Definitions and abbreviations.

(E) IEC 61508–5 (1998–12) Part 5: Examples of methods for the determination of safety integrity levels and IEC 61508–5 Corr. 1 (1999–04) Corrigendum 1—Part 5: Examples of methods for determination of safety integrity levels.

(F) IEC 61508–6 (2000–04) Part 6: Guidelines on the applications of IEC 61508–2 and –3.

(G) IEC 61508–7 (2000–03) Part 7: Overview of techniques and measures.

(H) IEC 62278: 2002, Railway Applications: Specification and Demonstration of Reliability, Availability, Maintainability and Safety (RAMS);

(I) IEC 62279: 2002 Railway Applications: Software for Railway Control and Protection Systems;

(4) Use of unpublished standards, including proprietary standards, is authorized to the extent that such standards are shown to achieve the requirements of this part. However, any such standards shall be available for inspection and replication by FRA and for public examination in any public proceeding before the FRA to which they are relevant.

(5) The various standards provided in this paragraph are for illustrative purposes only. Copies of these standards can be obtained in accordance with the following:

(i) U.S. government standards and technical publications may be obtained by contacting the federal National Technical Information Service, 5301 Shawnee Rd, Alexandria, VA 22312.

(ii) U.S. National Standards may be obtained by contacting the American

National Standards Institute, 25 West 43rd Street, 4 Floor, New York, NY 10036.

(iii) IEC Standards may be obtained by contacting the International Electrotechnical Commission, 3, rue de Varembé, P.O. Box 131 CH—1211, GENEVA, 20, Switzerland.

(iv) CENLEC Standards may be obtained by contacting any of one the national standards bodies that make up the European Committee for Electrotechnical Standardization.

(v) IEEE standards may be obtained by contacting the IEEE Publications Office, 10662 Los Vaqueros Circle, P.O. Box 3014, Los Alamitos, CA 90720–1264.

(vi) AREMA standards may be obtained from the American Railway Engineering and Maintenance-of-Way Association, 10003 Derekwood Lane, Suite 210, Lanham, MD 20706.

■ 15. Revise Appendix D to part 236 to read as follows:

Appendix D to Part 236—Independent Review of Verification and Validation

(a) This appendix provides minimum requirements for independent third-party assessment of product safety verification and validation pursuant to subpart H or subpart I of this part. The goal of this assessment is to provide an independent evaluation of the product manufacturer's utilization of safety design practices during the product's development and testing phases, as required by any mutually agreed upon controlling documents and standards and the applicable railroad's:

(1) Railroad Safety Program Plan (RSPP) and Product Safety Plan (PSP) for processor based systems developed under subpart H or,

(2) PTC Product Development Plan (PTCDP) and PTC Safety Plan (PTCSP) for PTC systems developed under subpart I.

(b) The supplier may request advice and assistance of the reviewer concerning the actions identified in paragraphs (c) through (g) of this appendix. However, the reviewer shall not engage in any design efforts associated with the product, the products subsystems, or the products components, in order to preserve the reviewer's independence and maintain the supplier's proprietary right to the product.

(c) The supplier shall provide the reviewer access to any and all documentation that the reviewer requests and attendance at any design review or walkthrough that the reviewer determines as necessary to complete and accomplish the third party assessment. The reviewer may be accompanied by representatives of FRA as necessary, in FRA's judgment, for FRA to monitor the assessment.

(d) The reviewer shall evaluate the product with respect to safety and comment on the adequacy of the processes which the supplier applies to the design and development of the product. At a minimum, the reviewer shall compare the supplier processes with acceptable validation and verification methodology and employ any other such tests or comparisons if they have been agreed to previously with FRA. Based on these analyses, the reviewer shall identify and document any significant safety vulnerabilities which are not adequately mitigated by the supplier's (or user's) processes. Finally, the reviewer shall evaluate and document the adequacy of the railroad's

(1) RSPP, the PSP, and any other documents pertinent to a product being developed under subpart H of this part; or

(2) PTCDP and PTCSP for systems being developed under subpart I of this part.

(e) The reviewer shall analyze the Hazard Log and/or any other hazard analysis documents for comprehensiveness and compliance with applicable railroad, vendor, supplier, industry, national, and international standards.

(f) The reviewer shall analyze all Fault Tree Analyses (FTA), Failure Mode and Effects Criticality Analysis (FMECA), and other hazard analyses for completeness, correctness, and compliance with applicable railroad, vendor, supplier, industry, national and international standards.

(g) The reviewer shall randomly select various safety-critical software, and hardware modules, if directed by FRA, for audit to verify whether the requirements of the applicable railroad, vendor, supplier, industry, national, and international standards were followed. The number of modules audited must be determined as a representative number sufficient to provide confidence that all unaudited modules were developed in compliance with the applicable railroad, vendor, supplier, industry, national, and international standards.

(h) The reviewer shall evaluate and comment on the plan for installation and test procedures of the product for revenue service.

(i) The reviewer shall prepare a final report of the assessment. The report shall be submitted to the railroad prior to the commencement of installation testing and contain at least the following information:

(1) Reviewer's evaluation of the adequacy of the PSP in the case of products developed under subpart H, or PTCSP for products developed under subpart I of this part, including the supplier's MTTHE and risk estimates for the product, and the supplier's confidence interval in these estimates;

(2) Product vulnerabilities, potentially hazardous failure modes, or potentially hazardous operating circumstances which the reviewer felt were not adequately identified, tracked, mitigated, and corrected by either the vendor or supplier or the railroad;

(3) A clear statement of position for all parties involved for each product vulnerability cited by the reviewer;

(4) Identification of any documentation or information sought by the reviewer that was denied, incomplete, or inadequate;

(5) A listing of each applicable vendor, supplier, industry, national, or international standard, procedure or process which was not properly followed;

(6) Identification of the software verification and validation procedures, as well as the hardware verification validation procedures if deemed appropriate by FRA, for the product's safety-critical applications, and the reviewer's evaluation of the adequacy of these procedures;

(7) Methods employed by the product manufacturer to develop safety-critical software;

(8) If deemed applicable by FRA, the methods employed by the product manufacturer to develop safety-critical hardware by generally acceptable techniques;

(9) Method by which the supplier or railroad addresses comprehensiveness of the product design which considers the safety elements listed in paragraph (b) of appendix C to this part.

■ 16. Revise Appendix E to part 236 to read as follows:

Appendix E to Part 236—Human-Machine Interface (HMI) Design

(a) This appendix provides human factors design criteria applicable to both subpart H and subpart I of this part. HMI design criteria will minimize negative safety effects by causing designers to consider human factors in the development of HMIs. The product design should sufficiently incorporate human factors engineering that is appropriate to the complexity of the product; the gender, educational, mental, and physical capabilities of the intended operators and maintainers; the degree of required human interaction with the component; and the environment in which the product will be used.

(b) As used in this section, "designer" means anyone who specifies requirements for—or designs a system or subsystem, or both, for—a product subject to subpart H or subpart I of this part, and "operator" means any human who is intended to receive information from, provide information to, or perform repairs or maintenance on a safety-critical product subject to subpart H or I of this part.

(c) Human factors issues the designers must consider with regard to the general function of a system include:

(1) *Reduced situational awareness and over-reliance.* HMI design must give an operator active functions to perform, feedback on the results of the operator's actions, and information on the automatic functions of the system as well as its performance. The operator must be "in-the-loop." Designers must consider at a minimum the following methods of maintaining an active role for human operators:

(i) The system must require an operator to initiate action to operate the train and require an operator to remain "in-the-loop" for at least 30 minutes at a time;

(ii) The system must provide timely feedback to an operator regarding the system's automated actions, the reasons for such actions, and the effects of the operator's manual actions on the system;

(iii) The system must warn operators in advance when it requires an operator to take action;

(iv) HMI design must equalize an operator's workload; and

(v) HMI design must not distract from the operator's safety related duties.

(2) *Expectation of predictability and consistency in product behavior and communications.* HMI design must accommodate an operator's expectation of logical and consistent relationships between actions and results. Similar objects must behave consistently when an operator performs the same action upon them.

(3) *End user limited ability to process information.* HMI design must therefore minimize an operator's information processing load. To minimize information processing load, the designer must:

(i) Present integrated information that directly supports the variety and types of decisions that an operator makes;

(ii) Provide information in a format or representation that minimizes the time required to understand and act; and

(iii) Conduct utility tests of decision aids to establish clear benefits such as processing time saved or improved quality of decisions.

(4) *End user limited memory.* HMI design must therefore minimize an operator's information processing load.

(i) To minimize short-term memory load, the designer shall integrate data or information from multiple sources into a single format or representation ("chunking") and design so that three or fewer "chunks" of information need to be remembered at any one time.

(ii) To minimize long-term memory load, the designer shall design to support recognition memory, design memory aids to minimize the amount of information that must be recalled from unaided memory when making critical decisions, and promote active processing of the information.

(d) Design systems that anticipate possible user errors and include capabilities to catch errors before they propagate through the system;

(1) Conduct cognitive task analyses prior to designing the system to better understand the information processing requirements of operators when making critical decisions; and

(2) Present information that accurately represents or predicts system states.

(e) When creating displays and controls, the designer must consider user ergonomics and shall:

(1) Locate displays as close as possible to the controls that affect them;

(2) Locate displays and controls based on an operator's position;

(3) Arrange controls to minimize the need for the operator to change position;

(4) Arrange controls according to their expected order of use;

(5) Group similar controls together;

(6) Design for high stimulus-response compatibility (geometric and conceptual);

(7) Design safety-critical controls to require more than one positive action to activate (e.g., auto stick shift requires two movements to go into reverse);

(8) Design controls to allow easy recovery from error; and

(9) Design display and controls to reflect specific gender and physical limitations of the intended operators.

(f) The designer shall also address information management. To that end, HMI design shall:

(1) Display information in a manner which emphasizes its relative importance;

(2) Comply with the ANSI/HFS 100–1988 standard;

(3) Utilize a display luminance that has a difference of at least 35cd/m2 between the foreground and background (the displays should be capable of a minimum contrast 3:1 with 7:1 preferred, and controls should be provided to adjust the brightness level and contrast level);

(4) Display only the information necessary to the user;

(5) Where text is needed, use short, simple sentences or phrases with wording that an operator will understand and appropriate to the educational and cognitive capabilities of the intended operator;

(6) Use complete words where possible; where abbreviations are necessary, choose a commonly accepted abbreviation or consistent method and select commonly used terms and words that the operator will understand;

(7) Adopt a consistent format for all display screens by placing each design element in a consistent and specified location;

(8) Display critical information in the center of the operator's field of view by placing items that need to be found quickly in the upper left hand corner and items which are not time-critical in the lower right hand corner of the field of view;

(9) Group items that belong together;

(10) Design all visual displays to meet human performance criteria under monochrome conditions and add color only if it will help the user in performing a task, and use color coding as a redundant coding technique;

(11) Limit the number of colors over a group of displays to no more than seven;

(12) Design warnings to match the level of risk or danger with the alerting nature of the signal; and

(13) With respect to information entry, avoid full QWERTY keyboards for data entry.

(g) With respect to problem management, the HMI designer shall ensure that the:

(1) HMI design must enhance an operator's situation awareness;

(2) HMI design must support response selection and scheduling; and

(3) HMI design must support contingency planning.

(h) Ensure that electronics equipment radio frequency emissions are compliant with appropriate Federal Communications Commission regulations. The FCC rules and regulations are codified in Title 47 of the Code of Federal Regulations (CFR).

(1) Electronics equipment must have appropriate FCC Equipment Authorizations. The following documentation is applicable to obtaining FCC Equipment Authorization:

(i) OET Bulletin Number 61 (October, 1992 Supersedes May, 1987 issue) FCC Equipment Authorization Program for Radio Frequency Devices. This document provides an overview of the equipment authorization program to control radio interference from radio transmitters and certain other electronic products and an overview of how to obtain an equipment authorization.

(ii) OET Bulletin 63: (October 1993) Understanding The FCC Part 15 Regulations for Low Power, Non-Licensed Transmitters. This document provides a basic understanding of the FCC regulations for low power, unlicensed transmitters, and includes answers to some commonly-asked questions. This edition of the bulletin does not contain information concerning personal communication services (PCS) transmitters operating under Part 15, Subpart D of the rules.

(iii) 47 Code of Federal Regulations Parts 0 to 19. The FCC rules and regulations governing PCS transmitters may be found in 47 CFR, Parts 0 to 19.

(iv) OET Bulletin 62 (December 1993) Understanding The FCC Regulations for Computers and other Digital Devices. This document has been prepared to provide a basic understanding of the FCC regulations for digital (computing) devices, and includes answers to some commonly-asked questions.

(2) Designers must comply with FCC requirements for Maximum Permissible Exposure limits for field strength and power density for the transmitters operating at frequencies of 300 kHz to 100 GHz and specific absorption rate (SAR) limits for devices operating within close proximity to the body. The Commission's requirements are detailed in parts 1 and 2 of the FCC's Rules and Regulations (47 CFR 1.1307(b), 1.1310, 2.1091, 2.1093). The following documentation is applicable to demonstrating whether proposed or existing transmitting facilities, operations or devices comply with limits for human exposure to radiofrequency RF fields adopted by the FCC:

(i) OET Bulletin No. 65 (Edition 97–01, August 1997), "Evaluating Compliance With FCC Guidelines For Human Exposure To Radiofrequency Electromagnetic Fields",

(ii) OET Bulletin No 65 Supplement A, (Edition 97–01, August 1997), OET Bulletin No 65 Supplement B (Edition 97–01, August 1997) and

(iii) OET Bulletin No 65 Supplement C (Edition 01–01, June 2001).

(3) The bulletin and supplements offer guidelines and suggestions for evaluating compliance. However, they are not intended to establish mandatory procedures. Other methods and procedures may be acceptable if based on sound engineering practice.

■ 17. Add an Appendix F to part 236 to read as follows:

Appendix F to Part 236—Minimum Requirements of FRA Directed Independent Third-Party Assessment of PTC System Safety Verification and Validation

(a) This appendix provides minimum requirements for mandatory independent third-party assessment of PTC system safety verification and validation pursuant to subpart H or I of this part. The goal of this assessment is to provide an independent evaluation of the PTC system manufacturer's utilization of safety design practices during the PTC system's development and testing phases, as required by the applicable PSP, PTCDP, and PTCSP, the applicable requirements of subpart H or I of this part, and any other previously agreed-upon controlling documents or standards.

(b) The supplier may request advice and assistance of the independent third-party reviewer concerning the actions identified in paragraphs (c) through (g) of this appendix. However, the reviewer should not engage in design efforts in order to preserve the reviewer's independence and maintain the

supplier's proprietary right to the PTC system.

(c) The supplier shall provide the reviewer access to any and all documentation that the reviewer requests and attendance at any design review or walkthrough that the reviewer determines as necessary to complete and accomplish the third party assessment. The reviewer may be accompanied by representatives of FRA as necessary, in FRA's judgment, for FRA to monitor the assessment.

(d) The reviewer shall evaluate with respect to safety and comment on the adequacy of the processes which the supplier applies to the design and development of the PTC system. At a minimum, the reviewer shall evaluate the supplier design and development process regarding the use of an appropriate design methodology. The reviewer may use the comparison processes and test procedures that have been previously agreed to with FRA. Based on these analyses, the reviewer shall identify and document any significant safety vulnerabilities which are not adequately mitigated by the supplier's (or user's) processes. Finally, the reviewer shall evaluate the adequacy of the railroad's applicable PSP or PTCSP, and any other documents pertinent to the PTC system being assessed.

(e) The reviewer shall analyze the Hazard Log and/or any other hazard analysis documents for comprehensiveness and compliance with railroad, vendor, supplier, industry, national, or international standards.

(f) The reviewer shall analyze all Fault Tree Analyses (FTA), Failure Mode and Effects Criticality Analysis (FMECA), and other hazard analyses for completeness, correctness, and compliance with railroad, vendor, supplier, industry, national, or international standards.

(g) The reviewer shall randomly select various safety-critical software modules, as well as safety-critical hardware components if required by FRA for audit to verify whether the railroad, vendor, supplier, industry, national, or international standards were followed. The number of modules audited must be determined as a representative number sufficient to provide confidence that all unaudited modules were developed in compliance with railroad, vendor, supplier, industry, national, or international standards

(h) The reviewer shall evaluate and comment on the plan for installation and test procedures of the PTC system for revenue service.

(i) The reviewer shall prepare a final report of the assessment. The report shall be submitted to the railroad prior to the commencement of installation testing and contain at least the following information:

(1) Reviewer's evaluation of the adequacy of the PSP or PTCSP including the supplier's MTTHE and risk estimates for the PTC system, and the supplier's confidence interval in these estimates;

(2) PTC system vulnerabilities, potentially hazardous failure modes, or potentially hazardous operating circumstances which the reviewer felt were not adequately identified, tracked or mitigated;

(3) A clear statement of position for all parties involved for each PTC system vulnerability cited by the reviewer;

(4) Identification of any documentation or information sought by the reviewer that was denied, incomplete, or inadequate;

(5) A listing of each applicable vendor, supplier, industry, national or international standard, process, or procedure which was not properly followed;

(6) Identification of the hardware and software verification and validation procedures for the PTC system's safety-critical applications, and the reviewer's evaluation of the adequacy of these procedures;

(7) Methods employed by PTC system manufacturer to develop safety-critical software; and

(8) If directed by FRA, methods employed by PTC system manufacturer to develop safety-critical hardware.

Issued in Washington, DC, on December 30, 2009.

Joseph C. Szabo,

Administrator.

[FR Doc. E9–31362 Filed 1–12–10; 11:15 am]

BILLING CODE 4910–06–P

Federal Register

Friday,

January 15, 2010

Part III

Federal Reserve System

12 CFR Part 222

Federal Trade Commission

16 CFR Parts 640 and 698

Fair Credit Reporting Risk-Based Pricing Regulations; Final Rule

FEDERAL RESERVE SYSTEM

12 CFR Part 222

[Regulation V; Docket No. R–1316]

FEDERAL TRADE COMMISSION

16 CFR Parts 640 and 698

RIN 3084–AA94

Fair Credit Reporting Risk-Based Pricing Regulations

AGENCIES: Board of Governors of the Federal Reserve System (Board) and Federal Trade Commission (Commission).

ACTION: Final rules.

SUMMARY: The Board and the Commission are jointly issuing final rules to implement the risk-based pricing provisions in section 311 of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act), which amends the Fair Credit Reporting Act (FCRA). The final rules generally require a creditor to provide a risk-based pricing notice to a consumer when the creditor uses a consumer report to grant or extend credit to the consumer on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that creditor. The final rules also provide for two alternative means by which creditors can determine when they are offering credit on material terms that are materially less favorable. The final rules also include certain exceptions to the general rule, including exceptions for creditors that provide a consumer with a disclosure of the consumer's credit score in conjunction with additional information that provides context for the credit score disclosure.

DATES: These rules are effective on January 1, 2011.

FOR FURTHER INFORMATION CONTACT:

Board: David A. Stein, Managing Counsel; Amy B. Henderson, Senior Attorney; or Mandie K. Aubrey, Attorney, Division of Consumer and Community Affairs, (202) 452–3667 or (202) 452–2412; or Kara L. Handzlik, Attorney, Legal Division, (202) 452–3852, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551. For users of a Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

Commission: Manas Mohapatra and Katherine White, Attorneys, Division of Privacy and Identity Protection, Bureau of Consumer Protection, (202) 326–2252, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

The Fair and Accurate Credit Transactions Act of 2003 (FACT Act) was signed into law on December 4, 2003. Public Law 108–159, 117 Stat. 1952. In general, the FACT Act amended the Fair Credit Reporting Act (FCRA) to enhance the ability of consumers to combat identity theft, increase the accuracy of consumer reports, and allow consumers to exercise greater control regarding the type and amount of solicitations they receive.

Section 311 of the FACT Act added a new section 615(h) to the FCRA to address risk-based pricing. Risk-based pricing refers to the practice of setting or adjusting the price and other terms of credit offered or extended to a particular consumer to reflect the risk of nonpayment by that consumer. Information from a consumer report is often used in evaluating the risk posed by the consumer. Creditors that engage in risk-based pricing generally offer more favorable terms to consumers with good credit histories and less favorable terms to consumers with poor credit histories.

Under section 615(h) of the FCRA, a risk-based pricing notice must be provided to consumers in certain circumstances. Generally, a person must provide a risk-based pricing notice to a consumer when the person uses a consumer report in connection with an application, grant, extension, or other provision of credit and, based in whole or in part on the consumer report, grants, extends, or provides credit to the consumer on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that person. The risk-based pricing notice requirement is designed primarily to improve the accuracy of consumer reports by alerting consumers to the existence of negative information on their consumer reports so that consumers can, if they choose, check their consumer reports for accuracy and correct any inaccurate information. It is meant to complement the existing adverse action notice provisions of the FCRA.[1]

Section 615(h) requires the Board and the Commission (the Agencies) jointly to issue rules implementing the risk-based pricing provisions. The statute requires the Agencies to address in the implementing rules the form, content, timing, and manner of delivery of any notices pursuant to section 615(h). The rules also must clarify the meaning of certain terms used in this section, including what are "material" credit terms and when credit terms are "materially less favorable." Section 615(h) gives the Agencies the authority to provide exceptions to the notice requirement for classes of persons or transactions for which the Agencies determine that risk-based pricing notices would not significantly benefit consumers. Finally, the Agencies must provide a model notice that can be used to comply with section 615(h).

The Agencies published proposed regulations that would implement these risk-based pricing provisions on May 19, 2008 (73 FR 28966). The comment period closed on August 18, 2008. The Agencies received more than 80 comment letters regarding the proposal from banks and other creditors, industry trade associations, consumer groups, a trade association representing consumer reporting agencies, and others.

II. Developing the Final Rules

In developing the risk-based pricing rules, the Agencies sought to implement the statutory provisions in a manner that would provide a substantial benefit to consumers and be operationally feasible for the wide variety of entities subject to the rules. Based on in-depth outreach with interested parties undertaken before issuing the proposed rules, the Agencies determined that it would not be operationally feasible in many cases for creditors to compare the terms offered to each consumer with the terms offered to other consumers to whom the creditor has extended credit. The Agencies considered several approaches and concluded that the most effective way to implement the statute was to develop certain tests that could serve as proxies for comparing the terms offered to different consumers. The Agencies' goal was to determine which tests would both identify those consumers who likely received materially less favorable terms than the

[1] Under § 615(a) of the FCRA, creditors that deny a consumer's application for credit, based in whole or in part on information in a consumer report, must provide an adverse action notice to that consumer. Where a creditor does not reject an applicant with impaired credit, however, but instead offers credit on less favorable terms, the creditor generally is not required to provide an adverse action notice. The Senate Committee on Banking, Housing, and Urban Affairs cited concerns that the adverse action notification construct had been made obsolete in certain circumstances and found this problematic because the adverse action notice is the "primary tool the FCRA contains to ensure that mistakes in credit reports are discovered." *See* S. Rep. No. 108–166, at 20 (Oct. 17, 2003).

terms obtained by other consumers and be operationally feasible for creditors to implement. The tests that satisfied these criteria were included in the proposed rules.

The final rules retain the tests the Agencies identified in the proposal as the best approaches for meeting the statute's requirements with some revisions made in response to the comments received on the proposal. As noted in the proposal, the Agencies recognize that no single test or approach is likely to be feasible for all of the various types of creditors to which the rules apply or for the many different credit products for which risk-based pricing is used. Therefore, the final rules provide a menu of approaches that creditors may use to comply with the statute's legal requirements. The next section provides a brief explanation of the final rules.

III. Summary of the Final Rules [2]

Risk-Based Pricing Notice

The final rules implement the risk-based pricing notice requirement of section 615(h). The final rules apply to any person that both: (i) Uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit to a consumer; and (ii) based in whole or in part on the consumer report, grants, extends, or otherwise provides credit to that consumer on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that person. The rules clarify that the risk-based pricing notice requirements apply only in connection with credit that is primarily for personal, household, or family purposes, but not in connection with business credit. For more information about the scope of the final rules, see the discussion of § ____.70 in the Section-by-Section Analysis.

Definitions

The final rules define certain key terms. Specifically, the final rules define "material terms" as the annual percentage rate for credit that has an annual percentage rate,[3] or, in the case of credit that does not have an annual percentage rate, as the financial term that the person varies based on the consumer report and that has the most significant financial impact on consumers, such as an annual membership fee or a deposit. For credit cards, which may have multiple annual percentage rates applicable to different features, "material terms" is defined generally as the annual percentage rate applicable to purchases. In addition, the final rules define "materially less favorable," as it applies to material terms, to mean that the terms granted or extended to a consumer differ from the terms granted or extended to another consumer from or through the same person such that the cost of credit to the first consumer would be significantly greater than the cost of credit to the other consumer. For more information about the definitions of these and other terms used in the final rules, see the discussion of § ____.71 in the Section-by-Section Analysis.

General Rule and Methods for Identifying Consumers Who Must Receive Notice

The final rules state that a person must provide the consumer with a notice if that person both: (i) uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit to that consumer primarily for personal, family, or household purposes; and (ii) based in whole or in part on the consumer report, grants, extends, or otherwise provides credit to that consumer on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that person. The final rules apply to the person to whom the obligation is initially payable (also referred to as "the original creditor").

A person subject to the rule may determine, on a case-by-case basis, whether a consumer has received material terms that are materially less favorable than terms other consumers have received from or through that person by comparing the material terms offered to the consumer to the material terms offered to other consumers for a specific type of credit product. Because it may not be operationally feasible for many persons subject to the rule to make such direct comparisons between consumers, the final rules provide two alternative methods for determining which consumers must receive risk-based pricing notices for those persons that prefer not to compare directly the material terms offered to their consumers. Using either of the alternative methods, a person may determine when credit offered from or through that person is on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that person.

The first alternative method is the credit score proxy method. A credit score is a numerical representation of a consumer's credit risk based on information in the consumer's credit file. The final rules permit a creditor that uses credit scores to set the material terms of credit to determine a cutoff score, representing the point at which approximately 40 percent of its consumers have higher credit scores and 60 percent of its consumers have lower credit scores, and provide a risk-based pricing notice to each consumer who has a credit score lower than the cutoff score. The final rules also provide that, in the case of credit that has been granted, extended, or provided on the most favorable material terms to more than 40 percent of consumers, a person may set its cutoff score at a point at which the approximate percentage of consumers who historically have been granted, extended, or provided credit on material terms other than the most favorable terms would receive risk-based pricing notices under this section. The final rules require periodic updating of the cutoff score.

The second alternative method is the tiered pricing method. Under this method, a creditor that sets the material terms of credit by assigning each consumer to one of a discrete number of pricing tiers, based in whole or in part on a consumer report, may use this method and provide a risk-based pricing notice to each consumer who is not assigned to the top pricing tier or tiers. The number of tiers of consumers to whom the notice is required to be given depends upon the total number of tiers. For more information about the general rule and the alternative methods for determining which consumers must receive notices, see the discussion of § ____.72 in the Section-by-Section Analysis.

[2] The Board is placing the final regulations implementing section 311 in the part of their regulations that implements the FCRA—12 CFR part 222. For ease of reference, the discussion in the **SUPPLEMENTARY INFORMATION** section uses the numerical suffix of each of the Board's regulations. The FTC also is placing the final regulations and guidelines in the part of its regulations implementing the FCRA, specifically 16 CFR part 640. However, the FTC uses different numerical suffixes that equate to the numerical suffixes discussed in the **SUPPLEMENTARY INFORMATION** section as follows: suffix .70 = FTC suffix .1, suffix .71 = FTC suffix .2, suffix .72 = FTC suffix .3, suffix .73 = FTC suffix .4, suffix .74 = FTC suffix .5, and suffix .75 = FTC suffix .6.

[3] Under Regulation Z, which implements the Truth in Lending Act, 15 U.S.C. 1601 et seq., the annual percentage rate is a measure of the cost of credit, expressed as a yearly or annualized rate. *See* 12 CFR 226.14, 226.22. Regulation Z requires creditors to disclose accurately the cost of credit, including the annual percentage rate. *See* 12 CFR 226.5a(b)(1), 226.5b(d)(6) and (12), and 226.18(e).

Application of Rule to Credit Card Issuers

The final rules set forth a special test that a credit card issuer may use to identify the circumstances in which the issuer must provide a risk-based pricing notice to consumers, as an alternative to the options discussed above. If a credit card issuer uses this option, the issuer is required to provide a risk-based pricing notice to a consumer if the consumer applies for a credit card in connection with a multiple-rate offer and, based in whole or in part on a consumer report, is granted credit at an annual percentage rate referenced in § ____.71(n)(1)(ii) that is higher than the lowest annual percentage rate referenced in § ____.71(n)(1)(ii) available under that offer. The final rules assume that a consumer who applies for credit in response to a multiple-rate offer is applying for the best rate available. For more information about the application of the rule to credit card issuers, see the discussion of § ____.72 in the Section-by-Section Analysis.

Account Review

A creditor may periodically review the consumer report of a consumer with whom the creditor has an existing credit relationship as permitted under section 604 of the FCRA. If a consumer's credit history has deteriorated, the creditor may, pursuant to applicable account terms, increase the annual percentage rate applicable to that consumer's account. The final rules generally require the creditor to provide a risk-based pricing notice to the consumer if the creditor increases the consumer's annual percentage rate in an account review based in whole or in part on a consumer report, unless the creditor provides an adverse action notice to the consumer. For more information about the application of the general rule to account reviews, see the discussion of § ____.72 in the Section-by-Section Analysis.

Content of the Notice

In addition to the minimum content prescribed by section 615(h)(5) of the FCRA, the final rules require the risk-based pricing notice to include a statement that the terms offered may be less favorable than the terms offered to consumers with better credit histories. The Agencies believe that including such a statement in the notice could encourage consumers to check their consumer reports for inaccuracies. The final rules also include special content requirements for the notice that must be provided in the context of account reviews. For more information about the content of the risk-based pricing notices, see the discussion of § ____.73 in the Section-by-Section Analysis.

Form of the Notice

The final rules require the risk-based pricing notice and account review notice to be clear and conspicuous and to be provided to the consumer in oral, written, or electronic form. The final rules also state that creditors are deemed to be in compliance with the provisions requiring risk-based pricing notices and account review notices through use of the appropriate model forms. Use of the forms is optional. For more information about the form of these notices, see the discussion of § ____.73 in the Section-by-Section Analysis.

Timing of the Notice

The final rules generally require a risk-based pricing notice to be provided to the consumer after the terms of credit have been set, but before the consumer becomes contractually obligated on the credit transaction. In the case of closed-end credit, the notice must be provided to the consumer before consummation of the transaction, but not earlier than the time the approval decision is communicated to the consumer. In the case of open-end credit, the notice must be provided to the consumer before the first transaction is made under the plan, but not earlier than the time the approval decision is communicated to the consumer. For account reviews, the notice must be provided at the time that the decision to increase the annual percentage rate is communicated to the consumer or, if no notice of the increase in the annual percentage rate is provided to the consumer prior to the effective date of the change (to the extent permitted by law), no later than five days after the effective date of the change in the annual percentage rate. The final rules explain how the required notices may be delivered in the case of certain automobile lending transactions and also include an exception to the general timing rules in the case of contemporaneous purchase credit (instant credit). For more information about the timing requirements, see the discussion of § ____.73 in the Section-by-Section Analysis.

Exceptions to the Risk-Based Pricing Notice Requirement

The final rules contain a number of exceptions to the risk-based pricing notice requirement. The final rules implement the statutory exceptions that apply: (i) When a consumer applies for, and receives, specific material terms; and (ii) when a consumer has been or will be provided a notice of adverse action under section 615(a) of the FCRA in connection with the transaction.

In addition, the Agencies have used their exception authority set forth in section 615(h)(6)(iii) of the FCRA to create exceptions for creditors that provide consumers who apply for credit with a notice consisting of their credit score and certain additional information, in lieu of the risk-based pricing notice. For credit secured by one to four units of residential real property, a creditor may provide consumers with a notice containing the credit score disclosure required by section 609(g) of the FCRA along with certain additional information that provides context for the credit score disclosure. This notice also describes the creditor's use of credit scores to set the terms of credit and explains how consumers can obtain their free annual consumer reports. In the case of credit that is not secured by one to four units of residential real property, a creditor similarly may provide consumers with a notice of their credit score and certain additional information specified in the final rules. The final rules also include optional model forms for use by creditors.

In some cases, a consumer's credit file may not contain sufficient information to permit a consumer reporting agency or other person to calculate a score for that individual. In those cases, a creditor using either of the credit score disclosure exceptions described above is permitted to comply with the rules by providing an alternate narrative notice that does not include a credit score to those consumers for whom a score is not available.

The final rules also include an exception for prescreened solicitations. Under this exception, a creditor is not required to provide a risk-based pricing notice if that creditor obtains a consumer report that is a prescreened list and uses that consumer report to make a firm offer of credit to consumers, regardless of how the material terms of that offer compare to the terms that the creditor includes in other firm offers of credit. For more information about the exceptions, see the discussion of § ____.74 in the Section-by-Section Analysis.

Free Consumer Report

Section 615(h)(5)(C) of the FCRA states that the risk-based pricing notice must contain a statement informing the consumer that he or she may obtain a copy of a consumer report, without charge, from the consumer reporting agency identified in the notice. The final rules are based on the Agencies' reading of section 615(h) as giving

consumers a right to a separate free consumer report upon receipt of a risk-based pricing notice.

The notices provided under the credit score disclosure exceptions are not risk-based pricing notices, and therefore do not give rise to the right to a free consumer report. Instead, a consumer who receives a credit score disclosure notice that identifies a consumer reporting agency or other third party as the source of the credit score could request the free annual consumer report that is available from each of the three nationwide consumer reporting agencies. For more information about the credit score disclosure exceptions, see the discussion of § ____.74 in the Section-by-Section Analysis.

One Notice per Credit Extension

The final rules contain a rule of construction to clarify that, in general, only one risk-based pricing notice is required to be provided per credit extension, except in the case of a notice provided in connection with an account review. The person to whom the obligation is initially payable must provide the risk-based pricing notice, or satisfy one of the exceptions, even if the loan is assigned to a third party or if that person is not the funding source for the loan. Although legal responsibility for providing the notice rests with the person to whom the obligation is initially payable, the various parties involved in a credit extension may determine by contract which party will send the notice. Generally, purchasers or assignees of credit contracts are not subject to the risk-based pricing notice requirements, except in the case of a notice provided in connection with an account review. For more information about the rules of construction, see the discussion of § ____.75 in the Section-by-Section Analysis.

Multiple Consumers

The final rules contain a rule of construction to clarify that in a transaction involving two or more consumers who are granted, extended, or otherwise provided credit, a person must provide a risk-based pricing notice to each consumer. If the consumers have the same address, a person may satisfy the requirements by providing a single notice addressed to both consumers. If the consumers do not have the same address, a person must provide a notice to each consumer.

For credit score disclosure exception notices, a person must provide a separate notice to each consumer in a transaction involving two or more consumers who are granted, extended, or otherwise provided credit. Whether the consumers have the same address or not, the person must provide a separate notice to each consumer. Each separate notice must contain only the credit score(s) of the consumer to whom the notice is provided, and not the credit score(s) of the other consumer. For more information about the rules of construction, see the discussion of § ____.75 in the Section-by-Section Analysis.

Model Forms

Section 615(h)(6)(B)(iv) requires the Agencies to provide a model notice that may be used to comply with the risk-based pricing rules. For each of the risk-based pricing notices and alternative credit score disclosures, the Agencies have finalized model forms that are appended to the final rules as Appendices H–1 through H–5 of the Board's rule and Appendices B–1 through B–5 of the Commission's rule. For more information, see the discussion of the model forms in the Section-by-Section Analysis.

IV. Section-by-Section Analysis

Section ____.70 Scope

Proposed § ____.70 set forth the scope of the Agencies' rules. Proposed paragraph (a)(1) generally tracked the statutory language from section 615(h)(1) of the FCRA, except that it limited coverage of the proposed rules to credit to a consumer that is primarily for a consumer's personal, family, or household purposes.

Proposed paragraph (a)(2) provided that the risk-based pricing rules do not apply to persons who use consumer reports in connection with an application for, or grant, extension, or other provision of, credit for business purposes. Section 615(h) of the FCRA does not explicitly state that it applies only to a person using a consumer report in connection with consumer purpose credit. However, the statute's repeated use of the term "consumer," which section 603(c) of the FCRA defines to mean "an individual," suggests that Congress intended for the risk-based pricing provisions to apply only to credit that is primarily for personal, family, or household purposes.

Business-purpose loans generally are made to partnerships or corporations, as well as to individual consumers in the case of sole proprietorships. The Agencies understand that business borrowers generally are more sophisticated than individual consumers. For business loans made to partnerships or corporations, a creditor may obtain consumer reports on the principals of the business who may serve as guarantors for the loan.[4] The credit is granted or extended to the business entity, however, based primarily on that entity's creditworthiness, and that entity is primarily responsible for the loan. In addition, credit is not granted, extended, or provided to a guarantor; rather a guarantor simply supports, and assumes liability for, the credit granted, extended, or provided to the consumer. Also, when a consumer report is used in connection with a small business loan, the report may factor into the underwriting process quite differently than a consumer report utilized in connection with a consumer purpose loan.

Most commenters agreed that the coverage of the proposed rule, including the exclusion of business purpose credit, was appropriate. Some commenters requested that the Agencies clarify that the rules do not apply to consumer leases. Consumer leases generally are not treated as "credit" under the Equal Credit Opportunity Act (ECOA) and the Board's Regulation B (12 CFR 202.1 *et seq.*), which implements the ECOA.[5] Thus, the rule does not apply to consumer lease transactions. The final rules retain paragraph (a) substantively as proposed.

Proposed paragraph (b) provided that compliance with either the Board's or the Commission's substantively identical risk-based pricing rules would be deemed to satisfy the requirements of the statute. The Board proposed to codify its risk-based pricing rules at 12 CFR 222.70 *et seq.,* and the Commission proposed to codify its risk-based pricing rules at 16 CFR 640 *et seq.* Proposed paragraph (c), consistent with the statutory language in section 615(h)(8), provided that the risk-based pricing rules would be enforced in accordance with sections 621(a) and (b) by the relevant federal agencies and officials identified in those sections, including state officials. Under the statute and proposed rules, the risk-based pricing provisions would not provide for a

[4] *See* FTC Staff Opinion Letter from Joel Winston to Julie L. Williams, J. Virgil Mattingly, William F. Kroener, III, and Carolyn Buck (June 22, 2001) (available at *http://www.ftc.gov/os/statutes/fcra/tatelbaumw.shtm*).

[5] In *Brothers* v. *First Leasing,* 724 F.2d 789 (9th Cir.), *cert. denied,* 105 S. Ct. 121 (1984), the U.S. Court of Appeals for the Ninth Circuit held that consumer leases as defined by the Consumer Leasing Act are subject to the ECOA. However, the Board believes Congress did not intend the ECOA to cover lease transactions unless the transaction results in a "credit sale" as defined in the TILA and Regulation Z. Congress has consistently viewed lease and credit transactions as distinct financial transactions and has treated them separately under the Consumer Credit Protection Act.

private right of action. The Agencies did not receive comments on proposed paragraphs (b) or (c). Therefore, paragraphs (b) and (c) are adopted substantively as proposed in the final rules, with minor changes for clarity.

Section ____.71 Definitions

Proposed § ____.71 contained definitions for the following terms: "annual percentage rate" (and the related terms "closed-end credit" and "open-end credit plan"), "credit," "creditor," "credit card," "credit card issuer," "credit score," "material terms" (and the related term "consummation"), and "materially less favorable." These definitions are retained in the final rules, with certain revisions as discussed below.

Annual Percentage Rate and Related Terms

Proposed paragraph (a) defined "annual percentage rate" by incorporating the definitions of "annual percentage rate" for open-end credit plans and closed-end credit set forth in sections 226.14(b) and 226.22 of Regulation Z, respectively (12 CFR 226.14(b), 12 CFR 226.22). Paragraph (b) of the proposal defined "closed-end credit" to have the same meaning as in Regulation Z (12 CFR 226.2(a)(10)). Paragraph (k) of the proposal defined "open-end credit plan" to have the same meaning as set forth in the Truth in Lending Act (TILA), as implemented by the Board in Regulation Z and the Official Staff Commentary to Regulation Z (15 U.S.C. 1602(i), 12 CFR 226.2(a)(20)).

The Agencies received one comment in support of the definition of "annual percentage rate" and no comments regarding "closed-end credit" and "open-end credit plan." The Agencies believe that use of the Regulation Z definitions promotes consistency among the rules pertaining to consumer credit, including the rules that implement the FCRA and the TILA. Therefore, the definitions of "annual percentage rate," "closed-end credit," and "open-end credit plan" are adopted as proposed in the final rules, but renumbered as paragraphs (b), (c), and (p), respectively.

Consummation

Proposed paragraph (c) defined the term "consummation" to mean the time that a consumer becomes contractually obligated on a credit transaction. The proposed definition was identical to the definition of "consummation" in Regulation Z. 12 CFR 226.2(a)(13). The Agencies received no comments on this definition. In the final rules, the definition of "consummation" is substantively the same as in the proposal, but the text has been revised (and redesignated as paragraph (e)) so that the term is defined to have the same meaning as in 12 CFR 226.2(a)(13). This is consistent with other definitions in the final rules that cross-reference existing definitions.

Credit, Creditor, Credit Card, Credit Card Issuer, and Credit Score

Proposed paragraphs (d), (e), (f), (g), and (h) incorporated the FCRA's statutory definitions of "credit," "creditor," "credit card," "credit card issuer," and "credit score." The Agencies received few comments on these definitions, all of which incorporate existing statutory definitions. They are adopted as proposed in the final rules as paragraphs (h), (i), (j), (k), and (l).

Material Terms

Proposed paragraph (i) contained three separate definitions of "material terms," depending on whether the credit (1) is extended under an open-end credit plan for which there is an annual percentage rate, (2) is closed-end credit for which there is an annual percentage rate, or (3) is credit for which there is no annual percentage rate. Proposed paragraph (i)(1) defined "material terms" for credit extended under an open-end credit plan as the annual percentage rate required to be disclosed in the account-opening disclosures required by Regulation Z. The definition excluded both any temporary initial rate that is lower than the rate that would apply after the temporary rate expires and any penalty rate that would apply upon the occurrence of one or more specific events, such as a late payment or extension of credit that exceeds the credit limit. For credit cards (other than those used to access a home equity line of credit), the proposal defined "material terms" as the annual percentage rate applicable to purchases ("purchase annual percentage rate"), and no other annual percentage rate.

Proposed paragraph (i)(2) defined "material terms" for closed-end credit as the annual percentage rate required to be disclosed prior to consummation under the provisions of Regulation Z regarding closed-end credit (12 CFR 226.17(c) and 226.18(e)). This definition did not address temporary initial rates or penalty rates because, for purposes of the closed-end provisions of Regulation Z, a penalty rate is not included in the calculation of the annual percentage rate and a temporary initial rate is but one component of a single annual percentage rate for the transaction.

Most commenters supported defining material terms as the annual percentage rate for credit extended under an open-end credit plan and closed-end credit and, in the case of credit cards, the purchase annual percentage rate. Some commenters, however, suggested that the definition should include certain additional terms, such as fees or a down payment, depending upon the particular loan product. A consumer group commenter suggested that the definition should not be limited to a single term, but instead should be defined as any change to a credit transaction that is based upon a consumer's credit history or credit score.

For practical and operational reasons, §§ ____.71(i)(1) and (i)(2) are adopted largely as proposed as renumbered §§ ____.71(n)(1) and (n)(2), but with certain substantive revisions as discussed below. The Agencies recognize that the pricing of credit products is complex and that the annual percentage rate is only one of the costs of consumer credit. However, the Agencies have adopted a definition of "material terms" that generally focuses on a single term in order to ensure that there is a feasible way for creditors to identify those consumers who must receive risk-based pricing notices. Based on the comments received, extensive outreach to interested parties, and their own analysis, the Agencies conclude that it would not be feasible for creditors to compare credit terms on the basis of multiple variables. For example, it is unclear how a creditor would compare one mortgage loan with a given combination of annual percentage rate, down payment, and points and fees to another such loan where all three variables differ, even for the same product, such as a 30-year fixed-rate loan.

Focusing on the annual percentage rate is appropriate because most consumer credit products have an annual percentage rate, and it has historically been a significant factor, and often the most significant factor, in the pricing of credit. The Agencies understand that the annual percentage rate is the primary term that varies as a result of risk-based pricing. For credit cards, which often have multiple annual percentage rates applicable to purchases, cash advances, and balance transfers, purchases are the most common type of transaction. The Agencies understand that the annual percentage rate applicable to purchases is the primary term that varies as a result of risk-based pricing. Thus, the Agencies conclude that, in most cases, defining "material terms" with reference to the annual percentage rate (or the purchase annual percentage rate, in the case of credit cards) will effectively

target those consumers who are likely to have received credit on terms that are materially less favorable than the terms offered to other consumers.

One commenter requested clarification regarding whether the definition of "material terms" for credit cards in § ____.71(n)(1)(ii) excludes the temporary initial annual percentage rate and penalty annual percentage rate, as are excluded in § ____.71(n)(1)(i), the definition applicable to credit extended under an open-end credit plan. Section ____.71(n)(1)(ii) is a specific application of the general definition of "material terms" for credit extended under an open-end credit plan to a specific type of product, credit cards, that frequently has multiple annual percentage rates applicable to different balances. Therefore, the exclusions in § ____.71(n)(1)(i) of the final rules apply to all credit extended under an open-end credit plan, including credit cards.

Upon further analysis, the Agencies also have added "any fixed annual percentage rate option for a home equity line of credit" as an additional exclusion from § ____.71(n)(1)(i). Most annual percentage rates for home equity lines of credit are variable. Some creditors, however, also offer a fixed annual percentage rate option, which may be exercised on some portion of the advances. In these arrangements, the variable annual percentage rate is the most significant pricing term. Therefore, the Agencies have excluded the fixed annual percentage rate option from the definition. Finally, the Agencies have changed the citations in § ____.71(n)(1)(i) of the final rules to reflect amendments to Regulation Z made subsequent to the proposed rule.[6]

In response to one commenter's suggestion, the Agencies have excluded charge cards from § ____.71(n)(1)(ii). Under Regulation Z, a "charge card" is defined as a credit card on an account for which no periodic rate is used to compute a finance charge. 12 CFR 226.2(a)(15). This exclusion reflects the fact that charge cards do not have an annual percentage rate. As discussed below, material terms of charge cards are addressed in paragraph (n)(3).

Another commenter suggested that the rule should account for situations where a credit card has no purchase annual percentage rate. The final rules provide that in those instances, material terms means "the annual percentage rate that varies based on information in a consumer report and that has the most significant financial impact on consumers." For example, if a credit card product does not permit purchases, but allows for balance transfers and cash advances, the material term would be whichever of the two annual percentage rates varies based on information in a consumer report and has the most significant impact on consumers.

Proposed paragraph (i)(3), renumbered as paragraph (n)(3) in the final rules, defined "material terms" for credit with no annual percentage rate as any monetary terms that the person varies based on information in a consumer report, such as the down payment or deposit. Some commenters agreed with the definition, but other commenters suggested that "any monetary terms" should be limited to a single monetary term. For the same operational concerns that led the Agencies to focus exclusively on the annual percentage rate, the Agencies agree that the third prong of the definition should focus on a single significant term. Thus, in the final rules, "material terms" for credit with no annual percentage rate is defined as "the financial term that varies based on information in a consumer report and that has the most significant financial impact on consumers." By way of example, the final rules clarify that, depending upon the creditor's business and pricing practices, a significant financial term may include a deposit required by a telephone company or utility or an annual membership fee required to obtain a charge card.

Materially Less Favorable Material Terms

Proposed paragraph (j) defined "materially less favorable," when applied to material terms, to mean that the terms granted, extended, or otherwise provided to a consumer differ from the terms granted or extended to another consumer from or through the same person such that the cost of credit to the first consumer would be significantly greater than the cost of credit granted or extended to the other consumer. This definition clarified that a comparison between one set of material terms and another set of material terms generally would be required to satisfy the general rule and to identify which consumers must receive the notice.

Some commenters stated that the definition of "materially less favorable" was generally appropriate, but other commenters believed the Agencies should define the term with more objective criteria. The Agencies believe the definition of "materially less favorable" provides sufficient guidance regarding how to determine whether a particular set of terms is materially less favorable. Thus, the Agencies are adopting the definition of "materially less favorable" substantively as proposed as renumbered paragraph (o), with some revisions for clarity. The phrase "or otherwise provided" has been added to the definition to track the language of the statute. As noted in the supplementary information to the proposal, factors relevant to determining the significance of a difference in the cost of credit include the type of credit product, the term of the credit extension, if any, and the extent of the difference between the material terms granted, extended, or otherwise provided to the consumer and the material terms granted, extended, or otherwise provided to the comparison group.

Suggested Definitions

Two commenters suggested that terms such as "consumer" should also be defined in the final rules. For clarity and consistency, the final rules add definitions of the following terms by reference to the FCRA's statutory definitions: "adverse action" is defined in paragraph (a); "consumer" is defined in paragraph (d); "consumer report" is defined in paragraph (f); "consumer reporting agency" is defined in paragraph (g); "firm offer of credit" is defined in paragraph (m); and "person" is defined in paragraph (q).

Section ____.72 General Requirements for Risk-Based Pricing Notices

General Rule

Proposed § ____.72 established the basic rules implementing the risk-based pricing notice requirement of section 615(h). Paragraph (a) stated the general requirement that a person must provide the consumer with a notice if that person both: (i) uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit to that consumer that is primarily for personal, family, or household purposes; and (ii) based in whole or in part on the consumer report, grants, extends, or otherwise provides credit to that consumer on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that person. This paragraph mirrored the language in proposed § ____.70(a) and generally tracked the statutory language. In the final rules, paragraph (a) is adopted as proposed.

The proposed rules did not define what constitutes "a substantial proportion" of consumers. Some commenters stated that this term was too subjective and should be defined. The Agencies, however, do not believe

[6] 74 FR 5244 (Jan. 29, 2009).

it is appropriate to define "a substantial proportion" because no definition of "a substantial proportion" could reflect the widely varying pricing practices of creditors. For example, one creditor may offer its most favorable material terms to ninety percent of its consumers and materially less favorable material terms to ten percent of its consumers, while another may offer its most favorable material terms to ten percent of its consumers and materially less favorable material terms to ninety percent of its consumers. A third creditor may offer its most favorable material terms to one percent of its consumers, slightly less favorable material terms to twenty percent of its consumers, and materially less favorable material terms to its remaining consumers.

While each creditor's "substantial proportion" determination is an individual decision, the Agencies expect that creditors will consider "a substantial proportion" as constituting more than a de minimis percentage, but that may or may not represent a majority. The Agencies caution that creditors should not automatically apply the proportions set forth in the proxy methods when determining what constitutes "a substantial proportion" for purposes of making a direct comparison. Rather, creditors should determine what constitutes "a substantial proportion" based on their own circumstances.

Although the statute would permit various interpretations of "from or through that person," the Agencies in the proposal interpreted the phrase to refer to the person to whom the obligation is initially payable, *i.e.,* the original creditor. Under this interpretation, the original creditor would be responsible for determining whether consumers received materially less favorable material terms and providing risk-based pricing notices to such consumers, whether or not that person is the source of funding for the loan. The Agencies recognized that this interpretation would exclude from the scope of the proposed rules brokers and other intermediaries who do not themselves grant, extend, or provide credit to consumers, but who, based in whole or in part on a consumer report, shop credit applications to creditors that offer less favorable rates than other creditors.

Many commenters generally agreed that it is appropriate to require the original creditor to provide the risk-based pricing notice, rather than a broker or other intermediary. Some commenters, however, suggested that the Agencies require intermediaries to provide the notices in certain contexts, such as automobile or mortgage lending, instead of the original creditor. Others recommended that the Agencies allow either the original creditor or the intermediary to provide the notice.

The Agencies continue to believe that it is appropriate to require the original creditor, but not a broker or other intermediary, to provide the risk-based pricing notice. An intermediary's decision regarding where to shop a consumer's credit application generally occurs before the material terms are set. Thus, at the time the application is shopped to various creditors, it is too early in the process to perform the direct comparison of material terms required by the statute, even if a consumer report influenced the intermediary's decision regarding where to shop the consumer's credit application. Moreover, a rule requiring intermediaries to provide notices when they shop applications to certain creditors would frequently result in the consumer receiving multiple risk-based pricing notices in connection with a single extension of credit. The Agencies believe that, in general, a consumer would not benefit from receiving more than one risk-based pricing notice in connection with a single extension of credit and requiring multiple notices would increase compliance burdens and costs.

In certain situations, automobile dealers serve as the original creditor, but extend credit contingent on the ability to assign the loan to a third-party—a process known as "three-party financing." A typical three-party automobile financing transaction involves an automobile dealer, a consumer, and a third-party creditor or financing source. In these transactions, the dealer sells a vehicle to a consumer, the consumer signs a retail installment sale contract with the dealer, and the dealer assigns the contract to a third-party financing source that has notified the dealer that it will purchase the consumer's contract on specified terms. The third-party financing source then services the debt directly with the customer.

Some commenters asserted that in three-party financing transactions, automobile dealers are not engaged in risk-based pricing and therefore should not be subject to the requirements of the rules. These commenters stated that, although the dealer obtains a consumer's credit report in a three-party financing transaction, it does so in order to determine which third-party creditors to send the consumer's credit application, and not to set the terms of the retail installment sale contract. According to these commenters, the rate offered to the consumer by the automobile dealer is not based on the consumer's credit-worthiness, but rather on the combination of the "buy" rate—the wholesale rate at which the third-party creditor has indicated it will purchase the consumer's loan (which is determined, in part, by the third-party creditor's underwriting standards)—and the retail margin the dealer has been able to negotiate with the consumer. These commenters stated that in such circumstances, the automobile dealer is not engaged in risk-based pricing because it is the third-party creditor, not the dealer, who analyzes the consumer's credit-worthiness.

The Agencies disagree with the commenters' contention that three-party financing does not involve risk-based pricing by the automobile dealer. In the examples provided by the commenters, the automobile dealer uses a consumer report in connection with an application for credit to determine which third-party financing source it will attempt to assign the retail installment sale contract, and on what material terms. The material terms of the sales contract—specifically the annual percentage rate of the automobile loan—are based, in part, on the "buy" rate offered or expected to be offered by the third-party financing source. The automobile dealer's use of a consumer report to determine which third-party financing source is likely to purchase the retail installment sale contract and at what "buy rate," and to set the annual percentage rate based in part on the "buy rate," is conduct that fits squarely within the description of risk-based pricing in § ____.72(a) of the final rules. Thus, automobile dealers that are original creditors in a three-party financing transaction must provide risk-based pricing notices to consumers, in accordance with the rules.

Commenters also suggested that the Agencies allow the original creditor to provide a risk-based pricing notice to all consumers who apply for credit, including those who did not receive materially less favorable terms. However, the statute's general rule does not suggest that a notice should be provided to every consumer who applies for credit. Moreover, the risk-based pricing notice requirement was designed to be a substitute for adverse action notices when a consumer received less favorable credit terms based on his or her consumer report, rather than being denied credit.[7] The

[7] S. Rept. No. 108–166 (Oct. 17, 2003) at 20 provides: "Under current law, a consumer is only provided an adverse action notice when the consumer does not qualify for credit or rejects a counteroffer made by a creditor. * * * [D]espite the many benefits of risk-based pricing, it has made the

Agencies believe that providing a notice to all consumers who apply for credit would diminish the impact of notifying a subset of consumers that they received credit on less than the best terms based on information in a consumer report. Providing a notice to all consumers who apply for credit would also have the effect of allowing consumers to receive a free consumer report whenever they applied for credit. For the foregoing reasons, the Agencies conclude that a person that uses a consumer report to grant, extend, or otherwise provide credit on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers is required to provide a risk-based pricing notice only to those consumers who receive materially less favorable terms.

Under the final rules, a person is required to provide notice only to consumers to whom it "grants, extends, or otherwise provides credit." Except as discussed below, this generally refers to any consumer who applies and is approved for credit. A person does not grant, extend, or otherwise provide credit to a consumer who merely acts as a guarantor, co-signer, surety, or endorser for another consumer who applies and is approved for credit. As noted above, a guarantor, co-signer, surety, or endorser simply supports, and assumes liability for, credit granted, extended, or provided to a consumer, but does not itself receive a grant, extension, or other provision of credit.

Some commenters requested that the Agencies clarify whether a notice is required when a person grants credit, but a consumer does not accept the credit. As explained below in the discussion of § ____.73(c), a person is generally only required to provide a notice before consummation in the case of closed-end credit and before the first transaction in the case of open-end credit. A person may grant credit to a consumer, and the consumer may reject the offer of credit before a notice is required to be provided. Thus, some consumers who are granted credit may not receive a notice if they decline that credit before they are given the notice. In practice, however, some of these consumers may receive risk-based pricing notices if creditors provide notices at the time the decision to grant, extend, or provide credit is communicated to the consumer.[8]

Determining Which Consumers Must Receive a Notice

The Agencies proposed three methods that a person could use to determine which consumers must receive a risk-based pricing notice. The proposed direct comparison method would permit a person to apply the statutory test and determine on a case-by-case basis whether a consumer received from the person materially less favorable terms than the terms a substantial proportion of consumers received from that person. The Agencies also proposed two proxy methods: the credit score proxy method and the tiered pricing method. Under the credit score proxy method, a person could comply with the rules by (i) determining the credit score that represents the point at which approximately 40 percent of its consumers have higher credit scores and approximately 60 percent of its consumers have lower credit scores, and (ii) providing a risk-based pricing notice to each consumer with a credit score below that cutoff score. Under the tiered pricing method, a person that sets the material terms of credit granted, extended, or otherwise provided to a consumer by placing the consumer within one of a discrete number of pricing tiers could comply with the rules by providing a risk-based pricing notice to those consumers who are not placed in the person's best pricing tier or tiers. Consumers identified by either of these two alternative methods would be deemed to have been granted, extended, or otherwise provided credit on materially less favorable material terms.

Commenters supported the Agencies' decision to provide several methods for determining which consumers must receive a risk-based pricing notice. Many commenters believed the three methods were appropriate.

One commenter suggested an alternative method for determining which consumers must receive a risk-based pricing notice. This commenter suggested that the Agencies permit a method whereby creditors would determine the median annual percentage rate of consumers who received a particular type of product over a period of time and provide the notice to those receiving an annual percentage rate less favorable than that median. This suggestion was not adopted because it poses certain practical difficulties. Because rates fluctuate over time, sometimes quite dramatically, the median would have to be recalculated and recalibrated relatively frequently to retain an accurate measure of the median annual percentage rate. This would likely be impractical in many cases.

Direct Comparisons and Materially Less Favorable Material Terms

Under the proposed rule, creditors could determine, on a case-by-case basis, whether a consumer had received materially less favorable terms than the terms a substantial proportion of consumers have received from or through that creditor. The Agencies acknowledged that when a creditor undertakes direct, consumer-to-consumer comparisons, such comparisons necessarily must take into account the unique aspects of that creditor's business. Creditors would have to compare the transaction at issue with past transactions of a similar type and control for changes in interest rates and other market conditions over time. In addition, the Agencies recognized that a particular method of comparison that is sensible and feasible for one creditor may not be sensible and feasible for another creditor. Thus, the Agencies did not propose a quantitative standard or specific methodology for determining whether a consumer is receiving materially less favorable terms.

Nevertheless, the Agencies stated that the determination should be made in a reasonable manner and outlined their expectations for creditors who use this method. The creditor would first need to identify the appropriate subset of its current or past consumers to compare to any given consumer. The subset would need to be an adequate sample of consumers who have applied for a specific type of credit product. The creditor also would need to tailor its comparison to disregard any underwriting criteria that do not depend upon consumer report information. Such a comparison also would have to account for changes in the creditor's customer base, product offerings, or underwriting criteria over time. Similarly, adjustments would have to be made if the terms offered to consumers in the past are not presently offered to consumers. The Agencies would expect that creditors would provide risk-based pricing notices to some, but fewer than all, of the consumers to whom they extend credit.

Many commenters believed the direct comparison method would likely be impractical for most creditors. Some stated that the method was too subjective. Commenters nevertheless recommended that the option should be retained in the final rules. Industry

current adverse action notification construct obsolete in certain circumstances. This is problematic in as much as the adverse action notice is the primary tool the FCRA contains to ensure that mistakes in credit reports are discovered."

[8] However, where a consumer applies for specific credit terms and the creditor makes a counteroffer which the consumer does not accept, the creditor must provide an adverse action notice to the consumer. *See* 12 CFR 202.2(c)(1)(i).

commenters also requested clarification regarding the phrases "similar types of transactions" and "given class of products." Some of those commenters suggested that the Agencies provide reasonable flexibility to creditors when classifying a "given class of products." They also suggested that the Agencies provide a better definition of the term. One commenter suggested that the Agencies use either the term "similar types of transactions" or "given class of products," rather than both terms.

In the final rules, § ____.72(b) is generally adopted as proposed, with certain changes. The Agencies have substituted the term "specific type of credit product" for the proposed terms "similar types of transactions" and "given class of products" in the final rules in order to eliminate ambiguity in the terminology. The final rules define the term "specific type of credit product" to mean "one or more credit products with similar features that are designed for similar purposes." The final rules also provide examples of what constitutes a specific type of credit product, such as student loans, new auto loans, used auto loan, and others. The Agencies have also made non-substantive changes for clarity.

The Agencies recognize that different creditors' consideration of various factors when making direct comparisons may result in two creditors reaching opposite conclusions about the materiality of the same difference in annual percentage rates. For example, a credit card issuer considering these factors may conclude that a one-quarter percentage point difference in the annual percentage rate is not material, whereas a mortgage lender may conclude that a one-quarter percentage point difference in the annual percentage rate is material. In assessing the extent of the difference between two sets of material terms, a creditor should consider how much the consumer's cost of credit would increase as a result of receiving the less favorable material terms and whether that difference is likely to be important to a reasonable consumer.

Creditors may use one of the alternative methods, set forth below, if they determine the direct comparison method is not practical. The Agencies note that although a person may use the alternative methods, for purposes of consistency a person must use the same method to evaluate all consumers who are granted, extended, or otherwise provided a specific type of credit product from or through that person. For example, if a creditor uses the credit score proxy method to evaluate consumers who obtain credit to finance the purchase of a new automobile, the creditor must use that method for all such consumers for new automobile loans. On the other hand, the Agencies recognize that the feasibility of these methods may vary for different types of credit products, and creditors may use different methods for different types of credit products.

Credit Score Proxy Method

Proposed § ____.72(b)(1) set forth the credit score proxy method for determining which consumers should receive risk-based pricing notices. That subsection discussed the credit score proxy method; how to determine the cutoff score when using this method and how to recalculate that cutoff score; how to determine the cutoff score when using two or more credit scores; and how to determine a cutoff score when a credit score is not available. In the final rules, the credit score proxy method is adopted generally as proposed. However, the final rules contain some modifications from the proposal, as discussed below, made in response to comments received and the Agencies' own analysis.

General Rule

Proposed paragraph (b)(1)(i) set forth the credit score proxy method. Under this method, a person that sets the material terms of credit granted, extended, or otherwise provided to a consumer, based in whole or in part on a credit score, would comply with the rules by (i) determining the credit score that represents the point at which approximately 40 percent of its consumers have higher credit scores and approximately 60 percent of its consumers have lower credit scores, and (ii) providing a risk-based pricing notice to each consumer with a credit score below that cutoff score.[9] A creditor using the credit score proxy method would not be required to consider the actual credit terms offered to each consumer. Rather, that creditor would only have to compare the credit score of a given consumer with the pre-calculated cutoff score to determine whether a notice is required.

The credit score proxy method focused on a single variable: the consumer's credit score. A credit score obtained from an entity regularly engaged in the business of selling credit scores is based on information in a consumer report. For a creditor that obtains such a credit score, the credit score proxy method generally would eliminate the influence of variables that are not derived from information in a consumer report, such as the consumer's income, the term of the loan, or the amount of any down payment. In effect, this method would substitute a comparison of the credit scores of different consumers as a proxy for a comparison of the material terms offered to different consumers.

Commenters' suggestions regarding an appropriate cutoff point varied, but many suggested that the Agencies modify the proposed 40 percent/60 percent cutoff score point. Many commenters generally believed the cutoff score should be at a point where less than 60 percent of consumers receive the risk-based pricing notice. For example, some commenters believed the point at which a cutoff score is set should be where 50 percent of consumers have higher credit scores and 50 percent have lower credit scores, such that only those 50 percent of consumers with lower credit scores receive the risk-based pricing notice. The Agencies continue to believe that setting the standard for the cutoff score at a point that requires notices to be provided to the approximately 60 percent of a creditor's consumers who have the lowest credit scores is appropriate and reasonable. For example, one major credit score developer has published a national distribution of its scores, which indicates that approximately 40 percent of consumers receive scores that would likely enable them to qualify for the most favorable terms available.[10] Thus, the final rules retain as the cutoff score the point at which approximately 40 percent of a creditor's consumers have higher credit scores and approximately 60 percent of its consumers have lower credit scores.

One commenter requested greater flexibility to determine the cutoff score where the creditor could demonstrate that the 40 percent/60 percent cutoff score did not reflect the creditor's own lending experience. In the final rules, a new § ____.72(b)(1)(ii) is adopted to address such situations and an example is added under § ____.72(b)(1)(v)(B) to demonstrate this alternative.

In the case of credit that has been granted, extended, or provided on the most favorable material terms to more than 40 percent of consumers, § ____.72(b)(1)(ii) of the final rules permits a person to set its cutoff score

[9] The proposed rules did not require precision in the calculation of the 40 percent/60 percent cutoff point. Depending on the available data set and the practices of the creditor, the cutoff point may be approximate.

[10] *See* Credit Basics: National Distribution of FICO Scores. Retrieved June 3, 2009. *http://www.myfico.com/CreditEducation/CreditScores.aspx* (showing that 40 percent of consumers have FICO scores of 750 or higher).

at a point at which the approximate percentage of consumers who historically have been granted, extended, or provided credit on material terms other than the most favorable terms would receive risk-based pricing notices under this section. A creditor may determine the consumers who historically have been granted, extended, or provided credit on certain terms by using either the sampling approach or the secondary source approach in § ____.72(b)(1)(iii), as discussed below. For example, a credit card issuer may take a representative sample of consumers to whom it granted, extended, or provided credit over the preceding six months and determine that approximately 80 percent of those consumers received credit at its lowest annual percentage rate, and 20 percent received credit at a higher annual percentage rate. Approximately 80 percent of the sampled consumers have a credit score at or above 750 (on a scale of 350 to 850), and 20 percent have a credit score below 750. Accordingly, the card issuer selects 750 as its cutoff score. A creditor that acquires a credit portfolio as a result of a merger or acquisition also may apply this alternative approach using information it obtained from the party from which it acquired the portfolio regarding the percentage of consumers who historically received the most favorable material terms in that portfolio, as discussed below. A creditor is permitted, but not required, to use this alternative approach to the credit score proxy method. A creditor may always use the 40 percent/60 percent approach to determining its cutoff score, although, as noted above, the creditor must use the same approach to evaluate all consumers who are granted, extended, or otherwise provided a specific type of credit product from or through that person.

This alternative approach may reduce the number of risk-based pricing notices provided to consumers who are granted, extended, or provided credit on the most favorable material terms as compared with strictly applying the 40 percent/60 percent approach. In the example provided above, for instance, the creditor may provide notices only to the 20 percent of consumers who actually received credit on material terms other than the most favorable terms. If the same creditor had used the credit score proxy method, the creditor would have to provide notices to approximately 60 percent of consumers, many of whom likely would have received credit on the most favorable terms. The Agencies believe it is appropriate to minimize, where possible, the number of consumers who receive risk-based pricing notices and also receive the creditor's most favorable terms. However, to avoid undermining the basic purpose of the statute, the alternative approach does not permit risk-based pricing notices to be provided to more than approximately 60 percent of consumers. Thus, if credit has been granted, extended, or provided on the most favorable material terms to less than 40 percent of a creditor's consumers, a creditor may not use the alternative approach.

Finally, one commenter requested that the Agencies clarify that the appropriate population to consider when setting the cutoff score is "accepted applicants." The language in the final rules is revised to clarify the appropriate population to consider when setting the cutoff score in a manner that more closely tracks the language of the statute. Thus, the appropriate population to consider is consumers to whom the creditor grants, extends, or otherwise provides credit, regardless of whether those consumers decide to accept and use the credit.

Determining the Cutoff Score

Proposed paragraph (b)(1)(ii) described two methods for determining the cutoff score. In general, creditors would be required to use a sampling approach. Under this approach, a person that currently uses risk-based pricing with respect to the credit products it offers would calculate the cutoff score by considering the credit scores of all or a representative sample of the consumers to whom it has granted, extended, or otherwise provided credit. Where a creditor's customer base or underwriting standards varied significantly among different classes of credit products, such as mortgages, credit cards, automobile loans, and student loans, the proposal would have required creditors to calculate separate cutoff scores for different classes of products based on representative samples of consumers offered that type of credit.

The Agencies recognized that the sampling approach would not be feasible for some creditors, such as new entrants to the credit business, entities that introduce new credit products, or entities that have just started to use risk-based pricing and have not yet developed a representative sample of consumers. Thus, the Agencies proposed to allow such creditors initially to determine the appropriate cutoff score based on information from appropriate market research or relevant third-party sources for similar products, such as information from companies that develop credit scores. In addition, the Agencies proposed to permit a creditor that acquired a credit portfolio as a result of a merger or acquisition to determine the cutoff score based on information it received from the merged or acquired party.

The Agencies received few comments regarding these provisions, and they are generally adopted as proposed in renumbered paragraphs (b)(1)(iii)(A) and (b)(1)(iii)(B) in the final rules, with minor changes. An acquisition of a portfolio could be the result of a person either merging with or acquiring a party or acquiring a portfolio, but not the previous owner of the portfolio. Therefore, the language stating that a person may determine its cutoff score based on information from a "merged or acquired party" has been revised in the final rules to state that the cutoff score may be based on information from a "party which it acquired, with which it merged, or from which it acquired the portfolio."

The Agencies note that all of these approaches to determining the cutoff score apply to the 40 percent/60 percent cutoff score proxy method. A person using the alternative to the 40/60 percent cutoff score proxy method, however, may only make its determination of the cutoff score either using the sampling approach or, if a person acquires a credit portfolio as a result of a merger or acquisition, by basing its determination on information from the party which it acquired, with which it merged, or from which it acquired the portfolio.

Recalculation of Cutoff Scores

Proposed paragraph (b)(1)(ii)(C) addressed the recalculation of cutoff scores. As explained in the proposal, the Agencies understand that the distribution of credit scores for a creditor's customer base may shift over time. It is important to recalculate the cutoff score from time to time, but the time period between recalculations should be long enough so that the rule does not require continual sampling. On the other hand, the Agencies also indicated in the proposal that, to obtain a representative sample, the creditor must use an appropriate sampling period in order to minimize the risk of introducing distortions, such as seasonal variations, into the sampling. Therefore, the Agencies proposed to require persons using the sampling approach to recalculate their cutoff scores at least every two years.

As proposed, a person who used secondary sources to determine its cutoff score, however, generally would

be required to recalculate its cutoff score based on a representative sample of its own consumers within one year after it began using a cutoff score derived from market research, third-party data, or information from a merged or acquired party. If, however, a person using the secondary source approach did not grant, extend, or otherwise provide credit to a sufficient number of new consumers during that one-year period, and therefore lacked sufficient data with which to recalculate its cutoff score after one year, the proposal would have permitted the person to continue to use a cutoff score derived from secondary sources until it granted, extended, or otherwise provided credit to a sufficient number of new consumers and was able to collect sufficient data on which to base the recalculation.

Many commenters believed that re-assessing the cutoff score every two years, or every year when a cutoff score is derived from market research, third-party data, or information from a merged or acquired party, was appropriate. Commenters generally agreed with allowing the use of secondary sources to identify the cutoff score in the circumstances proposed, and some suggested that the Agencies allow creditors to use such secondary sources in all circumstances.

The general two-year reassessment requirement for cutoff scores is retained in the final rules. However, the final rules have been revised to reflect the language change discussed above regarding certain secondary sources, which provides that a person may determine its cutoff score based on information from a "party which it acquired, with which it merged, or from which it acquired a portfolio." The final rules also are revised with regard to situations where a person is permitted to use a cutoff score derived from market research, third-party data, or information from a party which it acquired, with which it merged, or from which it acquired a portfolio. In those situations, if a person does not grant, extend, or provide credit to new consumers during the one-year period such that the person lacks sufficient data with which to recalculate a cutoff score, the person may continue to use market research, third-party data, or information from a party which it acquired, with which it merged, or from which it acquired a portfolio until it obtains sufficient data. However, the Agencies want to ensure that a creditor engaging in risk-based pricing for new customers does not continue to use a cutoff score based on market research, third-party data, or information from a party which it acquired, with which it merged, or from which it acquired a portfolio for an indefinite period of time. Therefore, renumbered paragraph (b)(1)(iii)(C) of the final rules provides that if the person has granted, extended, or provided credit to some new consumers within two years, the person must recalculate the cutoff score using the sampling approach described in paragraph (b)(1)(iii)(A).

Use of Two or More Credit Scores

Proposed paragraph (b)(1)(ii)(D) addressed the situation where a creditor uses two or more credit scores in setting the material terms of credit. The proposal stated that if a person using the credit score proxy method generally used two or more scores in setting the material terms of credit granted, extended, or otherwise provided to a consumer, the person must determine the appropriate cutoff score based on how the person evaluates the multiple credit scores when making credit decisions. For example, if a creditor generally purchased two scores for each consumer and used the average of those two scores when setting the material terms of credit, the proposal would have required the creditor to use the average of its consumers' scores when calculating its cutoff score. In circumstances where creditors did not consistently use the same method for evaluating multiple scores, however, the proposed rules would have required the creditor to use a reasonable means for determining the appropriate cutoff score and provided a safe harbor for a creditor that used either a method that the creditor regularly used or the average credit score for each consumer as the means of calculating the cutoff score.

The Agencies received few comments regarding this paragraph, and it is generally adopted as proposed as renumbered paragraph (b)(1)(iii)(D), with minor changes.

Credit Score Not Available

For a consumer that does not have a credit score, proposed paragraph (b)(1)(iii) provided that the person using the credit score proxy method must assume that a consumer for whom a credit score is not available receives credit on material terms that are materially less favorable than the most favorable credit terms offered to a substantial proportion of consumers, and provide a risk-based pricing notice to that consumer.

A few commenters objected to the Agencies' assumption that consumers without credit scores are likely to receive less favorable terms and should receive a risk-based pricing notice, while one commenter believed the assumption was correct. Another commenter believed the Agencies should make an exception to the default rule in instances where the presumption is incorrect. The Agencies continue to believe the assumption regarding consumers without credit scores is appropriate. Initiatives undertaken to promote the use of non-traditional data, such as utility, telecommunications, and rental housing data, in consumer reports and credit scoring support the Agencies' belief that consumers who lack credit scores may have greater difficulty obtaining credit, or obtaining credit on the most favorable terms available. Although there may be isolated cases where a consumer without a credit score obtains the most favorable terms, the Agencies do not believe that an exception is warranted in such cases because the notice would provide information to the consumer that may be relevant to the consumer for future transactions, where the most favorable terms may not be offered if the consumer has no credit score. Thus, the substance of this provision is adopted as proposed in renumbered paragraph (b)(1)(iv) of the final rules, with a change in title and other non-substantive revisions.

The proposal included examples of how a credit card issuer and an auto lender could apply the credit score proxy method. The Agencies have retained these examples in the final rules, and added another example of a credit card issuer to illustrate the alternative approach discussed above.

Tiered Pricing Method

Proposed paragraph (b)(2) set forth the tiered pricing method for determining which consumers should receive a risk-based pricing notice. The general rule in proposed paragraph (b)(2)(i) provided that a person that sets the material terms of credit granted, extended, or otherwise provided to a consumer by placing the consumer within one of a discrete number of pricing tiers, based in whole or in part on a consumer report, may use the tiered pricing method. Pricing tiers could be reflected in a rate sheet that lists different rates available to the consumer depending upon information in a consumer report, such as the consumer's credit score, among other factors. For example, if a creditor offers automobile loans for which the annual percentage rate will be set at seven, nine, or eleven percent based in whole or in part on information from a consumer report, the creditor would only need to consider which annual percentage rate pricing tier applies to a consumer in order to determine whether the consumer should receive a risk-

based pricing notice, even if factors other than the consumer report influence the annual percentage rate received by the consumer.

Proposed paragraph (b)(2)(ii) described the application of the tiered pricing method when a person using this method has four or fewer pricing tiers. Proposed paragraph (b)(2)(iii) described the application of the tiered pricing method when a person using this method has five or more tiers. Each paragraph provided an example to illustrate the application of the tiered pricing method.

Some commenters suggested that the Agencies change the number of pricing tiers for which a notice must be sent. Those commenters generally believed that consumers falling into a greater number of the top, or lower-priced, tiers should not receive a risk-based pricing notice. Several commenters agreed with the Agencies' proposal to focus only on the number and percentage of tiers, rather than the number or percentage of consumers who are assigned to each tier. One commenter, however, suggested that the Agencies should allow creditors to consider the percentage of accepted consumers assigned to each tier and adjust the numbers of tiers receiving a notice accordingly.

In the proposal, the Agencies considered the possibility that creditors may attempt to circumvent the tiered pricing method by establishing an additional tier or tiers for which no consumers will likely qualify. The Agencies stated that a creditor using the tiered pricing method would not be permitted to consider tiers for which no consumers have qualified nor are reasonably expected to qualify, and requested comment on whether the proposed rules should be modified to prevent circumvention. Commenters generally did not believe creditors would seek to circumvent the tiered pricing method by establishing an additional tier or tiers for which no consumers will likely qualify.

Section ____.72(b)(2), the tiered pricing method, is generally adopted as proposed in the final rules, with some non-substantive changes. Under the final rules, where there are four or fewer pricing tiers, a person must provide a risk-based pricing notice to each consumer who does not qualify for the top, or lowest-priced, tier. Where there are five or more pricing tiers, a person using the tiered pricing method must send a risk-based pricing notice to each consumer who does not qualify for the top two (lowest-priced) tiers, plus any other tier that represents at least the top 30 percent but no more than the top 40 percent of the total number of tiers. As noted in the proposal, creditors may use different pricing tiers for different types of credit products, such as automobile loans and boat loans. If a creditor uses different pricing tiers for different products, a separate analysis is required for each product for which different tiers apply. If the same tiers apply regardless of the product, then a creditor need not distinguish between those products.

Credit Cards

Proposed paragraph (c) set forth special provisions applicable to credit card issuers. Proposed paragraph (c)(1) generally would have required a credit card issuer to provide a risk-based pricing notice to a consumer if: (i) the consumer applied for a credit card in connection with an application program, such as a direct-mail or take-one offer, or a pre-screened solicitation, for which more than a single possible purchase annual percentage rate may apply; and (ii) based in whole or in part on that consumer's consumer report, the card issuer provided a credit card to the consumer with a purchase annual percentage rate that is higher than the lowest purchase annual percentage rate available under that application or solicitation.

Proposed paragraph (c)(2) described those circumstances in which a credit card issuer would not have been required to provide a risk-based pricing notice. Under this provision, a credit card issuer would not be required to provide a risk-based pricing notice to a consumer if the consumer applied for a credit card for which the creditor provides a single purchase annual percentage rate (excluding temporary and penalty rates). In addition, a credit card issuer would not be required to provide a risk-based pricing notice to a consumer if the consumer is offered the lowest purchase annual percentage rate available under the credit card offer for which the consumer applied, even if a lower rate is available from that issuer under a different credit card offer. Proposed paragraph (c)(3) set forth an example of the application of the risk-based pricing rules to a credit card solicitation containing multiple possible purchase annual percentage rates.

The proposed rule was based on the assumption that when a credit card issuer offers a range of rates within a single solicitation or offer, the consumer applies for the best rate available under that offer. Some industry commenters challenged this assumption, stating that consumers are applying for the best rate for which they qualify within the range of rates in the offer of credit. However, if the Agencies were to adopt this suggestion, then no consumers who apply for credit cards would receive risk-based pricing notices. The Agencies do not believe this would be consistent with the purpose of the statute. Accordingly, the final rules are based on the assumption that a consumer applies for the best rate available under a credit card offer.

Some commenters requested that the Agencies clarify whether all of the risk-based pricing and exception notice options, including the credit score proxy and tiered pricing methods, would be available to credit card issuers. The final rules have been revised to clarify that credit card issuers may comply with the rules by using either the special method for credit card issuers or any of the other methods permitted by the rules. When using the special method for credit cards, a card issuer determines which consumers must receive a notice on an offer-by-offer basis. However, if a credit card issuer opts to use the credit score proxy method or the tiered pricing method, it must determine which consumers must receive a notice through an analysis of the issuer's entire portfolio, rather than on an offer-by-offer basis.

The Agencies have also revised the language that states that a credit card issuer using this option must make its determination regarding whether a risk-based pricing notice is required to be provided to a consumer based solely on a purchase annual percentage rate. There may be instances where an issuer offers a credit card that does not have a purchase annual percentage rate, such as credit cards that may only be used for cash advances or balance transfers. To clarify that credit card issuers may also apply these special provisions to credit cards that do not have a purchase annual percentage rate, the final rules refer to the "annual percentage rate referenced in § ____.71(n)(1)(ii)" rather than the "purchase annual percentage rate." The annual percentage rate to be applied in this provision, therefore, is either the purchase annual percentage rate or, in the case of a credit card that has no purchase annual percentage rate, the annual percentage rate that varies based on information in a consumer report and that has the most significant financial impact on consumers.

The special provisions applicable to credit cards are otherwise adopted as proposed in paragraph (c) of the final rules, with some non-substantive changes.

Account Review

Proposed paragraph (d) described how the risk-based pricing rules apply

to the account review process. Proposed paragraph (d)(1) provided that a person must provide a risk-based pricing notice to a consumer if it: (i) Uses a consumer report in connection with a review of credit that has been extended to the consumer; and (ii) based in whole or in part on that consumer report, increases the annual percentage rate. Proposed paragraph (d)(2) illustrated this provision's applicability to credit card accounts.

Industry commenters objected to this requirement, stating that account review is not covered by the statute. They also argued that the provision was not needed because adverse action notices were already provided when annual percentage rates are increased during account review.

Paragraph (d) of the final rules is adopted as proposed. The legislative history indicates that the statute was meant to apply to account reviews, as well as to new accounts.[11] Moreover, the Agencies acknowledge that there are circumstances where an adverse action notice is provided to the consumer in connection with an account review that results in a rate increase. In these circumstances, the exception for adverse action notices, discussed below, would apply and the creditor would not be required to provide the consumer with a risk-based pricing account review notice. However, if an adverse action notice is not provided to a consumer, a risk-based pricing account review notice must be provided to the consumer.

Section ____.73 Content, Form, and Timing of Risk-Based Pricing Notices

Proposed § ____.73 set forth the content, form, and timing requirements for risk-based pricing notices that would apply whether the creditor made the direct, consumer-to-consumer comparisons described in the general rule or used one of the proxy methods.

Content

Proposed paragraph (a)(1) stated the general content requirements for risk-based pricing notices (hereafter "general risk-based pricing notice"). Proposed paragraph (a)(2) set forth the content requirements for any risk-based pricing notice required to be given as a result of the use of a consumer report in an account review (hereafter "account review notice"). The proposal provided that the general risk-based pricing notice must include a statement that the person sending the notice has set the terms of credit offered, such as the annual percentage rate, based on information from a consumer report and a statement that those terms may be less favorable than the terms offered to consumers with better credit histories. Similarly, the proposal provided that the account review notice must include a statement that the person sending the notice has conducted a review of the account based in whole or in part on information from a consumer report and a statement that as a result of that review the annual percentage rate on the account has been increased. In connection with both the general risk-based pricing notice and the account review notice, the proposal also provided that the notices must: (i) State that a consumer report includes information about a consumer's credit history and the type of information included in that credit history; (ii) state that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the consumer report; (iii) state the identity of each consumer reporting agency that furnished a consumer report used in the credit decision or account review; (iv) state that federal law gives the consumer a right to obtain a free copy of his or her consumer report from that consumer reporting agency for 60 days after receipt of the notice; (v) inform the consumer how to obtain such a consumer report; and (vi) direct the consumer to the web sites of the Board and the Commission to obtain more information about consumer reports. Paragraphs (a)(1) and (a)(2) are adopted as proposed in the final rules, with minor revisions for clarity.

The proposed rules did not require the notice to state that the terms offered to the consumer "are" or "will be" less favorable than the terms offered to other consumers. The Agencies were concerned that such a statement would not be accurate in certain cases if the creditor could not precisely distinguish consumers who received the most favorable terms from those who did not. For example, if a creditor applies the credit score proxy method, some consumers may receive a risk-based pricing notice even if they receive the most favorable terms available from that creditor. This may occur, for instance, if factors other than the consumer report, such as income or down payment amount, influenced the pricing decision.

Proposed paragraph (a)(1)(iii) provided that the general risk-based pricing notice must state that the terms offered to the consumer may be less favorable than the terms offered to consumers with better credit histories. This statement related the general information about credit history and credit pricing contained in the notice to the specific consumer. Absent this statement, the Agencies were concerned that some consumers may assume that the general information had no relevance to them. This statement was designed to carry out the statutory purpose of prompting consumers to check their consumer reports for any errors.

Some commenters urged the Agencies to delete the statement in proposed paragraph (a)(1)(iii) because they believed it was negative, potentially confusing to customers, and potentially misleading. For example, one commenter believed that the statement erroneously implied that other creditors would offer better terms. These commenters suggested replacing this language with neutral language that encouraged consumers to shop for better credit terms. Other commenters, however, stated that the language was accurate and should be retained. In the final rules, the Agencies have retained the phrase "terms offered to you may be less favorable" because they continue to believe that it puts consumers on notice that they should check their consumer reports for errors and accurately depicts the reason why consumers are receiving the notice.

Proposed paragraphs (a)(1)(vi) and (a)(2)(vi) implemented the statutory requirement in paragraph 615(h)(5)(C) of the FCRA that the notices include a statement informing the consumer that the consumer may obtain a copy of a consumer report without charge from the consumer reporting agency identified in the risk-based pricing notice. These paragraphs stated that the notice must include a statement that federal law gives the consumer the right to obtain a consumer report from the consumer reporting agency or agencies identified in the notice without charge for 60 days after receipt of the notice. Although section 615(h) of the FCRA does not prescribe any time period within which the consumer may obtain a free consumer report, the 60-day time period was proposed for consistency with the time limit contained in the adverse action notice provisions in section 612(b) of the FCRA. Under section 612(b), any right to a free consumer report is valid for 60 days

[11] *See* S. Rep. No. 108–166, at 20–21 (Oct. 17, 2003) ("This section is intended to address the frequently occurring situation where creditors review consumers' credit reports and make risk-based adjustments to the credit terms they offer the consumer * * * The Committee believes that consumers should receive these notices when information in a credit report leads to a change in terms that significantly impacts the cost of the credit offer.")

after the consumer receives the notice that gives rise to that right. The Agencies believed that incorporating this 60-day time period into the rules was appropriate in light of their reading of the statute as giving consumers who receive a risk-based pricing notice the right to a free consumer report separate from the free annual report. For these reasons and those described below, these provisions are adopted as proposed.

Some industry commenters urged the Agencies to read the statute as not giving the consumer the right to a free consumer report upon receipt of a risk-based pricing notice, arguing that section 311 of the FACT Act did not create this right. These industry representatives stated that section 615(h) of the FCRA does not give the consumer a right to a separate free consumer report, but that the reference in that section to a free consumer report refers to the free annual consumer report described in section 612(a) of the FCRA. Consumer groups, on the other hand, stated that section 615(h) gives a consumer a right to a separate free consumer report upon receipt of a risk-based pricing notice. Several commenters noted that if the Agencies believe that receipt of a risk based pricing notice gives the consumer the right to a free consumer report, then the 60-day time period in which the consumer may obtain the report is appropriate.

The Agencies read the statute as creating the right to a free consumer report upon receipt of a risk-based pricing notice and believe 60 days is an appropriate time period in which the consumer can request the report. Section 612(b) of the FCRA provides for free consumer reports to consumers who have received a notification pursuant to "section 615" of the FCRA. Section 615 of the FCRA includes both the adverse action notice requirement (section 615(a)), the risk-based pricing notice provision (section 615(h)), and certain other requirements. Accordingly, the Agencies read the reference to the free consumer report in section 612(b) to apply equally when notices are given under section 615(a) and section 615(h)(5)(C), *i.e.,* to require in both of those cases a free report that is separate from the free annual report.

One commenter requested that the Agencies add a provision requiring a disclosure of each consumer's name and the date the notice was provided in each form. The Agencies are not requiring this information to be included in the notices. However, as discussed below, the Agencies have included among acceptable changes to the model forms "including the name of the consumer, transaction identification numbers, a date, and other information that will assist in identifying the transaction to which the form pertains." Therefore, a creditor may elect to add this information to its notice.

Several commenters requested that the Agencies add other disclosures to the notices. Some stated that the notice should contain a more complete statement regarding why the consumer is receiving the notice. For example, one commenter suggested the notice state that the notice is required by Federal law. Several commenters suggested that the notice should state that the consumer reporting agencies were not involved in the decision to extend credit. Some commenters asked the Agencies to add a statement to the notice to clarify that the terms of credit may have been established based on creditworthiness criteria other than a credit score, such as income or loan-to-value ratio. The Agencies do not believe that these suggested additions are critical pieces of information for the consumer. These statements also would add to the length of the notice and potentially detract from more important pieces of information conveyed in the notice. Therefore, these suggestions have not been adopted.

Form

Proposed paragraph (b) set forth the format requirements for risk-based pricing notices. Proposed paragraph (b)(1)(i) provided that risk-based pricing notices must be clear and conspicuous. Proposed paragraph (b)(1)(ii) specified that persons subject to the rule would be permitted to make the disclosures in writing, orally, or electronically.

Proposed paragraph (b)(2) referenced the model forms of the risk-based pricing notices required by §§ ____.72(a) and (c), and by § ____.72(d), which were contained in Appendices H–1 and H–2 of the Board's proposed rule and Appendices B–1 and B–2 of the Commission's proposed rule. Appropriate use of these model forms would be deemed to be a safe harbor for compliance with the risk-based pricing notice requirements. Use of these model forms would be optional.

The Agencies received relatively few comments regarding the format of the risk-based pricing notices. Most of the comments received were requests for clarification regarding how much the notices could deviate from the model forms while still retaining the protection of the safe harbor. The Agencies have adopted some of the suggestions made by commenters, which are discussed below in the Section-by-Section Analysis regarding the model forms.

Paragraph (b) is adopted as proposed.

Timing

Proposed paragraph (c) set forth the timing requirements for providing risk-based pricing notices in connection with extensions of closed-end and open-end credit, as well as credit account reviews. For closed-end transactions, the proposal provided that the notice must be provided to the consumer before consummation of the transaction, but not earlier than the time the decision to approve an application for, or a grant, extension, or other provision of, credit is communicated to the consumer by the person required to give the notice. For open-end credit, the proposal provided that the notice must be provided to the consumer before the first transaction is made under the plan, but not earlier than the time the decision to approve an application for, or a grant, extension, or other provision of credit is communicated to the consumer. Finally, for account reviews, the proposal provided that the notice must be provided to the consumer at the time the decision to increase the annual percentage rate based on a consumer report is communicated to the consumer by the person required to give the notice, or if no notice of the increase in the annual percentage rate is provided to the consumer prior to the effective date of the change, no later than five days after the effective date of the change in the annual percentage rate.

The timing rules in paragraph (c) are generally adopted as proposed, with several minor changes for clarification. In the case of the provision in paragraph (c)(iii) addressing account reviews where no notice of an increase in annual percentage rate is provided, the final rules add the phrase "to the extent permitted by law" to clarify that the timing provision applies only when an increase in the annual percentage rate without prior notice is legally permissible.[12] In addition, as discussed below, two new timing provisions have been added to the final rules to address certain auto lending transactions and

[12] The Agencies recognize that the Credit Card Reform Act of 2009, and the Board's implementing regulations, require notice of an annual percentage rate increase prior to raising the rate. *See* 74 FR 36,077 (July 22, 2009) (interim final rule under Regulation Z). However, there may be products other than credit cards that permit an increase in annual percentage rate without notice. Thus, the Agencies are retaining this provision in the final rules, with the addition of the qualifier "to the extent provided by law," to account for potential situations or financial products, if any, that would permit persons to increase annual percentage rate during an account review with no notice.

contemporaneous purchase credit (instant credit).

General Comments

Two commenters believed the proposed timing requirements were appropriate. Other commenters, however, stated that because the statute allows for the notices to be given at the time of application, the Agencies should require a general educational notice at application rather than a personalized notice. Commenters also argued that this notice should contain a reminder to obtain a free annual consumer report, rather than create a right to a free consumer report in addition to the free annual consumer reports.

The Agencies considered whether to allow the risk-based pricing notice to be provided at the time of application, but have rejected that approach. Instead, the Agencies have concluded that the notice generally should be provided no earlier than the time when the decision to approve the credit is communicated to the consumer. The Agencies believe that requiring the notice to be provided later than the time of application gives effect to the statute's general rule by ensuring that risk-based pricing notices are provided only to those consumers who may receive materially less favorable material terms. The Agencies believe that a notice at the time of application is less likely to be noticed, read, and acted upon by consumers than a more targeted, personalized notice. The Agencies also believe that permitting the notice to be provided at the time of application would increase significantly the number of risk-based pricing notices provided to consumers compared to the number of notices that would be provided later in the credit process. The final rules are based on the Agencies' reading of section 615(h) as giving consumers a right to a separate free consumer report upon receipt of a risk-based pricing notice. Therefore, permitting application notices could greatly expand the number of free reports to which consumers may be entitled. This could be costly for all parties, and may result in costs being passed on to consumers.

Some commenters suggested that when a notice is provided upon account review, the Agencies should require that the notice be provided with the next periodic statement or at another later date. The Agencies continue to believe that providing the notice no later than five days after the effective date of the change in annual percentage rate is appropriate, because the effectiveness of the notice may be diminished if notice is not provided promptly after the decision to increase the rate is made. Accordingly, the timing requirements for the account review notice generally have been adopted as proposed, with the addition of the language "(to the extent permitted by law)," as discussed above.

Automobile Lending

Many commenters objected to the Agencies' timing requirements as applied to indirect automobile lending. These commenters stated that fulfilling the notice requirement at or prior to consummation would be impossible in instances where the creditor does not know that the dealer has placed a loan with the creditor until after the loan documents have been signed by the consumer. The commenters believed that the creditor should be permitted to send a notice after it receives necessary information or within a reasonable time after consummation, such as within 30 days or when the welcome letter is sent to the consumer. Alternatively, some commenters argued that the dealer arranging the loan should have the compliance responsibility.

In the final rules, the Agencies retained the general timing requirement for automobile lending. In some cases, the creditor directly communicates with the consumer about the transaction before consummation. For example, a consumer may obtain credit for an automobile purchase at a credit union or other financial institution prior to purchasing the vehicle. In these circumstances, the creditor should be able to provide a notice described in §§ ____.72(a), ____.74(e), or ____.74(f) to the consumer within the time periods set forth in paragraph (c)(1)(i) of this section, § ____.74(e)(3), or § ____.74(f)(4), as applicable.

The Agencies recognize, however, that the nature of indirect automobile lending may prevent creditors themselves from fulfilling their compliance responsibilities prior to consummation without relying upon the dealer or other party as an agent. In many cases, the creditor may approve and set the terms of credit for a particular consumer without any direct interaction with that consumer. In other circumstances, the creditor may not receive a completed application until after a consumer has already purchased the automobile. For example, a consumer may purchase a car from a dealer on a Saturday and sign the loan documents. The creditor, however, may not receive or have a chance to review the loan documents provided by the dealer until the creditor resumes business hours on Monday. The creditor would not have the opportunity to communicate with the consumer before it accepts or refuses the loan.

To account for such circumstances, the Agencies in the final rules have provided that when a person to whom a credit obligation is initially payable grants, extends, or otherwise provides credit to a consumer for the purpose of financing the purchase of an automobile from an auto dealer or other party that is not affiliated with the person, any requirement to provide a risk-based pricing notice pursuant to this subpart is satisfied if the person arranges to have the auto dealer or other party provide a notice described in §§ ____.72(a), ____.74(e), or ____.74(f) to the consumer on its behalf within the time periods set forth in paragraph (c)(1)(i) of this section, § ____.74(e)(3), or § ____.74(f)(4), as applicable, and maintains reasonable policies and procedures to verify that the auto dealer or other party provides such notice to the consumer within the applicable time periods.

The Agencies recognize that the auto dealer may not use the same credit score that the creditor uses. For example, the dealer may obtain a credit score from one consumer reporting agency, while the creditor obtains a credit score from a different consumer reporting agency. Because the auto dealer may not know which credit score the creditor will use, it is not feasible in these circumstances to require the dealer to disclose the same credit score that the creditor uses. Thus, the final rules provide that if the person to whom the credit obligation is initially payable arranges to have the auto dealer or other party provide a notice described in § ____.74(e), the person's obligation is satisfied if the consumer receives a notice containing a credit score obtained by the dealer or other party, even if a different credit score is obtained and used by the person on whose behalf the notice is provided. Moreover, because a dealer may provide a credit score on behalf of a creditor, the dealer, as agent of the creditor, may provide copies of any notice that it provides to a consumer, including a credit score disclosure, to the creditor without becoming a consumer reporting agency.

Contemporaneous Purchase Credit (Instant Credit)

Many commenters objected to the Agencies' proposed timing requirements as applied in the context of contemporaneous purchase credit (often referred to as "instant credit"). These commenters stated that providing a notice after approval but prior to the first transaction would be infeasible and costly and would substantially delay

transactions. Commenters argued that it would be difficult for employees in the retail context to provide risk-based pricing notices because retail employees are not trained to provide disclosures. In addition, cash registers are not capable of printing full-sized disclosures. Commenters also noted that providing notices at the point of sale could be embarrassing to consumers and would raise concerns about the disclosure of sensitive information. Some commenters suggested that the Agencies allow the notice to be provided within a reasonable time after the first transaction, such as when a credit card is mailed to a consumer or within 30 days after consummation. Other commenters suggested that the Agencies permit split notices, where the static portions of the notices are delivered at the time of application and the dynamic portions of the notice are delivered at a later time.

Although the Agencies generally believe that the notice is likely to have the greatest utility if it is provided early enough in a transaction to encourage a consumer to check his or her consumer report for inaccuracies, the Agencies also agree with many of the concerns raised by commenters. Accordingly, the Agencies have added a special timing provision in the final rules for certain instant credit scenarios. Under the final rules, when credit under an open-end credit plan is granted, extended, or provided to a consumer in person or by telephone for the purpose of financing the contemporaneous purchase of goods or services, any risk-based pricing notice required to be provided pursuant to this subpart (or the disclosures permitted under § ____.74(e) or (f)) may be provided at the earlier of: the time of the first mailing by the person to the consumer after the decision is made to approve the grant, extension, or other provision of open-end credit, such as in a mailing containing the account agreement or a credit card; or within 30 days after the decision to approve the grant, extension, or other provision of credit. This special provision applies only to contemporaneous purchase credit transactions by telephone or in person. The Agencies do not believe that the same operational and privacy concerns apply to online credit transactions. Therefore, in the final rules, the general timing requirements apply when providing risk-based pricing notices for online contemporaneous purchase credit transactions.

Section ____.74 Exceptions

Proposed § ____.74 set forth a number of exceptions to the general requirements regarding risk-based pricing notices. Each exception is discussed below.

Application for Specific Terms Exception

Proposed paragraph (a) provided that notice is not required if the consumer applied for specific material terms and was granted those terms. This exception does not apply if the specific material terms were specified by the person after the consumer applied for or requested credit and after the person obtained a consumer report. This exception implemented the statutory exception in FCRA section 615(h)(3)(A). The proposed exception clarified that "specific material terms" means a single material term or set of material terms, such as a single annual percentage rate, and not a range of alternatives, such as an offer that gives multiple annual percentage rates or a range of annual percentage rates. The example in proposed paragraph (a)(ii) explained that if a consumer received a firm offer of credit from a credit card issuer with a single rate, based in whole or in part on a consumer report, a risk-based pricing notice would not be required if the consumer applied for and received a credit card with that advertised rate. This would be the result because the creditor set the material terms of the offer before, not after, the consumer applied for or requested the credit.

Commenters believed that the proposed exception was appropriate. In the final rules, the application for specific terms exception in § ____.74(a) is adopted as proposed, with some non-substantive changes for clarity.

Adverse Action Exception

Proposed paragraph (b) provided that a risk-based pricing notice is not required if a creditor has provided or will provide an adverse action notice to the consumer under FCRA section 615(a) in connection with the transaction. This exception implemented the statutory exception in FCRA section 615(h)(3)(B). The proposed exception applied to any risk-based pricing notices otherwise required under the general rule, the rule applicable to credit card issuers, or the rule applicable upon account review, so long as an adverse action notice has been or will be provided to the consumer pursuant to section 615(a) of the FCRA.

Commenters believed that the proposed exception was appropriate. In the final rules, the adverse action exception in § ____.74(b) is adopted as proposed, with some non-substantive changes for clarity.

Prescreened Solicitations Exception

Proposed paragraph (c) provided an exception to the general risk-based pricing rule when consumer reports are used to set the terms in a prescreened solicitation (firm offer of credit). Proposed paragraph (c)(1) stated that a person is not required to provide a risk-based pricing notice if that person (i) obtains a consumer report that is a prescreened list as described in section 604(c)(2) of the FCRA, and (ii) uses that consumer report for the purpose of making a firm offer of credit to the consumer. The proposed exception applied regardless of the terms the creditor may offer to other consumers in other firm offers of credit. In other words, under the proposal, a creditor would not have been required to provide a risk-based pricing notice to a consumer to whom it sends a particular prescreened solicitation just because the creditor sends prescreened solicitations that offer more favorable material terms to another group of consumers.

The Agencies noted that this exception applied only when a consumer report is used to set the terms offered in a prescreened solicitation to a consumer at the pre-application stage, and did not eliminate the requirement to provide a risk-based pricing notice later in connection with the credit extension, pursuant to proposed § ____.72. For example, a firm offer of credit may contain several possible rates and, if a consumer applies in response to the offer and does not receive the lowest rate, the creditor generally would be required to provide a risk-based pricing notice to that consumer.

Commenters' views on the proposed exception varied. Some commenters believed this exception was appropriate. Other commenters believed this exception was unnecessary, arguing that because no credit is extended as part of a prescreened solicitation, those solicitations fall outside of the scope of the rule.

The Agencies continue to believe that requiring a notice in connection with prescreened solicitations would not significantly benefit consumers, but would impose substantial burdens on creditors and the credit reporting system. Prescreened solicitations typically are sent to many consumers who meet specific credit-granting criteria provided by a creditor. The Agencies understand that only about one half of one percent of consumers who receive prescreened solicitations respond to them. Therefore, for the vast majority of consumers who are not interested in obtaining credit via the

prescreened solicitation, a risk-based pricing notice would have no relevance.

This exception is consistent with the Agencies' determination that the appropriate time to provide a notice is no earlier than the time the decision to approve the credit application, or to grant, extend, or provide credit, is communicated to the consumer. At the time a creditor sends a prescreened solicitation, the consumer has not made an application or otherwise indicated any interest in the credit. The exception also is consistent with the rule of construction that consumers should receive only one risk-based pricing notice per credit transaction, as discussed below. Absent this exception, some consumers who respond to prescreened solicitations would receive multiple notices in connection with the transaction: the first when they receive the solicitation, and the second when they respond to the solicitation but do not receive the most favorable terms offered in that solicitation (*e.g.,* when the solicitation offers more than one possible annual percentage rate).

The Agencies also believe the prescreened solicitations exception provides an important clarification of the statutory requirements. Whether a prescreened solicitation is made "in connection with an application for, or a grant, extension, or other provision of credit"—and, thus, whether it is covered by section 615(h)—may depend on the circumstances of a particular solicitation, including whether a specific consumer actually applies for credit in response to the solicitation. Because the Agencies have created an exception for prescreened solicitations based on their finding, pursuant to section 615(h)(6)(B)(iii), that there is no significant benefit to consumers, the Agencies do not need to determine whether, and under what circumstances, such solicitations are "in connection with" an application for credit.

In the final rules, the prescreened solicitations exception in § ____.74(c) is adopted as proposed, with some non-substantive changes to better explain the purpose of the exception.

Credit Score Disclosure Exceptions

The Agencies proposed three exceptions to the risk-based pricing notice requirement for creditors that provide a credit score disclosure to consumers, which are described more fully below. The credit score disclosure generally would include the consumer's credit score, along with explanatory information regarding the score and information regarding the use of consumer reports and scores in the underwriting process. Under the proposed exceptions, a creditor would provide this disclosure to any consumer who requested an extension of credit. Thus, a creditor would not need to apply a test to determine which consumers likely were offered or received materially less favorable material terms. The Agencies also proposed an alternate form of the notice to be provided to consumers for whom credit scores are unavailable. As discussed below, these exceptions were proposed under section 615(h)(6)(iii) of the FCRA, which gives the Agencies the authority to create exceptions to the risk-based pricing notice requirement for classes of persons or transactions regarding which the Agencies determine that the notice would not significantly benefit consumers. Unlike a risk-based pricing notice given under proposed § ____.72, the notice provided with the credit score disclosure under these proposed exceptions would not give rise to an independent right to a free consumer report.

Proposed Credit Score Disclosure Exception for Credit Secured by Residential Real Property

Proposed paragraph (d) provided an exception to the risk-based pricing notice requirement for creditors offering loans secured by one to four units of residential real property. This exception would permit creditors offering loans to consumers that are secured by residential real property (purchase money mortgages, mortgage refinancings, home-equity lines of credit, and home-equity plans) to comply with the rules by adding certain supplemental disclosures regarding the use of consumer reports to the credit score disclosure they already are required to provide to consumers pursuant to section 609(g) of the FCRA. These creditors could provide this integrated notice to any consumer who requested credit in connection with loans secured by real property and would not be required to compare the terms offered to different consumers, as is required by the general rule.

Proposed paragraph (d)(1) set forth the requirements that a creditor would be required to meet to avail itself of the exception and stated that a creditor is not required to provide a risk-based pricing notice if it complies with this subsection. Paragraph (d)(1)(i) provided that in order to qualify for the exception, the credit requested by the consumer must involve an extension of credit secured by one to four units of residential real property.

Proposed paragraph (d)(1)(ii) set forth the contents of the notice that must be provided to the consumer in order for a creditor to qualify for the exception. Proposed paragraphs (d)(1)(ii)(A)–(d)(1)(ii)(C) would require disclosure of certain background information regarding consumer reports and credit scores, including: (i) A statement that a consumer report is a record of the consumer's credit history and includes information about whether the consumer pays his or her obligations on time and how much the consumer owes to creditors; (ii) a statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time to reflect changes in the consumer's credit history; and (iii) a statement that the consumer's credit score can affect whether the consumer can obtain credit and what the cost of that credit will be.

Proposed paragraph (d)(1)(ii)(D) would have required the notice to include all of the information required to be disclosed to the consumer pursuant to section 609(g) of the FCRA. Section 609(g) requires disclosure of: (i) The current credit score of the consumer or the most recent credit score of the consumer that was previously calculated for a purpose related to the extension of credit; (ii) the date on which that score was created; (iii) the name of the person or entity that provided the credit score or credit file on which the credit score was created; (iv) the range of possible credit scores under the model used; and (v) up to four key factors that adversely affected the consumer's credit score (or up to five factors if the number of inquiries made with respect to that consumer report is one of the factors).

For many consumers, a disclosure of the credit score number alone would provide no indication of whether that credit score is favorable, unfavorable, or about average when compared to the credit scores of other consumers. Therefore, proposed paragraph (d)(1)(ii)(E) contained the additional requirement that the notice disclose by clear and readily understandable means either a distribution of credit scores (*i.e.,* the proportion of consumers who have scores within the specified ranges) or a statement about how the consumer's credit score compares to the scores of other consumers. The Agencies believed that this information would provide important context to help consumers understand their credit scores. Any distribution or comparison of scores should reflect the population of consumers who have been scored under the model used by the person providing the score. If that information was not available from the person providing the

score, or if the creditor disclosed a proprietary score, then the creditor could base the distribution or comparison on its own consumers who have been scored using the model.

Under the proposal, if a creditor chose to disclose the credit score distribution, this information could be presented in the form of a bar graph containing a minimum of six bars, or by a different form of graphical presentation that is clear and readily understandable. If a credit score has a range of 1 to 100, the distribution must be disclosed using that same 1 to 100 scale. For a creditor using the bar graph, each bar would have to illustrate the percentage of consumers with credit scores within the range of scores reflected by that bar. A creditor would not be required to prepare its own bar graph; use of a bar graph obtained from the person providing the credit score that meets the requirements of this paragraph would be deemed compliant.

Alternatively, the proposal would permit the notice to inform the consumer by clear and readily understandable means how his or her credit score compares to the scores of other consumers. As discussed more fully in the Model Forms section below, a concise narrative statement informing the consumer that his or her credit score ranks higher than a specified percentage of consumers would be a clear and readily understandable means of providing this information.

Proposed paragraph (d)(1)(ii)(F) would have required the notice to include a statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the consumer report.

Proposed paragraphs (d)(1)(ii)(G) and (d)(1)(ii)(H) would have required the credit score disclosure to provide the consumer with information about how to obtain his or her consumer report. The notice must state that federal law gives the consumer the right to obtain copies of his or her consumer reports directly from the consumer reporting agencies, including a free consumer report from each of the nationwide consumer reporting agencies once during any 12-month period, and provide contact information for the centralized source from which consumers can obtain their free annual reports. Finally, proposed paragraph (d)(1)(ii)(I) would have required the notice to include a statement directing the consumer to the Web sites of the Board and the Commission to obtain more information about consumer reports.

Proposed paragraph (d)(2) set forth the form that the credit score disclosure must take in order to satisfy the exception. Under the proposal, the notice must be clear and conspicuous, provided on or with the notice required by section 609(g) of the FCRA, and segregated from other information provided to the consumer. The notice would also be provided to the consumer in writing in a form retainable by the consumer. The requirement that the notice be in writing would be satisfied if it is provided in electronic form in accordance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*).

Proposed paragraph (d)(3) described the timing requirements for the notice that would satisfy the exception. The notice would be required to be provided to the consumer concurrently with the notice required by section 609(g) of the FCRA, but in any event at or before consummation of a transaction in the case of closed-end credit or before the first transaction is made under an open-end credit plan. Section 609(g) of the FCRA states that the notice required by that subsection must be provided to the consumer "as soon as reasonably practicable." It was the Agencies' understanding that industry practice is generally to provide the credit score disclosure within three business days of obtaining a credit score and the Agencies would expect the integrated disclosure generally would be provided within the same timeframe.

Proposed paragraph (d)(4) stated that a model form of the notice described in proposed paragraph (d)(1)(ii), consolidated with the notice required by section 609(g) of the FCRA, is contained in Appendix H–3 of the Board's rules and Appendix B–3 of the Commission's rules. Under the proposal, appropriate use of this model form was deemed to be a safe harbor for compliance with the exception. Use of the model form was optional.

Proposed Credit Score Disclosure Exception for Non-Mortgage Credit

Proposed paragraph (e)(1) set forth a credit score disclosure exception for loans that are not secured by one to four units of residential real property, for which creditors are not required to provide the section 609(g) notice. This exception could be used, for example, by auto lenders, credit card issuers, and student loan companies. Creditors offering loans that are not secured by residential real property could comply with the rules by disclosing a consumer's credit score along with certain additional information.

This proposed exception was similar to the exception proposed for credit secured by residential real property. Consistent with the exception for credit secured by residential real property set forth in proposed paragraph (d), the Agencies proposed this exception under the authority conferred by FCRA section 615(h)(6)(iii). Creditors could provide this notice to any consumer who requested credit in connection with loans that are not secured by real property, without performing a comparison of the terms offered to different consumers.

Proposed paragraph (e)(1) set forth the requirements that a creditor must meet in order to satisfy the exception and stated that a person is not required to provide a risk-based pricing notice if it complies with this subsection. Proposed paragraph (e)(1)(i) stated that in order to qualify for the exception, the credit requested by the consumer must involve credit other than an extension of credit secured by one to four units of residential real property. Thus, a creditor that is obligated to give the notice required by FCRA section 609(g)(1) could not use this exception, but would need to use the exception described in proposed paragraph (d). Proposed paragraphs (e)(1)(ii)(A)–(e)(1)(ii)(C) would have required the notice to include contextual information identical to that set forth in proposed paragraphs (d)(1)(ii)(A)–(d)(1)(ii)(C) for credit secured by residential real property.

Proposed paragraph (e)(1)(ii)(D) would have required disclosure of the current credit score of the consumer or the most recent credit score of the consumer that was previously calculated for a purpose related to the extension of credit. As with the exception under proposed paragraph (d), a person using this exception generally would be required to provide a credit score that was used in connection with the credit decision, though a person that uses a credit score that was not created by a consumer reporting agency, such as a proprietary score, would be permitted to satisfy the exception either by providing the proprietary score to the consumer or by providing to the consumer a credit score and associated information it obtains from an entity regularly engaged in the business of selling credit scores. Similarly, a creditor that does not use a credit score in its credit evaluation process would be permitted to rely on this exception by purchasing and providing to the consumer a credit score and associated information it obtains

from an entity regularly engaged in the business of selling credit scores. Also consistent with proposed paragraph (d), proposed paragraph (e)(1)(ii)(E) would require disclosure of the range of possible credit scores under the model used to generate the credit score disclosed to the consumer.

Proposed paragraph (e)(1)(ii)(F) would have required that the notice disclose by clear and readily understandable means either a distribution of credit scores (*i.e.,* the proportion of consumers who have scores within the specified ranges) or a statement about how the consumer's credit score compares to the scores of other consumers. As with the exception in proposed paragraph (d), the distribution of credit scores could be presented in the form of a bar graph containing a minimum of six bars or by a different form of graphical presentation that is clear and readily understandable. Alternatively, the notice could inform the consumer by clear and readily understandable means how his or her credit score compares to the scores of other consumers. Consistent with what is required to be disclosed pursuant to section 609(g) for credit secured by residential real property, proposed paragraph (e)(1)(ii)(G) stated that the notice must contain the date on which the credit score was created and proposed paragraph (e)(1)(ii)(H) required the creditor to disclose the name of the consumer reporting agency or other person that provided the credit score.

Proposed paragraphs (e)(1)(ii)(I)–(e)(1)(ii)(L) are identical to proposed paragraphs (d)(1)(ii)(F)–(d)(1)(ii)(I) and would have required that the notice: contain a statement that the consumer is encouraged to verify the accuracy of the consumer report information and has the right to dispute any inaccurate information in the consumer report; provide the consumer with information about how to obtain his or her consumer report; and include a statement directing the consumer to the Web sites of the Board and the Commission to obtain more information about consumer reports. Unlike the notice required by section 609(g), the Agencies did not propose to require this notice to contain up to four key factors that adversely affected the credit score. The Agencies believe that the notice provides sufficient information to enable a consumer to evaluate his or her credit score without including the key factors.

Proposed paragraph (e)(2) set forth the form that the credit score notice must take in order to satisfy the exception. These requirements are the same as the form prescribed for the exception in proposed paragraph (d), except that the form is not provided on or with the notice required by section 609(g) of the FCRA. Proposed paragraph (e)(3) described the timing requirements for the notice that would satisfy the exception, which were also consistent with the timing requirement for the exception for loans secured by residential real property. Proposed paragraph (e)(4) stated that a model form of the notice described in paragraph (e)(1)(ii) is contained in Appendix H–4 of the Board's rules and Appendix B–4 of the Commission's rules. As with the exception for loans secured by residential real property, appropriate use of this model form is deemed to be a safe harbor for compliance with the exception, and use of the model form is optional.

Final Credit Score Disclosure Exceptions for Credit Secured by Residential Real Property and Non-Mortgage Credit

Many commenters supported the two credit score disclosure exceptions. These comments stated that the exceptions would be effective and should be retained in the final rules. Some commenters believed the credit score disclosure exceptions were burdensome, would cause confusion, and exceed the Agencies' statutory authority.

The Agencies continue to believe the credit score disclosure exceptions are appropriate as an alternative means of complying with the rules. The credit score disclosure provides to the consumer free of charge his or her credit score, which is an important piece of individualized information about the consumer's credit history. The notice integrates the score disclosure with additional information that will provide consumers with context for understanding how their credit scores may affect the terms of the offer and how their credit scores compare with the credit scores of other consumers. A consumer who discovers that his or her credit score ranks less favorably than the credit scores of other consumers may have a greater motivation to check his or her consumer report for errors than a consumer who receives the more generic information about consumer reports that will be included in a risk-based pricing notice. By providing a consumer with such specific information about his or her own credit history and how it compares to the credit histories of other consumers, the credit score disclosure and notice likely will provide consumers with equal or greater value than the more generic information a consumer will receive in a risk-based pricing notice. Furthermore, a consumer will obtain this valuable information without having to take action to request a consumer report from a consumer reporting agency. Finally, this specific information can be provided to consumers without the need for creditors to determine whether the terms of some offers are materially less favorable than the terms of other offers. Accordingly, the credit score disclosure exceptions are retained in the final rules as proposed, with certain revisions as discussed below.

Commenters supported the Agencies' conclusion that receipt of an exception notice does not trigger a free consumer report under section 612(b) of the FCRA. When a consumer receives an exception notice, the consumer receives a free credit score as well as specific information to enable the consumer to compare his or her credit score to the credit scores of other consumers. Moreover, consumers who receive free credit scores have other opportunities to obtain free consumer reports, such as the free annual reports.

Some commenters requested that the Agencies clarify in the final rules that a credit score disclosure exception should only be given to those consumers who would otherwise receive a risk-based pricing notice. The credit score disclosure exceptions were created to provide an alternative to the risk-based pricing notices that was potentially simpler for compliance purposes, but that also would provide consumers with information of equal or greater value than the information a consumer would receive in a risk-based pricing notice. Requiring creditors to provide credit score disclosure exception notices only to those who would otherwise receive the risk-based pricing notices would not be consistent with the Agencies' intent to provide a simpler alternative that could reduce the cost and burden associated with determining which consumers must receive notices. Thus, the final rules retain the requirement that in order to use these exceptions to the risk-based pricing disclosure requirements, a person must provide an exception notice to every consumer requesting an extension of credit for a product for which the person uses risk-based pricing, even those who would not otherwise receive a risk-based pricing notice. To clarify this, paragraph (d)(1)(ii) in the final rules is revised to replace the phrase "the consumer" with the phrase "each consumer described in paragraph (d)(1)(i) of this section." Similarly, paragraph (e)(1)(ii) in the final rules is revised to replace the phrase "the consumer" with the phrase

"each consumer described in paragraph (e)(1)(i) of this section," where "each consumer" is each one who requests an extension of credit.

One commenter believed that the Agencies' statement that a creditor must provide a credit score disclosure exception notice to "all" consumers was too broad, noting that some consumers may not be entitled to receive any type of notice under the rules. The Agencies agree that some consumers would not receive an exception notice. For instance, some consumers may fall outside of the scope of the rule completely, such as consumers who apply for business credit or who apply for a type of credit for which risk-based pricing is not used.

Creditors also do not need to provide an exception notice to a consumer if one of the other exceptions applies. For example, consumers who apply for and receive a specific rate or who receive an adverse action notice pursuant to the exceptions under § ____.74(a) and § ____.74(b), respectively, are not entitled to a notice. The Agencies note, however, that reliance on the other exceptions may not be possible in certain cases because the timing rules require the credit score disclosure exception notices to be provided to the consumer as soon as reasonably practicable after the credit score is obtained. For example, a mortgage lender may obtain a consumer's credit score and, in order to meet the timing requirements, provide an exception notice to the consumer within several days. However, the lender may ultimately determine after a more lengthy credit underwriting process, that it will not extend credit to the consumer and therefore provide an adverse action notice to the consumer.

The Agencies note that for purposes of providing credit score disclosure exception notices to a consumer as soon as reasonably practicable after a credit score is obtained, what is a reasonably practicable time period may be different depending on the circumstances of the transaction and the type of credit. For example, while it may be reasonably practicable to provide a notice to a consumer in several days in the mortgage lending context, what is reasonably practicable in other forms of credit may be a shorter or longer time period.

Some commenters asked the Agencies to clarify the exception notice requirements in circumstances where more than one credit score is used in making a credit decision. Some commenters urged the Agencies to permit creditors to disclose a single credit score, while another commenter suggested the Agencies permit creditors to disclose either a single credit score or all of the credit scores used in connection with the credit decision.

In the final rules, new §§ ____.74(d)(4) and (e)(4) have been adopted to clarify the credit score disclosure exception requirements in circumstances where creditors use multiple credit scores to make a credit decision. When a creditor obtains two or more credit scores from consumer reporting agencies, and uses one of those credit scores in setting the material terms of credit granted, extended, or provided to a consumer, for example, by using the low, middle, high, or most recent score, the notice described in paragraphs (d)(1)(ii) or (e)(1)(ii) of this section must include that credit score and the other information required by that paragraph. When a creditor obtains two or more credit scores from consumer reporting agencies and uses multiple credit scores in setting the material terms of credit granted, extended, or provided to a consumer, for example, by computing the average of all the credit scores obtained, the notice described in paragraph (d)(1)(ii) or (e)(1)(ii) of this section must include one of those credit scores and the other information required by that paragraph. At the creditor's option, the notice may include more than one credit score along with the additional information specified in § ____.74(d)(1)(ii) or (e)(1)(ii) for each credit score disclosed.

For example, a creditor that uses consumer reports to set the material terms of mortgage credit granted, extended, or provided to consumers regularly requests credit scores from several consumer reporting agencies and uses the low score when determining the material terms it will offer to the consumer. That creditor must disclose the low score in the notice described in paragraph (d)(1)(ii). A creditor that uses consumer reports to set the material terms of mortgage credit granted, extended, or provided to consumers regularly requests credit scores from several consumer reporting agencies, each of which it uses in an underwriting program in order to determine the material terms it will offer to the consumer. That creditor may choose one of these scores to include in the notice described in paragraph (d)(1)(ii).

The Agencies believe it is appropriate to require disclosure of only a single credit score because requiring disclosure of multiple scores would unnecessarily increase the complexity of the notices and increase the compliance burden for creditors. Requiring disclosure of multiple scores in these circumstances also would require disclosure of accompanying information for each score, which would increase the length of the notices, especially if the creditor disclosed how the consumer's score compared to other consumers' scores in the form of bar graphs. Moreover, the Agencies believe consumers may not benefit from this additional information, could be confused by the disclosure of multiple scores, and could be less likely to read a longer form.

Many commenters asked for clarification regarding the requirement to disclose the distribution of credit scores among consumers or how the credit score of the consumer receiving the notice compares to the scores of other consumers, whether in the form of a bar graph or a narrative. Some commenters suggested the Agencies should allow for a general disclosure about how a credit score statistically compares with others, rather than performing the comparison for each consumer. Some commenters mistakenly believed that both the bar graph and the narrative comparisons were required to be included in the notices. Other commenters suggested that the Agencies clarify how often either the bar graph or narrative must be updated. Commenters also asked Agencies to clarify where creditors could obtain information to make the appropriate comparisons. Alternatively, they asked the Agencies to publish this information.

The final rules, like the proposal, require that creditors disclose how a consumer compares to other consumers either in bar graph or in a narrative, but not in both forms. While creditors may obtain the information used to make a comparison from any source, the Agencies expect that many creditors will obtain the information from the person from whom the credit score is obtained. The final rules do not specify how frequently this information must be updated. Rather, the Agencies expect that the persons providing the information to the creditors will update the information periodically as necessary. Accordingly, the final rules retain the requirement to compare a consumer's credit score to the credit scores of other consumers generally as proposed, but with some changes for clarification. Sections ____.74(d)(1)(E) and (e)(1)(F) have been revised to clarify that the consumers who should be considered when determining the distribution of credit scores are those who are scored under the same scoring model that is used to generate the consumer's credit score.

A few commenters requested clarification regarding whether creditors

may use the credit score disclosure exception for credit secured by residential real property when providing a notice involving a transaction for a cooperative unit, regardless of whether the property is characterized as real property under state law. For these types of transactions, the Agencies will deem a creditor to be in compliance with the final rules if the creditor uses either the credit score disclosure exception for credit secured by residential real property or the credit score disclosure exception for non-mortgage credit.

One commenter asked the Agencies to clarify that any contractual prohibitions imposed by consumer reporting agencies are void. Section 609(g)(2)(A) of the FCRA specifically provides that any contract provision that prohibits the disclosure of a credit score by a person who makes or arranges loans or by a consumer reporting agency is void. The Agencies note that section 609(g)(2)(A) is not expressly limited to residential real property loans. Moreover, California law requires automobile dealers that use a consumer's credit score in connection with an application for credit to disclose that credit score to the consumer. The Agencies understand that contract provisions prohibiting credit score disclosures have not been invoked by consumer reporting agencies or other persons to prevent automobile dealers from disclosing credit scores to satisfy the requirements of California law. Similarly, the Agencies would not expect that contractual provisions would be invoked to prevent non-mortgage creditors from providing credit score disclosure exception notices for non-mortgage credit.

One commenter stated that permitting creditors to disclose a credit score from a consumer reporting agency, rather than the proprietary score used to make the credit decision, was appropriate. Two commenters requested that the Agencies address whether using a credit score obtained from a consumer reporting agency is permissible both for the credit score disclosure exception for credit secured by residential real property and the credit score disclosure exception for non-mortgage credit.

A person relying upon one of the exceptions set forth in §§ ____.74(d) or (e) generally would be required to provide to the consumer a credit score that was used in connection with the credit decision. If, however, the person uses a credit score that was not created by a consumer reporting agency, such as a proprietary score, that person is permitted to satisfy the exception by providing to the consumer either the proprietary score or a credit score and associated information it obtains from an entity regularly engaged in the business of selling credit scores. In addition, a person that uses a consumer report, but not a credit score, in its credit evaluation process is permitted to rely on this exception by purchasing and providing to the consumer a credit score and associated information it obtains from an entity regularly engaged in the business of selling credit scores.

Some commenters believed that requiring disclosure of the credit score creation date was appropriate and would be useful to consumers. Other commenters believed such a requirement would impose undue burdens. The credit score creation date is required to be disclosed to the consumer pursuant to section 609(g) of the FCRA, and this requirement has been incorporated into the disclosure requirements for the exception for credit secured by residential real property to ensure that the exception notice satisfies the requirements of section 609(g). Therefore, the Agencies have determined that it is appropriate, and not unduly burdensome, to retain the credit score creation date requirement for both the exception for credit secured by residential real property and the exception for non-mortgage credit.

One commenter requested that the Agencies allow creditors to use a credit score disclosure exception notice in lieu of an account review disclosure. The Agencies do not believe that the reasons for permitting exception notices in lieu of risk-based pricing notices apply in the case of account review notices. Account review notices do not require the creditor to make comparisons with other consumers using the direct comparison method or one of the alternative proxy methods. The Agencies have crafted a simple test for determining which consumers must receive risk-based pricing notices in the context of account reviews. Therefore, the Agencies find no compelling need to mitigate compliance burdens in the case of account reviews. Moreover, account review notices provide a very precise statement of the reason the consumer is receiving the notice. Unlike a risk-based pricing notice that can only generalize that the consumer "may" have received less favorable credit terms because of information in the consumer's consumer report, the account review notice is precise in its disclosure that the consumer did in fact receive less favorable terms. The account review disclosures also provide for free consumer reports. Thus, the exception notices do not provide as good or better information than the account review notice, and this suggestion has not been adopted in the final rules.

Proposed Credit Score Disclosure Exception—No Credit Score Available

In the proposal, the Agencies recognized that a creditor may not be able to obtain a credit score for each consumer for whom it obtains a consumer report. This might occur, for example, when a creditor obtains the consumer report for an individual who has only a limited credit history with few trade lines. A consumer report that contains such limited data may not produce sufficient information to permit the computation of a score.

Proposed paragraph (f) created an exception to the risk-based pricing notice requirement for creditors that regularly use one of the credit score disclosure exceptions in proposed paragraph (d) or (e), but are unable to provide the notices described in those paragraphs to a consumer because a credit score is not available for that consumer. To take advantage of this exception, the creditor would be required to provide a notice meeting the requirements of paragraph (f)(1)(ii).

Proposed paragraph (f)(1) set forth the requirements for the exception that applies when no credit score is available. Proposed paragraph (f)(1)(i) stated that in order to qualify for the exception, the person must regularly obtain credit scores from a consumer reporting agency and provide credit score disclosures to consumers in accordance with the exceptions in paragraphs (d) or (e) of this section, but be unable to obtain a credit score for the particular consumer from the consumer reporting agency from which the person regularly obtains credit scores. Proposed paragraph (f)(1)(ii) clarified that a person may qualify for this exception only if that person does not obtain a credit score from another consumer reporting agency in connection with granting, extending, or otherwise providing credit to the consumer. A person would not be required, however, to seek a credit score from another consumer reporting agency if the consumer reporting agency from which that person regularly obtains credit scores did not provide a credit score for a particular consumer. In addition, a person that regularly requests a particular type of credit score from a consumer reporting agency to provide to consumers to satisfy the requirements of paragraphs (d) or (e) of this section would not need to obtain or seek to obtain a different type of credit score if the score that it regularly obtains is not available. For example, a person that regularly requests a credit score from a

consumer reporting agency that is based on traditional forms of data, such as credit card, mortgage, and installment loan accounts, would not have to request a different score that takes into consideration non-traditional forms of data, such as rental payment history, telephone service payment history, and utility service payment history.

Proposed paragraph (f)(1)(iii) set forth the specific content of the notice to be provided to the consumer. The notice would be required to include: (i) A statement that the person was not able to obtain a credit score about the consumer from a consumer reporting agency, which must be identified by name, and that this is generally due to insufficient information regarding the consumer's credit history; (ii) a statement that a consumer report includes information about a consumer's credit history; (iii) a statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time if the consumer's credit history changes; (iv) a statement that credit scores are important because consumers with higher credit scores generally obtain more favorable credit terms; and (v) a statement that not having a credit score can affect whether the consumer can obtain credit and what the cost of that credit will be. The notice also would be required to include a statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the consumer report, and provide the consumer with information about how to obtain his or her consumer report. The notice would inform the consumer that federal law gives the consumer the right to obtain copies of his or her consumer reports directly from the consumer reporting agencies, including a free consumer report from each of the nationwide consumer reporting agencies once during any 12-month period, and must give contact information for the centralized source from which consumers can obtain their free annual reports. Finally, the notice would include a statement directing the consumer to the Web sites of the Board and the Commission to obtain more information about consumer reports.

This notice, like the two credit score disclosure exception notices, would not give rise to an independent right to a free consumer report because it is not a risk-based pricing notice provided under section 615(h) of the FCRA. A consumer who received this personalized notice containing specific information regarding his or her limited credit history would not receive a separate risk-based pricing notice.

Proposed paragraph (f)(2) illustrated this exception with an example. The example described a person that uses consumer reports to set the material terms of non-mortgage credit provided to consumers, and who regularly requests credit scores from a particular consumer reporting agency and provides those credit scores to consumers to satisfy the exception set forth in proposed paragraph (e). The consumer reporting agency provides a consumer report on a particular consumer that contains one trade line, but does not provide a credit score on that consumer. If the creditor does not obtain a credit score from another consumer reporting agency and, based in whole or in part on information in a consumer report, extends credit to the consumer, the creditor may provide the notice described under paragraph (f)(1)(iii) in order to satisfy its obligations under this subsection. If, however, the person obtains a credit score from another consumer reporting agency in connection with offering credit to the consumer, that person could not rely on the exception in proposed paragraph (f) of this section, but must satisfy the requirements of paragraph (e) and disclose the score obtained.

Proposed paragraph (f)(3) set forth the form that the notice must take in order to satisfy the exception for circumstances where a credit score is not available. Proposed paragraph (f)(4) described the timing requirements for the notice that will satisfy the exception. Proposed paragraph (f)(5) stated that a model form of the notice described in paragraph (f)(1)(iii) is contained in Appendix H–5 of the Board's rules and Appendix B–5 of the Commission's rules. These requirements were intended to be consistent with the comparable requirements for the exceptions in proposed paragraphs (d) and (e).

Final Credit Score Disclosure Exception—No Credit Score Available

Commenters generally believed the credit score disclosure exception for circumstances where no credit score is available was appropriate. The Agencies conclude that consumers with limited credit histories will benefit from receiving a notice indicating that they do not have a credit score because there is insufficient information in their consumer reports. The Agencies continue to believe that a creditor that otherwise uses the credit score disclosure exception should not be required to use a different analysis for those consumers for whom no credit score is available. Therefore, paragraph (f) of the final rules is adopted as proposed, with several non-substantive changes.

Other Suggested Exceptions

Finally, commenters requested the inclusion of certain other exceptions in the final rules. A few commenters believed there should be an exception for credit extended in connection with a private banking relationship available only to high net worth consumers. One commenter also believed accommodation loans made to owners and executives of commercial accounts should be excepted because such loans are made to more sophisticated borrowers who would derive little benefit from the risk-based pricing notice. Two commenters believed there should be an exception for non-residential mortgage transactions with amounts financed in excess of $50,000. Another commenter suggested the Agencies create an exception for situations where a consumer withdraws a credit application before the creditor has provided a notice.

The Agencies have determined that it is not appropriate to provide exceptions from the final rules for certain transactions based on the financial condition of a consumer or the value of the transaction. It is challenging to define appropriate metrics to differentiate consumers and consumer transactions based on the perceived financial sophistication of the participating consumer. Moreover, such metrics tend to become obsolete over time. In instances where a consumer withdraws an application before a creditor has provided a notice, no exception is necessary because a creditor generally is only required to provide a risk-based pricing notice before consummation or the first transaction under an open-end plan. For the foregoing reasons, no further exceptions have been added to the final rules.

Section ____.75 Rules of Construction

Proposed § ____.75 set forth two rules of construction. Proposed paragraph (a) stated that a consumer generally is entitled to no more than one risk-based pricing notice under proposed § ____.72(a) or (c) or one notice under proposed § ____.74(d), (e), or (f), for each grant, extension, or other provision of credit. Because the statute focuses on the material terms granted or extended to a consumer, and consumers receive only a single material term or set of material terms in each extension of credit, the Agencies generally did not

interpret the statute as requiring the consumer to receive more than one risk-based pricing notice in connection with a single extension of credit. The Agencies also did not believe that consumers would benefit by receiving multiple notices or multiple free consumer reports in connection with a single credit extension. Rather, the Agencies believed that one notice would be sufficient to encourage a consumer to check his or her consumer report for any errors. However, even if a consumer had previously received a risk-based pricing notice, another notice would be required as a result of an account review, if the conditions set forth in proposed § ____.72(d) have been met.

Commenters generally believed that requiring only one notice per credit extension is appropriate. Many commenters, however, believed the Agencies should also clarify how the rule applies to transactions involving multiple consumers, such as joint applicants. Some commenters suggested that the Agencies require creditors to give one notice to the primary consumer, if a primary consumer is readily apparent, as is required with adverse action notices under Regulation B. Other commenters suggested requiring that notice be given only to the consumer whose credit score served as the basis for the loan terms. Others suggested the Agencies require that a separate notice be given to each consumer when individual credit scores are disclosed.

The one-notice-per-transaction rule of construction is adopted as proposed in paragraph (a) of the final rules. New paragraph (c), however, has been added to the final rules to address transactions involving multiple consumers. Paragraph (c) clarifies that for risk-based pricing notices, in a transaction involving two or more consumers who are granted, extended, or otherwise provided credit, a person must provide a notice to each consumer. If the two consumers have the same address, a person may satisfy the requirements by providing a single notice addressed to both consumers. If the consumers do not have the same address, a person must provide a notice to each consumer. For credit score disclosure exception notices, a person must provide a separate notice to each consumer who is granted, extended, or otherwise provided credit in a transaction involving two or more consumers. Whether the consumers have the same address or not, the person must provide a separate notice to each consumer. Each separate notice must contain only the credit score(s) of the consumer to whom the notice is provided, and not the credit score(s) of the other consumer. The final rules include examples to illustrate the notice requirements for multiple consumers.

Proposed paragraph (b) set forth the rules governing multi-party transactions. Proposed paragraph (b)(1) stated that the person to whom the loan obligation is initially payable must provide a risk-based pricing notice under § ____.72 or comply with the notice requirements of the exceptions under § ____.74, even if that person immediately assigns the loan to a third party and is not the source of funding for the loan. Correspondingly, proposed paragraph (b)(2) clarified that a purchaser or assignee of a credit contract with a consumer is not required to provide the risk-based pricing notice or satisfy the conditions for one of the exceptions, even if that purchaser or assignee provides the funding for the loan. Proposed paragraph (b)(3) illustrated the rules of construction with several examples pertaining to auto finance transactions.

Commenters generally supported requiring the initial creditor, rather than a purchaser or assignee, to provide the notice. However, as discussed above in § ____.72, some commenters disagreed with this approach in the context of auto lending, since contracts for auto loans are often assigned immediately after the credit is extended.

The Agencies continue to believe it is appropriate for the initial creditor to provide a notice. Therefore, the provision requiring the person to whom the loan obligation is initially payable to provide a risk-based pricing notice, when appropriate, is adopted as proposed in paragraph (b) of the final rules.

Model Forms

Proposed Appendix H of the Board's rules and Appendix B of the Commission's rules contained model forms that the Agencies prepared to facilitate compliance with the rules. Two of the model forms were for risk-based pricing notices, and three of the model forms were for the credit score disclosure exceptions. Each of the model forms was designated for use in a particular set of circumstances as indicated by the title of that model form. Model forms H–1 and B–1 were for use in complying with the general risk-based pricing notice requirements in § ____.72. Model forms H–2 and B–2 were for risk-based pricing notices given in connection with account review. Model forms H–3 and B–3 were for use in connection with the credit score disclosure exception for loans secured by residential real property. Model forms H–4 and B–4 were for use in connection with the credit score disclosure exception for loans that are not secured by residential real property. Model forms H–5 and B–5 were for use in connection with the credit score disclosure exception when no credit score is available for a consumer. Each form, including its format, language, and other elements, was designed to communicate key information in a clear and readily understandable manner.

Although the Agencies did not test the proposed model forms with consumers, the design of the model forms was informed by consumer testing undertaken in connection with the interagency short-form privacy notice project and the Board's review of its credit card disclosure rules under the TILA.[13] In addition, the Agencies tested the proposed model forms using two widely available readability tests, the Flesch reading ease test and the Flesch-Kincaid grade level test, each of which generates a readability score.[14]

Several commenters believed the model forms were appropriate to ensure consistency and simplify compliance with the rules. One commenter believed the Agencies should allow creditors to provide notices in any "clear and conspicuous" manner while still retaining the safe harbor and substitute model clauses for model forms. Other commenters believed the model forms should be shorter and more succinct.

The Agencies believe the provision for model forms is appropriate, and that the length of the forms is appropriate in light of the content that must be communicated to the consumer. A creditor is permitted to change the forms by rearranging the format without modifying the substance of the disclosures and still rely upon the safe harbor. However, as the Agencies learned from consumer testing on privacy notices and credit card disclosures, format changes can have a significant effect on consumer comprehension.[15] Therefore, rearrangement of the model forms must not be so extensive as to affect materially the substance, clarity, comprehensibility, or meaningful

[13] *See* 72 FR 32,948, 32,951 (June 14, 2007) (Truth in Lending); 72 FR 14,940, 14,944 (Mar. 29, 2007) (Privacy).

[14] The Flesch reading ease test generates a score between zero and 100, where the higher score correlates with improved readability. The Flesch-Kincaid grade level test generates a numerical assessment of the grade-level at which the text is written. The Flesch-Kincaid readability tests are widely used by government agencies to evaluate readability levels of consumer communications.

[15] *See* 74 FR 5,244 (Jan. 29, 2009) (final revisions to credit card disclosures); 72 FR 14,940 (March 29, 2007) (proposed short-form privacy notice).

sequence of the forms. Creditors making revisions with that effect will lose the benefit of the safe harbor for appropriate use of Appendix H or Appendix B model forms. On the other hand, some format changes will not have a material adverse effect on the model forms, and may even enhance consumer comprehension. A creditor is permitted to use different colors or shading in its notice, include graphics or icons in its notice, such as a corporate logo or insignia, or make corrections or updates to telephone numbers, mailing addresses, or Web site addresses that may change over time.

Some commenters supported providing flexibility with regard to the content of the model forms, but asked the Agencies to clarify further the ways in which creditors could modify the notices, while still retaining the safe harbor. Some commenters suggested specific changes to the model forms that the Agencies should deem permissible without losing the safe harbor.

The Agencies agree that creditors should have some additional flexibility to modify the content of the model forms, while still retaining the safe harbor. Language has been added to the final rules to clarify that technical modifications to the language of the forms are permitted. More examples also have been added to the list of examples of acceptable changes to the model forms: substitution of the words "credit" and "creditor" or "finance" and "finance company" for the terms "loan" and "lender"; including pre-printed lists of the sources of consumer reports or consumer reporting agencies in a "check-the-box" format; and including the name of the consumer, transaction identification numbers, a date, and other information that will assist in identifying the transaction to which the form pertains. The final rules also specifically state that unacceptable changes to the model forms include: providing model forms on register receipts or interspersed with other disclosures and eliminating empty lines and extra spaces between sentences within the same section.

Some commenters asked the Agencies to clarify whether creditors must disclose in both bar graph and narrative form the distribution of credit scores and how a consumer's credit score compares to those scores. A creditor is permitted to use any clear and readily understandable means to convey this information and that information must only be disclosed using one format. A creditor may use the bar graph set forth in model forms H–3 and H–4 of the Board's rules and B–3 and B–4 of the Commission's rules to disclose the distribution of credit scores. Other clear and readily understandable means could include a different form of graphical presentation of the distribution. Alternatively, a creditor could include a short narrative statement such as that set forth in model forms H–3 and H–4 of the Board's rules and B–3 and B–4 of the Commission's rules to disclose how a consumer's credit score compares to the scores of other consumers. This statement must be simple and concise; a paragraph-length narrative description about the credit score distribution, such as a narrative description of the information represented in the bar graph set forth in the model forms, does not satisfy the clear and readily understandable standard.

The model forms are adopted generally as proposed, with revisions to address appropriate modifications that can be made to the model forms without losing the safe harbor and other revisions for clarification. Use of the model forms by creditors is optional. If a creditor uses an appropriate Appendix H or Appendix B model form, or modifies a form in accordance with the rules or the instructions to the appendix, that creditor is deemed to be acting in compliance with the provisions of §§ ____.72, ____.73, or ____.74, as applicable, of the final rules. Appropriate use of model form H–3 or model form B–3 is also intended to be compliant with the disclosure that may be required under section 609(g) of the FCRA.

Implementation Date

Industry commenters requested that the Agencies provide a sufficient period of time to implement the final rules. These commenters noted that they would have to develop and update systems and procedures to comply with the final rules. Appropriate implementation periods suggested by various commenters were two years, 18 months, and one year.

The Agencies have determined that 12 months is the appropriate implementation period. The Agencies believe that this provides a sufficient amount of time for creditors to implement the final rules. It will allow creditors to determine the method of disclosure they will use to implement the final rules and adjust their systems and make other changes accordingly. Moreover, for creditors who elect to use the credit score proxy method, this implementation period will also allow for time to take a sample and calculate a corresponding cutoff score. At the same time, this implementation period balances the need for creditors to have a sufficient period of time to prepare for implementation of the final rules with the Agencies' goal of providing disclosures based on risk-based pricing to consumers in a timely manner.

V. Regulatory Analysis

A. Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506; 5 CFR part 1320, Appendix A.1), the Board and the Commission (the Agencies) have reviewed the final rules and determined that they contain collections of information subject to the PRA. The collections of information required by these rules are found in 12 CFR 222.72(a), (c), and (d); 12 CFR 222.74(d), (e), and (f); 16 CFR 640.72(a), (c), and (d); and 16 CFR 640.74(d), (e), and (f).

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 OMB control number. The Commission submitted the information collection requirements contained in these joint final rules to OMB for review and approval under the PRA; OMB withheld formal action on the rule pending its further review of the joint final rule. The Board, under its delegated authority from OMB, has approved the implementation of this information collection; OMB control number is 7100–0308.[16]

The final rules generally require a creditor to provide a risk-based pricing notice to a consumer when the creditor uses a consumer report to grant or extend credit to the consumer on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that creditor. The final rules also provide for two alternative means by which creditors can determine when they are offering credit on material terms that are materially less favorable. The final rules also include certain exceptions to the general rule, including exceptions for creditors that provide a consumer with a disclosure of the consumer's credit score in conjunction with additional information that provides context for the credit score disclosure.

In the proposal, the Agencies estimated that respondents potentially affected by the new notice and

[16] The information collections (ICs) in this rule will be incorporated with the Board's Disclosure Requirements Associated with Regulation V (OMB No. 7100–0308). The burden estimates provided in this rule pertain only to the ICs associated with this proposed rulemaking. The current OMB inventory for Regulation V is available at: *http://www.reginfo.gov/public/do/PRAMain.*

disclosure requirements would take, on average, 40 hours (one business week) to reprogram and update systems, provide employee training, and modify model notices with respondent information to comply with proposed requirements. In addition, the Agencies estimated that, on a continuing basis, respondents would take five hours per month to modify and distribute notices to consumers. The Agencies recognized that the amount of time needed for any particular creditor subject to the proposed requirements may be higher or lower, but believed that this average figure was a reasonable estimate.

Comments Received:

The Agencies received two comments, one from a bank and another from a banking trade association, in response to the PRA section of the proposal. The commenters asserted that the time needed to update database systems may exceed the 40 hours estimated by the Agencies. The commenters, however, did not provide specific alternatives to this estimate.

Burden Statement:

The Agencies continue to believe that 40 hours is a reasonable estimate of the average amount of time to modify existing database systems. The Agencies have provided two alternative methods which creditors could use to determine which consumers must receive a risk-based pricing notice. The methods are intended to simplify compliance with the risk-based pricing requirement when it is not operationally feasible to make direct comparisons between consumers. Moreover, the Agencies have provided exceptions to the final rule, whereby creditors may fulfill their compliance obligation by providing credit score disclosures to consumers who apply for and are granted credit. Because creditors may provide credit score disclosures to consumers without regard to the terms offered, supplying these disclosures would eliminate the need for a creditor to perform an analysis to determine which consumers must receive a disclosure. The Agencies also believe that the availability of model notices may significantly reduce the cost of compliance with the final rules.

Frequency of Response: On occasion.

Affected Public: Any creditor that engages in risk-based pricing and uses a consumer report to set the terms on which credit is extended to consumers.

Board:

The Board is estimating the burden for entities regulated by the Board, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, Office of Thrift Supervision, National Credit Union Administration, and the U.S. Department of Housing and Urban Development (collectively, the "federal financial regulatory agencies") pursuant to the FCRA. Such entities are identified in section 621(b)(1)–(3) of the FCRA (15 U.S.C. 1681s(b)(1)–(3)) and may include, among others, state member banks, national banks, insured nonmember banks, savings associations, federally-chartered credit unions, and other mortgage lending institutions.

Number of Respondents: 18,173.

Estimated Time per Response: 40 hours (one business week) to reprogram and update systems, provide employee training, and modify model notices with respondent information to comply with final requirements. Five hours per month to modify and distribute notices to consumers on a continuing basis.

Total Estimated Annual Burden: 1,817,300 hours.[17]

Commission:

For purposes of the PRA, the Commission is estimating the burden for entities that extend credit to consumers for personal, household, or family purposes, and that are subject to the Commission's administrative enforcement pursuant to section 621(a)(1) of the FCRA (15 U.S.C. 1681s(a)(1)). These businesses include, among others, nonbank mortgage lenders, consumer lenders, utilities, state-chartered credit unions, and automobile dealers and retailers that directly extend credit to consumers for personal, non-business uses.

Number of Respondents: 199,500.[18]

Estimated Time per Response: 40 hours (1 business week) to reprogram and update systems, provide employee training, and modify model notices with respondent information to comply with final requirements. Five hours per month to modify and distribute notices to consumers on a continuing basis.

Total Estimated Annual Burden: 14,630,000 hours (rounded). The estimated annual labor cost associated with this burden is $252,048,000 (rounded).

Total Estimated Cost Burden: Commission staff derived labor costs by applying appropriate estimated hourly cost figures to the burden hours described above. It is difficult to calculate with precision the labor costs associated with the final rules, as they entail varying compensation levels of clerical, management, and/or technical staff among companies of different sizes. In calculating the cost figures, Commission staff assumes that managerial and/or professional technical personnel will develop procedures for conducting the risk-based pricing analyses, adapt the written notices as necessary, and train staff. In the NPRM analysis, Commission staff estimated labor cost for such employees to be at an hourly rate of $38.93, based on 2006 Bureau of Labor Statistics (BLS) data for management occupations. However, based on more current available BLS data, the Commission is revising upward the prior estimate to $42.15.[19] Commission staff assumes that personnel involved in sales and similar responsibilities will update and distribute the notices. In the NPRM analysis, Commission staff used 2006 BLS data to estimate labor costs for these employees to be at an hourly rate of $11.14. However, based on more current BLS data, the Commission is revising upward the prior estimate to $11.69.[20]

Based on the above estimates and assumptions, the estimated average annual labor cost for all categories of covered entities under the final rules is $252,048,000 (rounded to the nearest thousand) [{(40 hours × $42.15) + (180 hours × $11.69)} × 199,500 ÷ 3], or $1,263 per covered entity.[21]

[17] The increase of 1,380 hours corrects a mathematical error caused by a transposition of 1,815,980 hours published in the proposed rules.

[18] This estimate derives in part from an analysis of the figures obtained from the North American Industry Classification System (NAICS) Association's database of U.S. businesses. *See http://www.naics.com/search.htm.* Commission staff identified categories of entities under its jurisdiction that also directly provide credit to consumers. Those categories include retail, vehicle dealers, consumer lenders, and utilities. The estimate also includes state-chartered credit unions, which are subject to the Commission's jurisdiction. *See* 15 U.S.C. 1681s. For the latter category, Commission staff relied on estimates from the Credit Union National Association for the number of non-federal credit unions. *See http://www.ncua.gov/news/quick_facts/Facts2007.pdf.* For the purpose of estimating the burden, Commission staff made the conservative assumption that all of the included entities engage in risk-based pricing.

[19] This cost is derived from the median hourly wage for management occupations found in the May 2009 National Occupational Employment and Wage Estimates of the Bureau of Labor Statistics, Table 1.

[20] This cost is derived from the median hourly wage for sales and related occupations found in the May 2009 National Occupational Employment and Wage Estimates of the Bureau of Labor Statistics, Table 1.

[21] One commenter asserted that the rule was too costly. As noted above, however, the cost per covered entity is relatively low, particularly in comparison with the rule's benefits. These benefits include (1) educating consumers about the role that their consumer reports play in the pricing of credit; and (2) alerting consumers to the existence of potentially negative information in their consumer reports so that they may check their reports and correct any inaccurate information. If more consumers check their credit reports, as expected, the rule may also improve the accuracy of credit reports generally. Thus, the Commission believes that the benefits of the rule substantially outweigh the costs to those engaged in risk-based pricing.

Commission staff does not anticipate that compliance with the final rules will require any new capital or other non-labor expenditures.

The Agencies have a continuing interest in the public's opinions of our collections of information. At any time, comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, may be sent to:

Board: Comments, identified by *R–1316,* may be submitted by any of the following methods:

- *Agency Web Site: http://www.federalreserve.gov.* Follow the instructions for submitting comments on the *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: regs.comments@federalreserve.gov.* Include docket number in the subject line of the message.
- *FAX:* 202–452–3819 or 202–452–3102.
- *Mail:* Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

Commission: Comments should refer to "FACT ACT Risk-Based Pricing Rule: Project No. R411009" and may be submitted by any of the following methods. However, if the comment contains any material for which confidential treatment is requested, it must be filed in paper form, and the first page of the document must be clearly labeled "Confidential." [22]

- *Web site:* Comments filed in electronic form should be submitted by clicking on the following Web link: *https://secure.commentworks.com/ftc-RiskBasedPricing* and following the instructions on the Web-based form. To ensure that the Commission considers an electronic comment, you must file it on the Web-based form at *https://secure.commentworks.com/ftc-RiskBasedPricing.*
- *Federal eRulemaking Portal:* If this notice appears at *http://www.regulations.gov,* you may also file an electronic comment through that Web site. The Commission will consider all comments that regulations.gov forwards to it.
- *Mail or Hand Delivery:* A comment filed in paper form should include "FACT ACT Risk-Based Pricing Rule: Project No. R411009," both in the text and on the envelope and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H–135 (Annex M), 600 Pennsylvania Avenue, NW., Washington, DC 20580. The Commission is requesting that any comment filed in paper form be sent by courier or overnight service, if possible.

Comments on any proposed filing, recordkeeping, or disclosure requirements that are subject to paperwork burden review under the PRA should additionally be submitted to: Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Federal Trade Commission. Comments should be submitted via facsimile to (202) 395–5167 because U.S. postal mail at the OMB is subject to delays due to heightened security precautions.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the Commission's Web site, to the extent practicable, at *http://www.ftc.gov/os/publiccomments.htm.* As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the Commission's Web site. More information, including routine uses permitted by the Privacy Act, may be found in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

B. Regulatory Flexibility Act

Board:

The Board prepared an initial regulatory flexibility analysis as required by the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) (RFA) in connection with the proposed rule. Under section 605(b) of the RFA, 5 U.S.C. 605(b), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if an agency certifies, along with a statement providing the factual basis for such certification, that the rule will not have a significant economic impact on a substantial number of small entities. The rules cover certain banks, other depository institutions, and non-bank entities that extend credit to consumers. The Small Business Administration (SBA) establishes size standards that define which entities are small businesses for purposes of the RFA.[23] The size standard to be considered a small business is: $175 million or less in assets for banks and other depository institutions; and $7.0 million or less in annual revenues for the majority of non-bank entities that are likely to be subject to the rules. Based on its analysis and for the reasons stated below, the Board certifies that these final rules will not have a significant economic impact on a substantial number of small entities.

1. Reasons for the Final Rule

Section 311 of the FACT Act (which amends section 615 of the FCRA by adding a new subsection (h)) requires the Agencies to prescribe rules jointly to implement the duty of users of consumer reports to provide risk-based pricing notices in certain circumstances. Specifically, the rules must address, but are not limited to, the following aspects of section 615(h) of the FCRA: (i) The form, content, time, and manner of delivery of any risk-based pricing notice; (ii) clarification of the meaning of terms used in section 615(h), including what credit terms are material, and when credit terms are materially less favorable; (iii) exceptions to the risk-based pricing notice requirement for classes of persons or transactions regarding which the Agencies determine that notice would not significantly benefit consumers; (iv) a model notice that may be used to comply with section 615(h); and (v) the timing of the risk-based pricing notice, including the circumstances under which the notice must be provided after the terms offered to the consumer were set based on information from a consumer report. The Agencies are issuing the rules to fulfill their statutory duty to implement the risk-based

[22] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

[23] U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Industry Classification System Codes, available at *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.*

pricing notice provisions of section 615(h) of the FCRA.

The **SUPPLEMENTARY INFORMATION** above contains information on the objectives of the final rules.

2. Summaries of Issues Raised by Commenters

In connection with the proposed rule to implement the risk-based pricing provisions in section 311 of the FACT Act, the Board sought information and comment on any costs, compliance requirements, or changes in operating procedures arising from the application of the rule to small institutions. The Board received comments from a credit union and from trade associations that represent both banks and credit unions. The commenters asserted that compliance with the final rules would increase costs. They also believed that performing an analysis to determine which consumers must receive risk-based pricing notices would be too burdensome and could result in small creditors providing risk-based pricing notices to all consumers who apply for credit. These comments, however, did not contain specific information about costs that will be incurred or changes in operating procedures that will be required to comply with the final rule. In general, the comments discussed the impact of statutory requirements rather than any impact that the Board's proposed rules themselves would generate. The Board continues to believe that the final rules will not have a significant impact on a substantial number of small entities.

3. Description of Small Entities to Which the Rules Apply

The rules apply to any person that both (i) uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit to a consumer that is primarily for personal, family, or household purposes; and (ii) based in whole or in part on the consumer report, grants, extends, or otherwise provides credit to the consumer on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that person. The rules do not apply to any person that uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit primarily for a business purpose.

The total number of small entities likely to be affected by the final rules is unknown because the Agencies do not have data on the number of small entities that use consumer reports for risk-based pricing in connection with consumer credit. The risk-based pricing provisions of the FACT Act have broad applicability to persons who use consumer reports and engage in risk-based pricing in connection with the provision of consumer credit. Based on estimates compiled by the Board and other federal bank and thrift regulatory agencies,[24] there are approximately 10,268 depository institutions that could be considered small entities and that are potentially subject to the final rules.[25] The available data are insufficient to estimate the number of non-bank entities that would be subject to the final rules and that are small as defined by the SBA. Such entities would include non-bank mortgage lenders, auto finance companies, automobile dealers, other non-bank finance companies, telephone companies, and utility companies.

It also is unknown how many of these small entities that meet the SBA's size standards and are potentially subject to the rules engage in risk-based pricing based in whole or in part on consumer reports. The rules do not impose any requirements on small entities that do not use consumer reports or that do not engage in risk-based pricing of consumer credit on the basis of consumer reports.

4. Projected Reporting, Recordkeeping and Other Compliance Requirements

The compliance requirements of the rules are described in detail in the **SUPPLEMENTARY INFORMATION** above.

The rules generally require a person to provide a risk-based pricing notice to a consumer when that person uses a consumer report to grant or extend credit to the consumer on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that person. A person can identify consumers to whom it must provide the notice by directly comparing the material terms offered to its consumers or by using one of two alternative methods specified in the rules. The rules also include several exceptions to the general rule, including exceptions that would allow a person otherwise subject to the risk-based pricing notice requirement to provide a consumer with a credit score disclosure in conjunction with additional information that provides context for the credit score disclosure.

A person must determine if it engages in risk-based pricing, based in whole or in part on consumer reports, in connection with the provision of consumer credit. A person that does engage in such risk-based pricing must analyze the rules. Subject to the exceptions set forth in the final rule, the person generally would need to establish procedures for identifying those consumers to whom it must provide risk-based pricing notices. These procedures could involve either applying the general rule and performing a direct comparison among the terms offered to the person's consumers or utilizing one of the alternative methods set forth in the rules. Persons required to provide risk-based pricing notices also must design, generate, and provide those notices to the consumers that they have identified. Alternatively, a person that complies with the rules by providing notices that meet the requirements of any of the credit score disclosure exceptions would need to design, generate, and provide those notices to its consumers. In the case of automobile lending transactions, it may also be necessary for a person to arrange to have an auto dealer or other party provide risk-based pricing notices or credit score disclosures to consumers on its behalf and maintain reasonable policies and procedures to verify that the auto dealer or other party provides such notices to consumers within applicable time periods.

5. Steps Taken To Minimize the Economic Impact on Small Entities

The Board has sought to minimize the economic impact on small entities by adopting rules that are consistent with those adopted by the Commission; providing creditors with potentially less burdensome alternatives to the direct comparison method; permitting creditors to fulfill their compliance obligation by providing credit score disclosures to consumers who apply for and are granted credit; and providing model notices to ease creditors' compliance burden.

Commission:

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. 601–612, requires that the Commission provide an Initial Regulatory Flexibility Analysis (IRFA) with a proposed rule and a Final Regulatory Flexibility Analysis (FRFA) with the final rule, unless the Commission certifies that the rule will not have a significant economic impact on a substantial number of entities. *See* 5 U.S.C. 603–605.

[24] The Office of the Comptroller of the Currency, Board, Federal Deposit Insurance Corporation, and Office of Thrift Supervision.

[25] The estimate includes 1,444 institutions regulated by the Board and 4,357 federally-chartered credit unions, as determined by the Board. The estimate also includes 676 national banks, 3,400 FDIC-insured state nonmember banks, and 391 savings associations. *See* 74 FR 31484, 31506–31508 (Jul. 1, 2009).

The Commission hereby certifies that the final rule will not have a significant economic impact on a substantial number of small business entities. The Commission recognizes that the final rule will affect some small business entities; however we do not expect that a substantial number of small businesses will be affected or that the final rule will have a significant economic impact on them.

The Commission continues to believe that a precise estimate of the number of small entities that fall under the final rule is not feasible. The Commission did not receive any comments relating to the number of small entities which would be affected by the final rule. Nor did we receive any comments on the cost and burden on small entities of complying with the final rule. However, based on the Commission's own experience and knowledge of industry practices, the Commission continues to believe that the cost and burden to small entities of complying with the final rule are minimal. Accordingly, this document serves as notice to the Small Business Administration of the agency's certification of no effect. Nonetheless, the Commission has decided to publish a FRFA with the final rule. Therefore, the Commission has prepared the following analysis:

1. Need for and Objectives of the Rule

The FTC is charged with enforcing the requirements of section 311 of the FACT Act (which amends section 615 of the FCRA by adding a new subsection (h)) which requires that a risk-based pricing notice be provided to consumers in certain circumstances. The rule is generally intended to improve the accuracy of consumer reports by alerting consumers to the existence of potentially negative information in their consumer reports so that consumers may check their reports for accuracy and correct any inaccurate information. In addition, section 311 requires the Agencies jointly to prescribe rules to implement the duty of users of consumer reports to provide risk-based pricing notices in certain circumstances. Specifically, the rules must address, but are not limited to, the following aspects of section 615(h) of the FCRA: (i) The form, content, time, and manner of delivery of any risk-based pricing notice; (ii) clarification of the meaning of terms used in section 615(h), including what credit terms are material, and when credit terms are materially less favorable; (iii) exceptions to the risk-based pricing notice requirement for classes of persons or transactions regarding which the Agencies determine that notice would not significantly benefit consumers; (iv) a model notice that may be used to comply with section 615(h); and (v) the timing of the risk-based pricing notice, including the circumstances under which the notice must be provided after the terms offered to the consumer were set based on information from a consumer report. In this action, the FTC promulgates final rules that would implement these requirements of the FACT Act.

2. Significant Issues Received by Public Comment

The Commission received a number of comments in response to the proposed rule. Some of the comments addressed the effect of the proposed rule on businesses generally, but none identified small businesses as a particular category.

Two commenters suggested that the FTC staff has underestimated the amount of time and effort it would take businesses of all sizes to comply with the proposed rule. However, these commenters did not explain why they felt the Commission's estimate that compliance with the rule would take businesses on average 40 hours (1 business week) during the first year, and 5 hours per month on a continuing basis thereafter, was too low. These comments also did not offer any alternate time estimates. As explained in the PRA section, the Commission continues to believe that these time estimates are accurate and they remain unchanged in the final rule.

3. Small Entities to Which the Final Rule Will Apply

The total number of small entities likely to be affected by the final rule is unknown, because the Commission does not have data on the number of small entities that use consumer reports for risk-based pricing in connection with consumer credit. Moreover, the entities under the Commission's jurisdiction are so varied that there is no way to identify them in general and, therefore, no way to know how many of them qualify as small businesses. Generally, the entities under the Commission's jurisdiction that also are covered by section 311 include state-chartered credit unions, non-bank mortgage lenders, auto dealers, and utility companies. The available data, however, is not sufficient for the Commission to realistically estimate the number of small entities, as defined by the U.S. Small Business Administration (SBA), that the Commission regulates and that would be subject to the proposed rule.[26] The Commission did not receive any comments to the IRFA on the number of small entities that will be affected by the final rule. The final rule does not impose any requirements on small entities that do not use consumer reports or that do not engage in risk-based pricing of consumer credit on the basis of consumer reports.

4. Projected Reporting, Recordkeeping and Other Compliance Requirements

The final rule is a disclosure rule that generally requires a creditor to provide a risk-based pricing notice to a consumer when that creditor uses a consumer report to grant or extend credit to the consumer on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that creditor. A creditor can identify consumers to whom it must provide the notice by directly comparing the material terms offered to its consumers or by using one of the two alternative methods specified in the final rule. The final rule also includes several exceptions to the general rule, including exceptions that would allow a creditor otherwise subject to the risk-based pricing notice requirement to provide a consumer with a credit score disclosure in conjunction with additional information that provides context for the credit score disclosure.

The final rule will involve some expenditure of time and resources for entities to comply, although Commission staff anticipates that the costs per entity will not be significant. Most of the costs will be incurred initially as entities develop systems for determining which of their consumers should receive risk-based pricing notices and as they train staff to comply with the rule. In calculating these costs, Commission staff assumes that for all entities managerial and/or professional technical personnel will handle the initial aspects of compliance with the proposed rule, and that sales associates or administrative personnel will handle any ongoing responsibilities. Cost estimates for compliance with the final

[26] Under the SBA's size standards, many creditors, including the majority of non-bank entities that are likely to be subject to the proposed regulations and are subject to the Commission's jurisdiction, are considered small if their average annual receipts do not exceed $6.5 million. Auto dealers have a higher size standard of $26.5 million in average annual receipts for new car dealers and $21 million in average annual receipts for used car dealers. A list of the SBA's size standards for all industries can be found in the SBA's Table of Small Business Size Standards Matched to North American Industry Classification Codes, which is available at *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.*

rule are described in detail in the PRA section of this Notice.

To minimize these costs, the final rule offers several different ways that businesses can perform a risk-based pricing analysis, allowing businesses to choose the method that is least burdensome and best-suited to their particular business model. Additionally, Commission staff believes that, as creditors, most of the covered entities are familiar already with the existing provisions of section 615 of the FCRA, which require specific disclosures in connection with adverse action notices whenever a creditor uses a credit report to deny credit. Commission staff anticipates that many businesses already have systems in place to handle the existing requirements under section 615 and that they will be able to incorporate the risk-based pricing notice requirements into those systems. As for any continuing costs such as those involved in preparing and distributing the notices, the final rule provides a model risk-based pricing notice, thereby significantly limiting the ongoing time and effort required by businesses to comply with the rule.

For these reasons, Commission staff does not expect that the costs associated with the final rule will place a significant burden on small entities.

5. Steps Taken To Minimize Significant Economic Impact of the Rule on Small Entities

The Commission considered whether any significant alternatives, consistent with the purposes of the FACT Act, could further minimize the final rule's impact on small entities. The FTC asked for comment on this issue and received none. The final rule provides flexibility so that a covered entity, regardless of its size, may tailor its practices to its individual needs. For example, the rule identifies several different ways that an entity can perform a risk-based pricing analysis, allowing each entity to choose the approach that fits best with its business model. A small business may find it easiest to make individual, consumer-to-consumer comparisons. If it uses a tiered system to determine a consumer's interest rate, however, then it may prefer to use the tiered pricing method to conduct the risk-based pricing analysis. Alternatively, a business may find the credit score disclosure notice to be least burdensome, and opt for that approach to comply with the rule. A business may prefer to deliver these notices electronically. By providing a range of options, the Agencies have sought to help businesses of all sizes reduce the burden or inconvenience of complying with the final rule.

Similarly, the final rule provides model notices and model credit score disclosures to facilitate compliance. By using these model notices, businesses qualify for a safe harbor. They are not required to use the model notices, however, as long as they provide a notice that effectively conveys the required information; these businesses simply would not receive the benefit of the safe harbor. Having this option, again, provides businesses of all sizes flexibility in how to comply with the final rule.

Some commenters requested that the FTC delay implementation of the final rule for up to two years in order that businesses may update software, develop and implement risk-based pricing procedures, and adequately train staff on the new rule. The agencies have set a compliance deadline that gives all affected entities one year in which to implement the final regulations. The Commission believes that one year is an adequate amount of time for businesses to reprogram and update systems to incorporate these new notice requirements, to provide employee training, and to modify model notices with respondent information to comply with the final rule.

List of Subjects

12 CFR Part 222

Banks, Banking, Consumer protection, Fair Credit Reporting Act, Holding companies, Privacy, Reporting and recordkeeping requirements, State member banks.

16 CFR Part 640

Consumer reporting agencies, Consumer reports, Credit, Fair Credit Reporting Act, Trade practices.

16 CFR Part 698

Consumer reporting agencies, Consumer reports, Credit, Fair Credit Reporting Act, Trade practices.

Board of Governors of the Federal Reserve System

12 CFR Chapter II

Authority and Issuance

■ For the reasons discussed in the joint preamble, the Board of Governors of the Federal Reserve System amends chapter II of title 12 of the Code of Federal Regulations by amending 12 CFR part 222 as follows:

PART 222—FAIR CREDIT REPORTING (REGULATION V)

■ 1. The authority citation for part 222 is revised to read as follows:

Authority: 15 U.S.C. 1681b, 1681c, 1681m and 1681s; Secs. 3, 214, and 216, Pub. L. 108–159, 117 Stat. 1952.

■ 2. Add Subpart H to part 222 to read as follows:

Subpart H—Duties of Users Regarding Risk-Based Pricing

Sec.
222.70 Scope.
222.71 Definitions.
222.72 General requirements for risk-based pricing notices.
222.73 Content, form, and timing of risk-based pricing notices.
222.74 Exceptions.
222.75 Rules of construction.

Subpart H—Duties of Users Regarding Risk-Based Pricing

§ 222.70 Scope.

(a) *Coverage*—(1) *In general.* This subpart applies to any person that both—

(i) Uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit to a consumer that is primarily for personal, family, or household purposes; and

(ii) Based in whole or in part on the consumer report, grants, extends, or otherwise provides credit to the consumer on material terms that are materially less favorable than the most favorable material terms available to a substantial proportion of consumers from or through that person.

(2) *Business credit excluded.* This subpart does not apply to an application for, or a grant, extension, or other provision of, credit to a consumer or to any other applicant primarily for a business purpose.

(b) *Relation to Federal Trade Commission rules.* These rules are substantively identical to the Federal Trade Commission's (Commission's) risk-based pricing rules in 16 CFR 640. Both rules apply to the covered person described in paragraph (a) of this section. Compliance with either the Board's rules or the Commission's rules satisfies the requirements of the statute (15 U.S.C. 1681m(h)).

(c) *Enforcement.* The provisions of this subpart will be enforced in accordance with the enforcement authority set forth in sections 621(a) and (b) of the FCRA.

§ 222.71 Definitions.

For purposes of this subpart, the following definitions apply:

(a) *Adverse action* has the same meaning as in 15 U.S.C. 1681a(k)(1)(A).

(b) *Annual percentage rate* has the same meaning as in 12 CFR 226.14(b) with respect to an open-end credit plan and as in 12 CFR 226.22 with respect to closed-end credit.

(c) *Closed-end credit* has the same meaning as in 12 CFR 226.2(a)(10).

(d) *Consumer* has the same meaning as in 15 U.S.C. 1681a(c).

(e) *Consummation* has the same meaning as in 12 CFR 226.2(a)(13).

(f) *Consumer report* has the same meaning as in 15 U.S.C. 1681a(d).

(g) *Consumer reporting agency* has the same meaning as in 15 U.S.C. 1681a(f).

(h) *Credit* has the same meaning as in 15 U.S.C. 1681a(r)(5).

(i) *Creditor* has the same meaning as in 15 U.S.C. 1681a(r)(5).

(j) *Credit card* has the same meaning as in 15 U.S.C. 1681a(r)(2).

(k) *Credit card issuer* has the same meaning as in 15 U.S.C. 1681a(r)(1)(A).

(l) *Credit score* has the same meaning as in 15 U.S.C. 1681g(f)(2)(A).

(m) *Firm offer of credit* has the same meaning as in 15 U.S.C. 1681a(l).

(n) *Material terms* means—

(1) (i) Except as otherwise provided in paragraphs (n)(1)(ii) and (n)(3) of this section, in the case of credit extended under an open-end credit plan, the annual percentage rate required to be disclosed under 12 CFR 226.6(a)(1)(ii) or 12 CFR 226.6(b)(2)(i), excluding any temporary initial rate that is lower than the rate that will apply after the temporary rate expires, any penalty rate that will apply upon the occurrence of one or more specific events, such as a late payment or an extension of credit that exceeds the credit limit, and any fixed annual percentage rate option for a home equity line of credit;

(ii) In the case of a credit card (other than a credit card that is used to access a home equity line of credit or a charge card), the annual percentage rate required to be disclosed under 12 CFR 226.6(b)(2)(i) that applies to purchases ("purchase annual percentage rate") and no other annual percentage rate, or in the case of a credit card that has no purchase annual percentage rate, the annual percentage rate that varies based on information in a consumer report and that has the most significant financial impact on consumers;

(2) In the case of closed-end credit, the annual percentage rate required to be disclosed under 12 CFR 226.17(c) and 226.18(e); and

(3) In the case of credit for which there is no annual percentage rate, the financial term that varies based on information in a consumer report and that has the most significant financial impact on consumers, such as a deposit required in connection with credit extended by a telephone company or utility or an annual membership fee for a charge card.

(o) *Materially less favorable* means, when applied to material terms, that the terms granted, extended, or otherwise provided to a consumer differ from the terms granted, extended, or otherwise provided to another consumer from or through the same person such that the cost of credit to the first consumer would be significantly greater than the cost of credit granted, extended, or otherwise provided to the other consumer. For purposes of this definition, factors relevant to determining the significance of a difference in cost include the type of credit product, the term of the credit extension, if any, and the extent of the difference between the material terms granted, extended, or otherwise provided to the two consumers.

(p) *Open-end credit plan* has the same meaning as in 15 U.S.C. 1602(i), as interpreted by the Board of Governors of the Federal Reserve System in Regulation Z (12 CFR part 226) and the Official Staff Commentary to Regulation Z (Supplement I to 12 CFR Part 226).

(q) *Person* has the same meaning as in 15 U.S.C. 1681a(b).

§ 222.72 General requirements for risk-based pricing notices.

(a) *In general.* Except as otherwise provided in this subpart, a person must provide to a consumer a notice ("risk-based pricing notice") in the form and manner required by this subpart if the person both—

(1) Uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit to that consumer that is primarily for personal, family, or household purposes; and

(2) Based in whole or in part on the consumer report, grants, extends, or otherwise provides credit to that consumer on material terms that are materially less favorable than the most favorable material terms available to a substantial proportion of consumers from or through that person.

(b) *Determining which consumers must receive a notice.* A person may determine whether paragraph (a) of this section applies by directly comparing the material terms offered to each consumer and the material terms offered to other consumers for a specific type of credit product. For purposes of this section, a "specific type of credit product" means one or more credit products with similar features that are designed for similar purposes. Examples of a specific type of credit product include student loans, unsecured credit cards, secured credit cards, new automobile loans, used automobile loans, fixed-rate mortgage loans, and variable-rate mortgage loans. As an alternative to making this direct comparison, a person may make the determination by using one of the following methods:

(1) *Credit score proxy method*—(i) *In general.* A person that sets the material terms of credit granted, extended, or otherwise provided to a consumer, based in whole or in part on a credit score, may comply with the requirements of paragraph (a) of this section by—

(A) Determining the credit score (hereafter referred to as the "cutoff score") that represents the point at which approximately 40 percent of the consumers to whom it grants, extends, or provides credit have higher credit scores and approximately 60 percent of the consumers to whom it grants, extends, or provides credit have lower credit scores; and

(B) Providing a risk-based pricing notice to each consumer to whom it grants, extends, or provides credit whose credit score is lower than the cutoff score.

(ii) *Alternative to the 40/60 cutoff score determination.* In the case of credit that has been granted, extended, or provided on the most favorable material terms to more than 40 percent of consumers, a person may, at its option, set its cutoff score at a point at which the approximate percentage of consumers who historically have been granted, extended, or provided credit on material terms other than the most favorable terms would receive risk-based pricing notices under this section.

(iii) *Determining the cutoff score*—(A) *Sampling approach.* A person that currently uses risk-based pricing with respect to the credit products it offers must calculate the cutoff score by considering the credit scores of all or a representative sample of the consumers to whom it has granted, extended, or provided credit for a specific type of credit product.

(B) *Secondary source approach in limited circumstances.* A person that is a new entrant into the credit business, introduces new credit products, or starts to use risk-based pricing with respect to the credit products it currently offers may initially determine the cutoff score based on information derived from appropriate market research or relevant third-party sources for a specific type of credit product, such as research or data from companies that develop credit scores. A person that acquires a credit

portfolio as a result of a merger or acquisition may determine the cutoff score based on information from the party which it acquired, with which it merged, or from which it acquired the portfolio.

(C) *Recalculation of cutoff scores.* A person using the credit score proxy method must recalculate its cutoff score(s) no less than every two years in the manner described in paragraph (b)(1)(iii)(A) of this section. A person using the credit score proxy method using market research, third-party data, or information from a party which it acquired, with which it merged, or from which it acquired the portfolio as permitted by paragraph (b)(1)(iii)(B) of this section generally must calculate a cutoff score(s) based on the scores of its own consumers in the manner described in paragraph (b)(1)(iii)(A) of this section within one year after it begins using a cutoff score derived from market research, third-party data, or information from a party which it acquired, with which it merged, or from which it acquired the portfolio. If such a person does not grant, extend, or provide credit to new consumers during that one-year period such that it lacks sufficient data with which to recalculate a cutoff score based on the credit scores of its own consumers, the person may continue to use a cutoff score derived from market research, third-party data, or information from a party which it acquired, with which it merged, or from which it acquired the portfolio as provided in paragraph (b)(1)(iii)(B) until it obtains sufficient data on which to base the recalculation. However, the person must recalculate its cutoff score(s) in the manner described in paragraph (b)(1)(iii)(A) of this section within two years, if it has granted, extended, or provided credit to some new consumers during that two-year period.

(D) *Use of two or more credit scores.* A person that generally uses two or more credit scores in setting the material terms of credit granted, extended, or provided to a consumer must determine the cutoff score using the same method the person uses to evaluate multiple scores when making credit decisions. These evaluation methods may include, but are not limited to, selecting the low, median, high, most recent, or average credit score of each consumer to whom it grants, extends, or provides credit. If a person that uses two or more credit scores does not consistently use the same method for evaluating multiple credit scores (*e.g.,* if the person sometimes chooses the median score and other times calculates the average score), the person must determine the cutoff score using a reasonable means. In such cases, use of any one of the methods that the person regularly uses or the average credit score of each consumer to whom it grants, extends, or provides credit is deemed to be a reasonable means of calculating the cutoff score.

(iv) *Credit score not available.* For purposes of this section, a person using the credit score proxy method who grants, extends, or provides credit to a consumer for whom a credit score is not available must assume that the consumer receives credit on material terms that are materially less favorable than the most favorable credit terms offered to a substantial proportion of consumers from or through that person and must provide a risk-based pricing notice to the consumer.

(v) *Examples.* (A) A credit card issuer engages in risk-based pricing and the annual percentage rates it offers to consumers are based in whole or in part on a credit score. The credit card issuer takes a representative sample of the credit scores of consumers to whom it issued credit cards within the preceding three months. The credit card issuer determines that approximately 40 percent of the sampled consumers have a credit score at or above 720 (on a scale of 350 to 850) and approximately 60 percent of the sampled consumers have a credit score below 720. Thus, the card issuer selects 720 as its cutoff score. A consumer applies to the credit card issuer for a credit card. The card issuer obtains a credit score for the consumer. The consumer's credit score is 700. Since the consumer's 700 credit score falls below the 720 cutoff score, the credit card issuer must provide a risk-based pricing notice to the consumer.

(B) A credit card issuer engages in risk-based pricing, and the annual percentage rates it offers to consumers are based in whole or in part on a credit score. The credit card issuer takes a representative sample of the consumers to whom it issued credit cards over the preceding six months. The credit card issuer determines that approximately 80 percent of the sampled consumers received credit at its lowest annual percentage rate, and 20 percent received credit at a higher annual percentage rate. Approximately 80 percent of the sampled consumers have a credit score at or above 750 (on a scale of 350 to 850), and 20 percent have a credit score below 750. Thus, the card issuer selects 750 as its cutoff score. A consumer applies to the credit card issuer for a credit card. The card issuer obtains a credit score for the consumer. The consumer's credit score is 740. Since the consumer's 740 credit score falls below the 750 cutoff score, the credit card issuer must provide a risk-based pricing notice to the consumer.

(C) An auto lender engages in risk-based pricing, obtains credit scores from one of the nationwide consumer reporting agencies, and uses the credit score proxy method to determine which consumers must receive a risk-based pricing notice. A consumer applies to the auto lender for credit to finance the purchase of an automobile. A credit score about that consumer is not available from the consumer reporting agency from which the lender obtains credit scores. The lender nevertheless grants, extends, or provides credit to the consumer. The lender must provide a risk-based pricing notice to the consumer.

(2) *Tiered pricing method*—(i) *In general.* A person that sets the material terms of credit granted, extended, or provided to a consumer by placing the consumer within one of a discrete number of pricing tiers for a specific type of credit product, based in whole or in part on a consumer report, may comply with the requirements of paragraph (a) of this section by providing a risk-based pricing notice to each consumer who is not placed within the top pricing tier or tiers, as described below.

(ii) *Four or fewer pricing tiers.* If a person using the tiered pricing method has four or fewer pricing tiers, the person complies with the requirements of paragraph (a) of this section by providing a risk-based pricing notice to each consumer to whom it grants, extends, or provides credit who does not qualify for the top tier (that is, the lowest-priced tier). For example, a person that uses a tiered pricing structure with annual percentage rates of 8, 10, 12, and 14 percent would provide the risk-based pricing notice to each consumer to whom it grants, extends, or provides credit at annual percentage rates of 10, 12, and 14 percent.

(iii) *Five or more pricing tiers.* If a person using the tiered pricing method has five or more pricing tiers, the person complies with the requirements of paragraph (a) of this section by providing a risk-based pricing notice to each consumer to whom it grants, extends, or provides credit who does not qualify for the top two tiers (that is, the two lowest-priced tiers) and any other tier that, together with the top tiers, comprise no less than the top 30 percent but no more than the top 40 percent of the total number of tiers. Each consumer placed within the remaining tiers must receive a risk-

based pricing notice. For example, if a person has nine pricing tiers, the top three tiers (that is, the three lowest-priced tiers) comprise no less than the top 30 percent but no more than the top 40 percent of the tiers. Therefore, a person using this method would provide a risk-based pricing notice to each consumer to whom it grants, extends, or provides credit who is placed within the bottom six tiers.

(c) *Application to credit card issuers*—(1) *In general.* A credit card issuer subject to the requirements of paragraph (a) of this section may use one of the methods set forth in paragraph (b) of this section to identify consumers to whom it must provide a risk-based pricing notice. Alternatively, a credit card issuer may satisfy its obligations under paragraph (a) of this section by providing a risk-based pricing notice to a consumer when—

(i) A consumer applies for a credit card either in connection with an application program, such as a direct-mail offer or a take-one application, or in response to a solicitation under 12 CFR 226.5a, and more than a single possible purchase annual percentage rate may apply under the program or solicitation; and

(ii) Based in whole or in part on a consumer report, the credit card issuer provides a credit card to the consumer with an annual percentage rate referenced in § 222.71(n)(1)(ii) that is greater than the lowest annual percentage rate referenced in § 222.71(n)(1)(ii) available in connection with the application or solicitation.

(2) *No requirement to compare different offers.* A credit card issuer is not subject to the requirements of paragraph (a) of this section and is not required to provide a risk-based pricing notice to a consumer if—

(i) The consumer applies for a credit card for which the card issuer provides a single annual percentage rate referenced in § 222.71(n)(1)(ii), excluding a temporary initial rate that is lower than the rate that will apply after the temporary rate expires and a penalty rate that will apply upon the occurrence of one or more specific events, such as a late payment or an extension of credit that exceeds the credit limit; or

(ii) The credit card issuer offers the consumer the lowest annual percentage rate referenced in § 222.71(n)(1)(ii) available under the credit card offer for which the consumer applied, even if a lower annual percentage rate referenced in § 222.71(n)(1)(ii) is available under a different credit card offer issued by the card issuer.

(3) *Examples.* (i) A credit card issuer sends a solicitation to the consumer that discloses several possible purchase annual percentage rates that may apply, such as 10, 12, or 14 percent, or a range of purchase annual percentage rates from 10 to 14 percent. The consumer applies for a credit card in response to the solicitation. The card issuer provides a credit card to the consumer with a purchase annual percentage rate of 12 percent based in whole or in part on a consumer report. Unless an exception applies under § 222.74, the card issuer may satisfy its obligations under paragraph (a) of this section by providing a risk-based pricing notice to the consumer because the consumer received credit at a purchase annual percentage rate greater than the lowest purchase annual percentage rate available under that solicitation.

(ii) The same facts as in the example in paragraph (c)(3)(i) of this section, except that the card issuer provides a credit card to the consumer at a purchase annual percentage rate of 10 percent. The card issuer is not required to provide a risk-based pricing notice to the consumer even if, under a different credit card solicitation, that consumer or other consumers might qualify for a purchase annual percentage rate of 8 percent.

(d) *Account review*—(1) *In general.* Except as otherwise provided in this subpart, a person is subject to the requirements of paragraph (a) of this section and must provide a risk-based pricing notice to a consumer in the form and manner required by this subpart if the person—

(i) Uses a consumer report in connection with a review of credit that has been extended to the consumer; and

(ii) Based in whole or in part on the consumer report, increases the annual percentage rate (the annual percentage rate referenced in § 222.71(n)(1)(ii) in the case of a credit card).

(2) *Example.* A credit card issuer periodically obtains consumer reports for the purpose of reviewing the terms of credit it has extended to consumers in connection with credit cards. As a result of this review, the credit card issuer increases the purchase annual percentage rate applicable to a consumer's credit card based in whole or in part on information in a consumer report. The credit card issuer is subject to the requirements of paragraph (a) of this section and must provide a risk-based pricing notice to the consumer.

§ 222.73 Content, form, and timing of risk-based pricing notices.

(a) *Content of the notice*—(1) *In general.* The risk-based pricing notice required by § 222.72(a) or (c) must include:

(i) A statement that a consumer report (or credit report) includes information about the consumer's credit history and the type of information included in that history;

(ii) A statement that the terms offered, such as the annual percentage rate, have been set based on information from a consumer report;

(iii) A statement that the terms offered may be less favorable than the terms offered to consumers with better credit histories;

(iv) A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the report;

(v) The identity of each consumer reporting agency that furnished a consumer report used in the credit decision;

(vi) A statement that federal law gives the consumer the right to obtain a copy of a consumer report from the consumer reporting agency or agencies identified in the notice without charge for 60 days after receipt of the notice;

(vii) A statement informing the consumer how to obtain a consumer report from the consumer reporting agency or agencies identified in the notice and providing contact information (including a toll-free telephone number, where applicable) specified by the consumer reporting agency or agencies; and

(viii) A statement directing consumers to the Web sites of the Federal Reserve Board and Federal Trade Commission to obtain more information about consumer reports.

(2) *Account review.* The risk-based pricing notice required by § 222.72(d) must include:

(i) A statement that a consumer report (or credit report) includes information about the consumer's credit history and the type of information included in that credit history;

(ii) A statement that the person has conducted a review of the account using information from a consumer report;

(iii) A statement that as a result of the review, the annual percentage rate on the account has been increased based on information from a consumer report;

(iv) A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the report;

(v) The identity of each consumer reporting agency that furnished a consumer report used in the account review;

(vi) A statement that federal law gives the consumer the right to obtain a copy of a consumer report from the consumer

reporting agency or agencies identified in the notice without charge for 60 days after receipt of the notice;

(vii) A statement informing the consumer how to obtain a consumer report from the consumer reporting agency or agencies identified in the notice and providing contact information (including a toll-free telephone number, where applicable) specified by the consumer reporting agency or agencies; and

(viii) A statement directing consumers to the Web sites of the Federal Reserve Board and Federal Trade Commission to obtain more information about consumer reports.

(b) *Form of the notice*—(1) *In general.* The risk-based pricing notice required by § 222.72(a), (c), or (d) must be:

(i) Clear and conspicuous; and

(ii) Provided to the consumer in oral, written, or electronic form.

(2) *Model forms.* A model form of the risk-based pricing notice required by § 222.72(a) and (c) is contained in Appendix H–1 of this part. Appropriate use of Model Form H–1 is deemed to comply with the content and form requirements of paragraphs (a)(1) and (b) of this section. A model form of the risk-based pricing notice required by § 222.72(d) is contained in Appendix H–2 of this part. Appropriate use of Model Form H–2 is deemed to comply with the content and form requirements of paragraphs (a)(2) and (b) of this section. Use of the model forms is optional.

(c) *Timing*—(1) *General.* Except as provided in paragraph (c)(3) of this section, a risk-based pricing notice must be provided to the consumer—

(i) In the case of a grant, extension, or other provision of closed-end credit, before consummation of the transaction, but not earlier than the time the decision to approve an application for, or a grant, extension, or other provision of, credit, is communicated to the consumer by the person required to provide the notice;

(ii) In the case of credit granted, extended, or provided under an open-end credit plan, before the first transaction is made under the plan, but not earlier than the time the decision to approve an application for, or a grant, extension, or other provision of, credit is communicated to the consumer by the person required to provide the notice; or

(iii) In the case of a review of credit that has been extended to the consumer, at the time the decision to increase the annual percentage rate (annual percentage rate referenced in § 222.71(n)(1)(ii) in the case of a credit card) based on a consumer report is communicated to the consumer by the person required to provide the notice, or if no notice of the increase in the annual percentage rate is provided to the consumer prior to the effective date of the change in the annual percentage rate (to the extent permitted by law), no later than five days after the effective date of the change in the annual percentage rate.

(2) *Application to certain automobile lending transactions.* When a person to whom a credit obligation is initially payable grants, extends, or provides credit to a consumer for the purpose of financing the purchase of an automobile from an auto dealer or other party that is not affiliated with the person, any requirement to provide a risk-based pricing notice pursuant to this subpart is satisfied if the person:

(i) Provides a notice described in §§ 222.72(a), 222.74(e), or 222.74(f) to the consumer within the time periods set forth in paragraph (c)(1)(i) of this section, § 222.74(e)(3), or § 222.74(f)(4), as applicable; or

(ii) Arranges to have the auto dealer or other party provide a notice described in §§ 222.72(a), 222.74(e), or 222.74(f) to the consumer on its behalf within the time periods set forth in paragraph (c)(1)(i) of this section, § 222.74(e)(3), or § 222.74(f)(4), as applicable, and maintains reasonable policies and procedures to verify that the auto dealer or other party provides such notice to the consumer within the applicable time periods. If the person arranges to have the auto dealer or other party provide a notice described in § 222.74(e), the person's obligation is satisfied if the consumer receives a notice containing a credit score obtained by the dealer or other party, even if a different credit score is obtained and used by the person on whose behalf the notice is provided.

(3) *Timing requirements for contemporaneous purchase credit.* When credit under an open-end credit plan is granted, extended, or provided to a consumer in person or by telephone for the purpose of financing the contemporaneous purchase of goods or services, any risk-based pricing notice required to be provided pursuant to this subpart (or the disclosures permitted under § 222.74(e) or (f)) may be provided at the earlier of:

(i) The time of the first mailing by the person to the consumer after the decision is made to approve the grant, extension, or other provision of open-end credit, such as in a mailing containing the account agreement or a credit card; or

(ii) Within 30 days after the decision to approve the grant, extension, or other provision of credit.

§ 222.74 Exceptions.

(a) *Application for specific terms*—(1) *In general.* A person is not required to provide a risk-based pricing notice to the consumer under § 222.72(a) or (c) if the consumer applies for specific material terms and is granted those terms, unless those terms were specified by the person using a consumer report after the consumer applied for or requested credit and after the person obtained the consumer report. For purposes of this section, "specific material terms" means a single material term, or set of material terms, such as an annual percentage rate of 10 percent, and not a range of alternatives, such as an annual percentage rate that may be 8, 10, or 12 percent, or between 8 and 12 percent.

(2) *Example.* A consumer receives a firm offer of credit from a credit card issuer. The terms of the firm offer are based in whole or in part on information from a consumer report that the credit card issuer obtained under the FCRA's firm offer of credit provisions. The solicitation offers the consumer a credit card with a single purchase annual percentage rate of 12 percent. The consumer applies for and receives a credit card with an annual percentage rate of 12 percent. Other customers with the same credit card have a purchase annual percentage rate of 10 percent. The exception applies because the consumer applied for specific material terms and was granted those terms. Although the credit card issuer specified the annual percentage rate in the firm offer of credit based in whole or in part on a consumer report, the credit card issuer specified that material term *before,* not *after,* the consumer applied for or requested credit.

(b) *Adverse action notice.* A person is not required to provide a risk-based pricing notice to the consumer under § 222.72(a), (c), or (d) if the person provides an adverse action notice to the consumer under section 615(a) of the FCRA.

(c) *Prescreened solicitations*—(1) *In general.* A person is not required to provide a risk-based pricing notice to the consumer under § 222.72(a) or (c) if the person:

(i) Obtains a consumer report that is a prescreened list as described in section 604(c)(2) of the FCRA; and

(ii) Uses the consumer report for the purpose of making a firm offer of credit to the consumer.

(2) *More favorable material terms.* This exception applies to any firm offer of credit offered by a person to a consumer, even if the person makes other firm offers of credit to other

consumers on more favorable material terms.

(3) *Example.* A credit card issuer obtains two prescreened lists from a consumer reporting agency. One list includes consumers with high credit scores. The other list includes consumers with low credit scores. The issuer mails a firm offer of credit to the high credit score consumers with a single purchase annual percentage rate of 10 percent. The issuer also mails a firm offer of credit to the low credit score consumers with a single purchase annual percentage rate of 14 percent. The credit card issuer is not required to provide a risk-based pricing notice to the low credit score consumers who receive the 14 percent offer because use of a consumer report to make a firm offer of credit does not trigger the risk-based pricing notice requirement.

(d) *Loans secured by residential real property—credit score disclosure.* (1) *In general.* A person is not required to provide a risk-based pricing notice to a consumer under § 222.72(a) or (c) if:

(i) The consumer requests from the person an extension of credit that is or will be secured by one to four units of residential real property; and

(ii) The person provides to each consumer described in paragraph (d)(1)(i) of this section a notice that contains the following—

(A) A statement that a consumer report (or credit report) is a record of the consumer's credit history and includes information about whether the consumer pays his or her obligations on time and how much the consumer owes to creditors;

(B) A statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time to reflect changes in the consumer's credit history;

(C) A statement that the consumer's credit score can affect whether the consumer can obtain credit and what the cost of that credit will be;

(D) The information required to be disclosed to the consumer pursuant to section 609(g) of the FCRA;

(E) The distribution of credit scores among consumers who are scored under the same scoring model that is used to generate the consumer's credit score using the same scale as that of the credit score that is provided to the consumer, presented in the form of a bar graph containing a minimum of six bars that illustrates the percentage of consumers with credit scores within the range of scores reflected in each bar or by other clear and readily understandable graphical means, or a clear and readily understandable statement informing the consumer how his or her credit score compares to the scores of other consumers. Use of a graph or statement obtained from the person providing the credit score that meets the requirements of this paragraph (d)(1)(ii)(E) is deemed to comply with this requirement;

(F) A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the report;

(G) A statement that federal law gives the consumer the right to obtain copies of his or her consumer reports directly from the consumer reporting agencies, including a free report from each of the nationwide consumer reporting agencies once during any 12-month period;

(H) Contact information for the centralized source from which consumers may obtain their free annual consumer reports; and

(I) A statement directing consumers to the Web sites of the Federal Reserve Board and Federal Trade Commission to obtain more information about consumer reports.

(2) *Form of the notice.* The notice described in paragraph (d)(1)(ii) of this section must be:

(i) Clear and conspicuous;

(ii) Provided on or with the notice required by section 609(g) of the FCRA;

(iii) Segregated from other information provided to the consumer, except for the notice required by section 609(g) of the FCRA; and

(iv) Provided to the consumer in writing and in a form that the consumer may keep.

(3) *Timing.* The notice described in paragraph (d)(1)(ii) of this section must be provided to the consumer at the time the disclosure required by section 609(g) of the FCRA is provided to the consumer, but in any event at or before consummation in the case of closed-end credit or before the first transaction is made under an open-end credit plan.

(4) *Multiple credit scores*—(i) *In General.* When a person obtains two or more credit scores from consumer reporting agencies and uses one of those credit scores in setting the material terms of credit granted, extended, or otherwise provided to a consumer, for example, by using the low, middle, high, or most recent score, the notice described in paragraph (d)(1)(ii) of this section must include that credit score and the other information required by that paragraph. When a person obtains two or more credit scores from consumer reporting agencies and uses multiple credit scores in setting the material terms of credit granted, extended, or otherwise provided to a consumer, for example, by computing the average of all the credit scores obtained, the notice described in paragraph (d)(1)(ii) of this section must include one of those credit scores and the other information required by that paragraph. The notice may, at the person's option, include more than one credit score, along with the additional information specified in paragraph (d)(1)(ii) of this section for each credit score disclosed.

(ii) *Examples.* (A) A person that uses consumer reports to set the material terms of mortgage credit granted, extended, or provided to consumers regularly requests credit scores from several consumer reporting agencies and uses the low score when determining the material terms it will offer to the consumer. That person must disclose the low score in the notice described in paragraph (d)(1)(ii) of this section.

(B) A person that uses consumer reports to set the material terms of mortgage credit granted, extended, or provided to consumers regularly requests credit scores from several consumer reporting agencies, each of which it uses in an underwriting program in order to determine the material terms it will offer to the consumer. That person may choose one of these scores to include in the notice described in paragraph (d)(1)(ii) of this section.

(5) *Model form.* A model form of the notice described in paragraph (d)(1)(ii) of this section consolidated with the notice required by section 609(g) of the FCRA is contained in Appendix H–3 of this part. Appropriate use of Model Form H–3 is deemed to comply with the requirements of § 222.74(d). Use of the model form is optional.

(e) *Other extensions of credit—credit score disclosure*—(1) *In general.* A person is not required to provide a risk-based pricing notice to a consumer under § 222.72(a) or (c) if:

(i) The consumer requests from the person an extension of credit other than credit that is or will be secured by one to four units of residential real property; and

(ii) The person provides to each consumer described in paragraph (e)(1)(i) of this section a notice that contains the following—

(A) A statement that a consumer report (or credit report) is a record of the consumer's credit history and includes information about whether the consumer pays his or her obligations on time and how much the consumer owes to creditors;

(B) A statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time

to reflect changes in the consumer's credit history;

(C) A statement that the consumer's credit score can affect whether the consumer can obtain credit and what the cost of that credit will be;

(D) The current credit score of the consumer or the most recent credit score of the consumer that was previously calculated by the consumer reporting agency for a purpose related to the extension of credit;

(E) The range of possible credit scores under the model used to generate the credit score;

(F) The distribution of credit scores among consumers who are scored under the same scoring model that is used to generate the consumer's credit score using the same scale as that of the credit score that is provided to the consumer, presented in the form of a bar graph containing a minimum of six bars that illustrates the percentage of consumers with credit scores within the range of scores reflected in each bar, or by other clear and readily understandable graphical means, or a clear and readily understandable statement informing the consumer how his or her credit score compares to the scores of other consumers. Use of a graph or statement obtained from the person providing the credit score that meets the requirements of this paragraph (e)(1)(ii)(F) is deemed to comply with this requirement;

(G) The date on which the credit score was created;

(H) The name of the consumer reporting agency or other person that provided the credit score;

(I) A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the report;

(J) A statement that federal law gives the consumer the right to obtain copies of his or her consumer reports directly from the consumer reporting agencies, including a free report from each of the nationwide consumer reporting agencies once during any 12-month period;

(K) Contact information for the centralized source from which consumers may obtain their free annual consumer reports; and

(L) A statement directing consumers to the web sites of the Federal Reserve Board and Federal Trade Commission to obtain more information about consumer reports.

(2) *Form of the notice.* The notice described in paragraph (e)(1)(ii) of this section must be:

(i) Clear and conspicuous;

(ii) Segregated from other information provided to the consumer; and

(iii) Provided to the consumer in writing and in a form that the consumer may keep.

(3) *Timing.* The notice described in paragraph (e)(1)(ii) of this section must be provided to the consumer as soon as reasonably practicable after the credit score has been obtained, but in any event at or before consummation in the case of closed-end credit or before the first transaction is made under an open-end credit plan.

(4) *Multiple credit scores*—(i) *In General.* When a person obtains two or more credit scores from consumer reporting agencies and uses one of those credit scores in setting the material terms of credit granted, extended, or otherwise provided to a consumer, for example, by using the low, middle, high, or most recent score, the notice described in paragraph (e)(1)(ii) of this section must include that credit score and the other information required by that paragraph. When a person obtains two or more credit scores from consumer reporting agencies and uses multiple credit scores in setting the material terms of credit granted, extended, or otherwise provided to a consumer, for example, by computing the average of all the credit scores obtained, the notice described in paragraph (e)(1)(ii) of this section must include one of those credit scores and the other information required by that paragraph. The notice may, at the person's option, include more than one credit score, along with the additional information specified in paragraph (e)(1)(ii) of this section for each credit score disclosed.

(ii) *Examples.* The manner in which multiple credit scores are to be disclosed under this section are substantially identical to the manner set forth in the examples contained in paragraph (d)(4)(ii) of this section.

(5) *Model form.* A model form of the notice described in paragraph (e)(1)(ii) of this section is contained in Appendix H–4 of this part. Appropriate use of Model Form H–4 is deemed to comply with the requirements of § 222.74(e). Use of the model form is optional.

(f) *Credit score not available*—(1) *In general.* A person is not required to provide a risk-based pricing notice to a consumer under § 222.72(a) or (c) if the person:

(i) Regularly obtains credit scores from a consumer reporting agency and provides credit score disclosures to consumers in accordance with paragraphs (d) or (e) of this section, but a credit score is not available from the consumer reporting agency from which the person regularly obtains credit scores for a consumer to whom the person grants, extends, or provides credit;

(ii) Does not obtain a credit score from another consumer reporting agency in connection with granting, extending, or providing credit to the consumer; and

(iii) Provides to the consumer a notice that contains the following—

(A) A statement that a consumer report (or credit report) includes information about the consumer's credit history and the type of information included in that history;

(B) A statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time in response to changes in the consumer's credit history;

(C) A statement that credit scores are important because consumers with higher credit scores generally obtain more favorable credit terms;

(D) A statement that not having a credit score can affect whether the consumer can obtain credit and what the cost of that credit will be;

(E) A statement that a credit score about the consumer was not available from a consumer reporting agency, which must be identified by name, generally due to insufficient information regarding the consumer's credit history;

(F) A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the consumer report;

(G) A statement that federal law gives the consumer the right to obtain copies of his or her consumer reports directly from the consumer reporting agencies, including a free consumer report from each of the nationwide consumer reporting agencies once during any 12-month period;

(H) The contact information for the centralized source from which consumers may obtain their free annual consumer reports; and

(I) A statement directing consumers to the web sites of the Federal Reserve Board and Federal Trade Commission to obtain more information about consumer reports.

(2) *Example.* A person that uses consumer reports to set the material terms of non-mortgage credit granted, extended, or provided to consumers regularly requests credit scores from a particular consumer reporting agency and provides those credit scores and additional information to consumers to satisfy the requirements of paragraph (e) of this section. That consumer reporting agency provides to the person a consumer report on a particular consumer that contains one trade line,

but does not provide the person with a credit score on that consumer. If the person does not obtain a credit score from another consumer reporting agency and, based in whole or in part on information in a consumer report, grants, extends, or provides credit to the consumer, the person may provide the notice described in paragraph (f)(1)(iii) of this section. If, however, the person obtains a credit score from another consumer reporting agency, the person may not rely upon the exception in paragraph (f) of this section, but may satisfy the requirements of paragraph (e) of this section.

(3) *Form of the notice.* The notice described in paragraph (f)(1)(iii) of this section must be:

(i) Clear and conspicuous;

(ii) Segregated from other information provided to the consumer; and

(iii) Provided to the consumer in writing and in a form that the consumer may keep.

(4) *Timing.* The notice described in paragraph (f)(1)(iii) of this section must be provided to the consumer as soon as reasonably practicable after the person has requested the credit score, but in any event not later than consummation of a transaction in the case of closed-end credit or when the first transaction is made under an open-end credit plan.

(5) *Model form.* A model form of the notice described in paragraph (f)(1)(iii) of this section is contained in Appendix H–5 of this part. Appropriate use of Model Form H–5 is deemed to comply with the requirements of § 222.74(f). Use of the model form is optional.

§ 222.75 Rules of construction.

For purposes of this subpart, the following rules of construction apply:

(a) *One notice per credit extension.* A consumer is entitled to no more than one risk-based pricing notice under § 222.72(a) or (c), or one notice under § 222.74(d), (e), or (f), for each grant, extension, or other provision of credit. Notwithstanding the foregoing, even if a consumer has previously received a risk-based pricing notice in connection with a grant, extension, or other provision of credit, another risk-based pricing notice is required if the conditions set forth in § 222.72(d) have been met.

(b) *Multi-party transactions*—(1) *Initial creditor.* The person to whom a credit obligation is initially payable must provide the risk-based pricing notice described in § 222.72(a) or (c), or satisfy the requirements for and provide the notice required under one of the exceptions in § 222.74(d), (e), or (f), even if that person immediately assigns the credit agreement to a third party and is not the source of funding for the credit.

(2) *Purchasers or assignees.* A purchaser or assignee of a credit contract with a consumer is not subject to the requirements of this subpart and is not required to provide the risk-based pricing notice described in § 222.72(a) or (c), or satisfy the requirements for and provide the notice required under one of the exceptions in § 222.74(d), (e), or (f).

(3) *Examples.* (i) A consumer obtains credit to finance the purchase of an automobile. If the auto dealer is the person to whom the loan obligation is initially payable, such as where the auto dealer is the original creditor under a retail installment sales contract, the auto dealer must provide the risk-based pricing notice to the consumer (or satisfy the requirements for and provide the notice required under one of the exceptions noted above), even if the auto dealer immediately assigns the loan to a bank or finance company. The bank or finance company, which is an assignee, has no duty to provide a risk-based pricing notice to the consumer.

(ii) A consumer obtains credit to finance the purchase of an automobile. If a bank or finance company is the person to whom the loan obligation is initially payable, the bank or finance company must provide the risk-based pricing notice to the consumer (or satisfy the requirements for and provide the notice required under one of the exceptions noted above) based on the terms offered by that bank or finance company only. The auto dealer has no duty to provide a risk-based pricing notice to the consumer. However, the bank or finance company may comply with this rule if the auto dealer has agreed to provide notices to consumers before consummation pursuant to an arrangement with the bank or finance company, as permitted under § 222.73(c).

(c) *Multiple consumers*—(1) *Risk-based pricing notices.* In a transaction involving two or more consumers who are granted, extended, or otherwise provided credit, a person must provide a notice to each consumer to satisfy the requirements of § 222.72(a) or (c). If the consumers have the same address, a person may satisfy the requirements by providing a single notice addressed to both consumers. If the consumers do not have the same address, a person must provide a notice to each consumer.

(2) *Credit score disclosure notices.* In a transaction involving two or more consumers who are granted, extended, or otherwise provided credit, a person must provide a separate notice to each consumer to satisfy the exceptions in § 222.74(d), (e), or (f). Whether the consumers have the same address or not, the person must provide a separate notice to each consumer. Each separate notice must contain only the credit score(s) of the consumer to whom the notice is provided, and not the credit score(s) of the other consumer.

(3) *Examples.* (i) Two consumers jointly apply for credit with a creditor. The creditor grants credit to the consumers on material terms that are materially less favorable than the most favorable terms available to other consumers from the creditor. The two consumers reside at different addresses. The creditor provides risk-based pricing notices to satisfy its obligations under this subpart. The creditor must provide a risk-based pricing notice to each consumer at the address where each consumer resides.

(ii) Two consumers jointly apply for credit with a creditor. The two consumers reside at the same address. The creditor obtains credit scores on each of the two consumer applicants. The creditor grants credit to the consumers. The creditor provides credit score disclosure notices to satisfy its obligations under this subpart. Even though the two consumers reside at the same address, the creditor must provide a separate credit score disclosure notice to each of the consumers. Each notice must contain only the credit score of the consumer to whom the notice is provided.

■ 3. In Part 222, Appendix H is added to read as follows:

Appendix H—Model Forms for Risk-Based Pricing and Credit Score Disclosure Exception Notices

1. This appendix contains two model forms for risk-based pricing notices and three model forms for use in connection with the credit score disclosure exceptions. Each of the model forms is designated for use in a particular set of circumstances as indicated by the title of that model form.

2. Model form H–1 is for use in complying with the general risk-based pricing notice requirements in § 222.72. Model form H–2 is for risk-based pricing notices given in connection with account review. Model form H–3 is for use in connection with the credit score disclosure exception for loans secured by residential real property. Model form H–4 is for use in connection with the credit score disclosure exception for loans that are not secured by residential real property. Model form H–5 is for use in connection with the credit score disclosure exception when no credit score is available for a consumer. All forms contained in this appendix are models; their use is optional.

3. A person may change the forms by rearranging the format or by making technical modifications to the language of the forms, in each case without modifying the substance of

the disclosures. Any such rearrangement or modification of the language of the model forms may not be so extensive as to materially affect the substance, clarity, comprehensibility, or meaningful sequence of the forms. Persons making revisions with that effect will lose the benefit of the safe harbor for appropriate use of Appendix H model forms. A person is not required to conduct consumer testing when rearranging the format of the model forms.

a. Acceptable changes include, for example:

i. Corrections or updates to telephone numbers, mailing addresses, or Web site addresses that may change over time.

ii. The addition of graphics or icons, such as the person's corporate logo.

iii. Alteration of the shading or color contained in the model forms.

iv. Use of a different form of graphical presentation to depict the distribution of credit scores.

v. Substitution of the words "credit" and "creditor" or "finance" and "finance company" for the terms "loan" and "lender."

vi. Including pre-printed lists of the sources of consumer reports or consumer reporting agencies in a "check-the-box" format.

vii. Including the name of the consumer, transaction identification numbers, a date, and other information that will assist in identifying the transaction to which the form pertains.

viii. Including the name of an agent, such as an auto dealer or other party, when providing the "Name of the Entity Providing the Notice."

b. Unacceptable changes include, for example:

i. Providing model forms on register receipts or interspersed with other disclosures.

ii. Eliminating empty lines and extra spaces between sentences within the same section.

4. If a person uses an appropriate Appendix H model form, or modifies a form in accordance with the above instructions, that person shall be deemed to be acting in compliance with the provisions of § 222.73 or § 222.74, as applicable, of this regulation. It is intended that appropriate use of Model Form H–3 also will comply with the disclosure that may be required under section 609(g) of the FCRA.

H–1 Model form for risk-based pricing notice.

H–2 Model form for account review risk-based pricing notice.

H–3 Model form for credit score disclosure exception for credit secured by one to four units of residential real property.

H–4 Model form for credit score disclosure exception for loans not secured by residential real property.

H–5 Model form for credit score disclosure exception for loans where credit score is not available.

BILLING CODE P

H-1. Model form for risk-based pricing notice

[Name of Entity Providing the Notice]
Your Credit Report[s] and the Price You Pay for Credit

What is a credit report?	A credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors.
How did we use your credit report[s]?	We used information from your credit report[s] to set the terms of the credit we are offering you, such as the [Annual Percentage Rate/down payment]. The terms offered to you may be less favorable than the terms offered to consumers who have better credit histories.
What if there are mistakes in your credit report[s]?	You have a right to dispute any inaccurate information in your credit report[s]. If you find mistakes on your credit report[s], contact **[insert name of CRA(s)]**, which [is/are] the [consumer reporting agency/consumer reporting agencies] from which we obtained your credit report[s]. It is a good idea to check your credit report[s] to make sure the information [it contains/they contain] is accurate.
How can you obtain a copy of your credit report[s]?	Under federal law, you have the right to obtain a copy of your credit report[s] without charge for 60 days after you receive this notice. To obtain your free report[s], contact **[insert name of CRA(s)]**: *By telephone:* Call toll-free: 1-877-xxx-xxxx *By mail:* Mail your written request to: **[Insert address]** *On the web:* Visit **[insert web site address]**
How can you get more information about credit reports?	For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at www.federalreserve.gov, or the Federal Trade Commission's web site at www.ftc.gov.

H-2. Model form for account review risk-based pricing notice

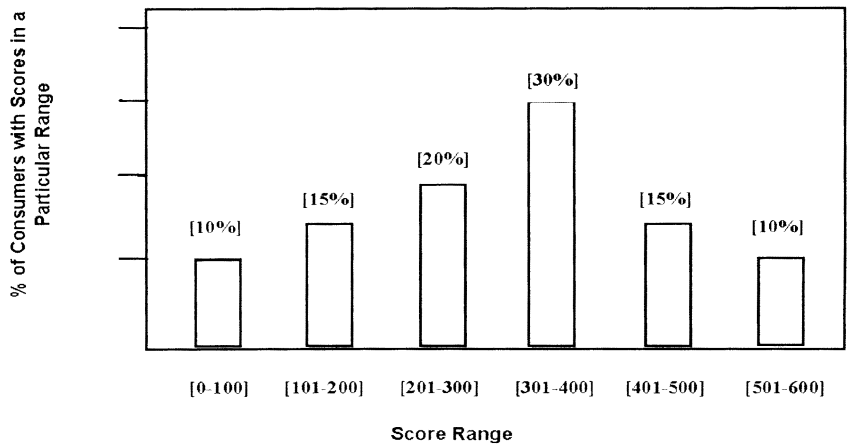
[Name of Entity Providing the Notice]
Your Credit Report[s] and the Pricing of Your Account

What is a credit report?	A credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors.
How did we use your credit report[s]?	We have used information from your credit report[s] to review the terms of your account with us. Based on our review of your credit report[s], we have increased the annual percentage rate on your account.
What if there are mistakes in your credit report[s]?	You have a right to dispute any inaccurate information in your credit report[s]. If you find mistakes on your credit report[s], contact **[insert name of CRA(s)]**, which [is/are] [a consumer reporting agency/consumer reporting agencies] from which we obtained your credit report[s]. It is a good idea to check your credit report[s] to make sure the information [it contains/they contain] is accurate.
How can you obtain a copy of your credit report[s]?	Under federal law, you have the right to obtain a copy of your credit report[s] without charge for 60 days after you receive this notice. To obtain your free report[s], contact **[insert name of CRA(s)]**: *By telephone:* Call toll-free: 1-877-xxx-xxxx *By mail:* Mail your written request to: **[Insert address]** *On the web:* Visit **[insert web site address]**
How can you get more information about credit reports?	For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at www.federalreserve.gov, or the Federal Trade Commission's web site at www.ftc.gov.

H-3. Model form for credit score disclosure exception for loans secured by one to four units of residential real property

[Name of Entity Providing the Notice]
Your Credit Score and the Price You Pay for Credit

Your Credit Score	
Your credit score	**[Insert credit score]** Source: **[Insert source]** Date: **[Insert date score was created]**

Understanding Your Credit Score	
What you should know about credit scores	Your credit score is a number that reflects the information in your credit report. Your credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors. Your credit score can change, depending on how your credit history changes.
How we use your credit score	Your credit score can affect whether you can get a loan and how much you will have to pay for that loan.
The range of scores	Scores range from a low of **[Insert bottom number in the range]** to a high of **[Insert top number in the range]**. Generally, the higher your score, the more likely you are to be offered better credit terms.
How your score compares to the scores of other consumers	 **[or]** [Your credit score ranks higher than [X] percent of U.S. consumers.]

Understanding Your Credit Score (continued)	
Key factors that adversely affected your credit score	**[Insert first factor]** **[Insert second factor]** **[Insert third factor]** **[Insert fourth factor]** **[Insert fifth factor, if applicable]**

Checking Your Credit Report	
What if there are mistakes in your credit report?	You have a right to dispute any inaccurate information in your credit report. If you find mistakes on your credit report, contact the consumer reporting agency. It is a good idea to check your credit report to make sure the information it contains is accurate.
How can you obtain a copy of your credit report?	Under federal law, you have the right to obtain a free copy of your credit report from each of the nationwide consumer reporting agencies once a year. To order your free annual credit report— *By telephone:* Call toll-free: 1-877-322-8228 *On the web:* Visit www.annualcreditreport.com *By mail:* Mail your completed Annual Credit Report Request Form (which you can obtain from the Federal Trade Commission's web site at http://www.ftc.gov/ bcp/conline/include/requestformfinal.pdf) to: Annual Credit Report Request Service P.O. Box 105281 Atlanta, GA 30348-5281
How can you get more information?	For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at www.federalreserve.gov, or the Federal Trade Commission's web site at www.ftc.gov.

Notice to the Home Loan Applicant

In connection with your application for a home loan, the lender must disclose to you the score that a consumer reporting agency distributed to users and the lender used in connection with your home loan, and the key factors affecting your credit scores.

The credit score is a computer generated summary calculated at the time of the request and based on information that a consumer reporting agency or lender has on file. The scores are based on data about your credit history and payment patterns. Credit scores are important because they are used to assist the lender in determining whether you will obtain a loan. They may also be used to determine what interest rate you may be offered on the mortgage. Credit scores can change over time, depending on your conduct, how your credit history and payment patterns change, and how credit scoring technologies change.

Because the score is based on information in your credit history, it is very important that you review the credit-related information that is being furnished to make sure it is accurate. Credit records may vary from one company to another.

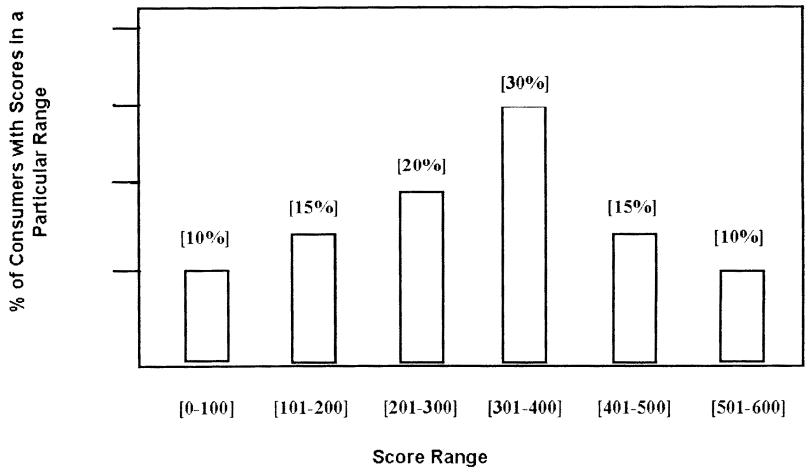
If you have questions about your credit score or the credit information that is furnished to you, contact the consumer reporting agency at the address and telephone number provided with this notice, or contact the lender, if the lender developed or generated the credit score. The consumer reporting agency plays no part in the decision to take any action on the loan application and is unable to provide you with specific reasons for the decision on a loan application.

If you have questions concerning the terms of the loan, contact the lender.

H-4. Model form for credit score disclosure exception for loans not secured by residential real property

[Name of Entity Providing the Notice]
Your Credit Score and the Price You Pay for Credit

Your Credit Score	
Your credit score	**[Insert credit score]** Source: **[Insert source]** Date: **[Insert date score was created]**

Understanding Your Credit Score	
What you should know about credit scores	Your credit score is a number that reflects the information in your credit report. Your credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors. Your credit score can change, depending on how your credit history changes.
How we use your credit score	Your credit score can affect whether you can get a loan and how much you will have to pay for that loan.
The range of scores	Scores range from a low of **[Insert bottom number in the range]** to a high of **[Insert top number in the range]**. Generally, the higher your score, the more likely you are to be offered better credit terms.
How your score compares to the scores of other consumers	 **[or]** [Your credit score ranks higher than [X] percent of U.S. consumers.]

Checking Your Credit Report	
What if there are mistakes in your credit report?	You have a right to dispute any inaccurate information in your credit report. If you find mistakes on your credit report, contact the consumer reporting agency. It is a good idea to check your credit report to make sure the information it contains is accurate.
How can you obtain a copy of your credit report?	Under federal law, you have the right to obtain a free copy of your credit report from each of the nationwide consumer reporting agencies once a year. To order your free annual credit report— *By telephone:* Call toll-free: 1-877-322-8228 *On the web:* Visit www.annualcreditreport.com *By mail:* Mail your completed Annual Credit Report Request Form (which you can obtain from the Federal Trade Commission's web site at http://www.ftc.gov/ bcp/conline/include/requestformfinal.pdf) to: Annual Credit Report Request Service P.O. Box 105281 Atlanta, GA 30348-5281
How can you get more information?	For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at www.federalreserve.gov, or the Federal Trade Commission's web site at www.ftc.gov.

H-5. Model form for loans where credit score is not available

[Name of Entity Providing the Notice]
Credit Scores and the Price You Pay for Credit

Your Credit Score	
Your credit score	Your credit score is not available from [**Insert name of CRA**], which is a consumer reporting agency, because they may not have enough information about your credit history to calculate a score.
What you should know about credit scores	A credit score is a number that reflects the information in a credit report. A credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors. A credit score can change, depending on how a consumer's credit history changes.
Why credit scores are important	Credit scores are important because consumers who have higher credit scores generally will get more favorable credit terms. Not having a credit score can affect whether you can get a loan and how much you will have to pay for that loan.
Checking Your Credit Report	
What if there are mistakes in your credit report?	You have a right to dispute any inaccurate information in your credit report. If you find mistakes on your credit report, contact the consumer reporting agency. It is a good idea to check your credit report to make sure the information it contains is accurate.
How can you obtain a copy of your credit report?	Under federal law, you have the right to obtain a free copy of your credit report from each of the nationwide consumer reporting agencies once a year. To order your free annual credit report— *By telephone:* Call toll-free: 1-877-322-8228 *On the web:* Visit www.annualcreditreport.com *By mail:* Mail your completed Annual Credit Report Request Form (which you can obtain from the Federal Trade Commission's web site at http://www.ftc.gov/bcp/conline/include/requestformfinal.pdf) to: Annual Credit Report Request Service P.O. Box 105281 Atlanta, GA 30348-5281
How can you get more information?	For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at www.federalreserve.gov, or the Federal Trade Commission's web site at www.ftc.gov.

BILLING CODE C

Federal Trade Commission

16 CFR Chapter I

Authority and Issuance

■ For the reasons discussed in the joint preamble, the Federal Trade Commission amends chapter I, title 16, Code of Federal Regulations, as follows:
■ 1. Add a new part 640 to read as follows:

PART 640—DUTIES OF CREDITORS REGARDING RISK-BASED PRICING

Sec.
640.1 Scope.
640.2 Definitions.
640.3 General requirements for risk-based pricing notices.
640.4 Content, form, and timing of risk-based pricing notices.
640.5 Exceptions.
640.6 Rules of construction.

Authority: Pub. L. 108–159, sec. 311; 15 U.S.C. 1681m(h).

§ 640.1 Scope.

(a) *Coverage*—(1) *In general.* This part applies to any person that both—

(i) Uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit to a consumer that is primarily for personal, family, or household purposes; and

(ii) Based in whole or in part on the consumer report, grants, extends, or otherwise provides credit to the consumer on material terms that are materially less favorable than the most favorable material terms available to a substantial proportion of consumers from or through that person.

(2) *Business credit excluded.* This part does not apply to an application for, or a grant, extension, or other provision of, credit to a consumer or to any other applicant primarily for a business purpose.

(b) *Relation to Board of Governors of the Federal Reserve System rules.* The rules in this part were developed jointly with the Board of Governors of the Federal Reserve System (Board) and are substantively identical to the Board's risk-based pricing rules in 12 CFR part 222. Both rules apply to the covered person described in paragraph (a) of this section. Compliance with either the Board's rules or the Commission's rules satisfies the requirements of the statute (15 U.S.C. 1681m(h)).

(c) *Enforcement.* The provisions of this part will be enforced in accordance with the enforcement authority set forth in sections 621(a) and (b) of the FCRA.

§ 640.2 Definitions.

For purposes of this part, the following definitions apply:

(a) *Adverse action* has the same meaning as in 15 U.S.C. 1681a(k)(1)(A).

(b) *Annual percentage rate* has the same meaning as in 12 CFR 226.14(b) with respect to an open-end credit plan and as in 12 CFR 226.22 with respect to closed-end credit.

(c) *Closed-end credit* has the same meaning as in 12 CFR 226.2(a)(10).

(d) *Consumer* has the same meaning as in 15 U.S.C. 1681a(c).

(e) *Consummation* has the same meaning as in 12 CFR 226.2(a)(13).

(f) *Consumer report* has the same meaning as in 15 U.S.C. 1681a(d).

(g) *Consumer reporting agency* has the same meaning as in 15 U.S.C. 1681a(f).

(h) *Credit* has the same meaning as in 15 U.S.C. 1681a(r)(5).

(i) *Creditor* has the same meaning as in 15 U.S.C. 1681a(r)(5).

(j) *Credit card* has the same meaning as in 15 U.S.C. 1681a(r)(2).

(k) *Credit card issuer* has the same meaning as in 15 U.S.C. 1681a(r)(1)(A).

(l) *Credit score* has the same meaning as in 15 U.S.C. 1681g(f)(2)(A).

(m) *Firm offer of credit* has the same meaning as in 15 U.S.C. 1681a(l).

(n) *Material terms* means—

(1) (i) Except as otherwise provided in paragraphs (n)(1)(ii) and (n)(3) of this section, in the case of credit extended under an open-end credit plan, the annual percentage rate required to be disclosed under 12 CFR 226.6(a)(1)(ii) or 12 CFR 226.6(b)(2)(i), excluding any temporary initial rate that is lower than the rate that will apply after the temporary rate expires, any penalty rate that will apply upon the occurrence of one or more specific events, such as a late payment or an extension of credit that exceeds the credit limit, and any fixed annual percentage rate option for a home equity line of credit;

(ii) In the case of a credit card (other than a credit card that is used to access a home equity line of credit or a charge card), the annual percentage rate required to be disclosed under 12 CFR 226.6(b)(2)(i) that applies to purchases ("purchase annual percentage rate") and no other annual percentage rate, or in the case of a credit card that has no purchase annual percentage rate, the annual percentage rate that varies based on information in a consumer report and that has the most significant financial impact on consumers;

(2) In the case of closed-end credit, the annual percentage rate required to be disclosed under 12 CFR 226.17(c) and 226.18(e); and

(3) In the case of credit for which there is no annual percentage rate, the financial term that varies based on information in a consumer report and that has the most significant financial impact on consumers, such as a deposit required in connection with credit extended by a telephone company or utility or an annual membership fee for a charge card.

(o) *Materially less favorable* means, when applied to material terms, that the terms granted, extended, or otherwise provided to a consumer differ from the terms granted, extended, or otherwise provided to another consumer from or through the same person such that the cost of credit to the first consumer would be significantly greater than the cost of credit granted, extended, or otherwise provided to the other consumer. For purposes of this definition, factors relevant to determining the significance of a difference in cost include the type of credit product, the term of the credit extension, if any, and the extent of the difference between the material terms granted, extended, or otherwise provided to the two consumers.

(p) *Open-end credit plan* has the same meaning as in 15 U.S.C. 1602(i), as interpreted by the Board in Regulation Z and the Official Staff Commentary to Regulation Z.

(q) *Person* has the same meaning as in 15 U.S.C. 1681a(b).

§ 640.3 General requirements for risk-based pricing notices.

(a) *In general.* Except as otherwise provided in this part, a person must provide to a consumer a notice ("risk-based pricing notice") in the form and manner required by this part if the person both—

(1) Uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit to that consumer that is primarily for personal, family, or household purposes; and

(2) Based in whole or in part on the consumer report, grants, extends, or otherwise provides credit to that consumer on material terms that are materially less favorable than the most favorable material terms available to a substantial proportion of consumers from or through that person.

(b) *Determining which consumers must receive a notice.* A person may determine whether paragraph (a) of this section applies by directly comparing the material terms offered to each consumer and the material terms offered to other consumers for a specific type of credit product. For purposes of this section, a "specific type of credit product" means one or more credit products with similar features that are designed for similar purposes. Examples of a specific type of credit product include student loans, unsecured credit

cards, secured credit cards, new automobile loans, used automobile loans, fixed-rate mortgage loans, and variable-rate mortgage loans. As an alternative to making this direct comparison, a person may make the determination by using one of the following methods:

(1) *Credit score proxy method*—(i) *In general.* A person that sets the material terms of credit granted, extended, or otherwise provided to a consumer, based in whole or in part on a credit score, may comply with the requirements of paragraph (a) of this section by—

(A) Determining the credit score (hereafter referred to as the "cutoff score") that represents the point at which approximately 40 percent of the consumers to whom it grants, extends, or provides credit have higher credit scores and approximately 60 percent of the consumers to whom it grants, extends, or provides credit have lower credit scores; and

(B) Providing a risk-based pricing notice to each consumer to whom it grants, extends, or provides credit whose credit score is lower than the cutoff score.

(ii) *Alternative to the 40/60 cutoff score determination.* In the case of credit that has been granted, extended, or provided on the most favorable material terms to more than 40 percent of consumers, a person may, at its option, set its cutoff score at a point at which the approximate percentage of consumers who historically have been granted, extended, or provided credit on material terms other than the most favorable terms would receive risk-based pricing notices under this section.

(iii) *Determining the cutoff score*—(A) *Sampling approach.* A person that currently uses risk-based pricing with respect to the credit products it offers must calculate the cutoff score by considering the credit scores of all or a representative sample of the consumers to whom it has granted, extended, or provided credit for a specific type of credit product.

(B) *Secondary source approach in limited circumstances.* A person that is a new entrant into the credit business, introduces new credit products, or starts to use risk-based pricing with respect to the credit products it currently offers may initially determine the cutoff score based on information derived from appropriate market research or relevant third-party sources for a specific type of credit product, such as research or data from companies that develop credit scores. A person that acquires a credit portfolio as a result of a merger or acquisition may determine the cutoff score based on information from the party which it acquired, with which it merged, or from which it acquired the portfolio.

(C) *Recalculation of cutoff scores.* A person using the credit score proxy method must recalculate its cutoff score(s) no less than every two years in the manner described in paragraph (b)(1)(iii)(A) of this section. A person using the credit score proxy method using market research, third-party data, or information from a party which it acquired, with which it merged, or from which it acquired the portfolio as permitted by paragraph (b)(1)(iii)(B) of this section generally must calculate a cutoff score(s) based on the scores of its own consumers in the manner described in paragraph (b)(1)(iii)(A) of this section within one year after it begins using a cutoff score derived from market research, third-party data, or information from a party which it acquired, with which it merged, or from which it acquired the portfolio. If such a person does not grant, extend, or provide credit to new consumers during that one-year period such that it lacks sufficient data with which to recalculate a cutoff score based on the credit scores of its own consumers, the person may continue to use a cutoff score derived from market research, third-party data, or information from a party which it acquired, with which it merged, or from which it acquired the portfolio as provided in paragraph (b)(1)(iii)(B) until it obtains sufficient data on which to base the recalculation. However, the person must recalculate its cutoff score(s) in the manner described in paragraph (b)(1)(iii)(A) of this section within two years, if it has granted, extended, or provided credit to some new consumers during that two-year period.

(D) *Use of two or more credit scores.* A person that generally uses two or more credit scores in setting the material terms of credit granted, extended, or provided to a consumer must determine the cutoff score using the same method the person uses to evaluate multiple scores when making credit decisions. These evaluation methods may include, but are not limited to, selecting the low, median, high, most recent, or average credit score of each consumer to whom it grants, extends, or provides credit. If a person that uses two or more credit scores does not consistently use the same method for evaluating multiple credit scores (*e.g.,* if the person sometimes chooses the median score and other times calculates the average score), the person must determine the cutoff score using a reasonable means. In such cases, use of any one of the methods that the person regularly uses or the average credit score of each consumer to whom it grants, extends, or provides credit is deemed to be a reasonable means of calculating the cutoff score.

(iv) *Credit score not available.* For purposes of this section, a person using the credit score proxy method who grants, extends, or provides credit to a consumer for whom a credit score is not available must assume that the consumer receives credit on material terms that are materially less favorable than the most favorable credit terms offered to a substantial proportion of consumers from or through that person and must provide a risk-based pricing notice to the consumer.

(v) *Examples.* (A) A credit card issuer engages in risk-based pricing and the annual percentage rates it offers to consumers are based in whole or in part on a credit score. The credit card issuer takes a representative sample of the credit scores of consumers to whom it issued credit cards within the preceding three months. The credit card issuer determines that approximately 40 percent of the sampled consumers have a credit score at or above 720 (on a scale of 350 to 850) and approximately 60 percent of the sampled consumers have a credit score below 720. Thus, the card issuer selects 720 as its cutoff score. A consumer applies to the credit card issuer for a credit card. The card issuer obtains a credit score for the consumer. The consumer's credit score is 700. Since the consumer's 700 credit score falls below the 720 cutoff score, the credit card issuer must provide a risk-based pricing notice to the consumer.

(B) A credit card issuer engages in risk-based pricing, and the annual percentage rates it offers to consumers are based in whole or in part on a credit score. The credit card issuer takes a representative sample of the consumers to whom it issued credit cards over the preceding six months. The credit card issuer determines that approximately 80 percent of the sampled consumers received credit at its lowest annual percentage rate, and 20 percent received credit at a higher annual percentage rate. Approximately 80 percent of the sampled consumers have a credit score at or above 750 (on a scale of 350 to 850), and 20 percent have a credit score below 750. Thus, the card issuer selects 750 as its cutoff score. A consumer applies to the credit card issuer for a credit card. The card issuer obtains a credit score for the consumer. The consumer's credit score is 740. Since the consumer's 740 credit score falls below the 750 cutoff score, the credit card

issuer must provide a risk-based pricing notice to the consumer.

(C) An auto lender engages in risk-based pricing, obtains credit scores from one of the nationwide consumer reporting agencies, and uses the credit score proxy method to determine which consumers must receive a risk-based pricing notice. A consumer applies to the auto lender for credit to finance the purchase of an automobile. A credit score about that consumer is not available from the consumer reporting agency from which the lender obtains credit scores. The lender nevertheless grants, extends, or provides credit to the consumer. The lender must provide a risk-based pricing notice to the consumer.

(2) *Tiered pricing method*—(i) *In general.* A person that sets the material terms of credit granted, extended, or provided to a consumer by placing the consumer within one of a discrete number of pricing tiers for a specific type of credit product, based in whole or in part on a consumer report, may comply with the requirements of paragraph (a) of this section by providing a risk-based pricing notice to each consumer who is not placed within the top pricing tier or tiers, as described below.

(ii) *Four or fewer pricing tiers.* If a person using the tiered pricing method has four or fewer pricing tiers, the person complies with the requirements of paragraph (a) of this section by providing a risk-based pricing notice to each consumer to whom it grants, extends, or provides credit who does not qualify for the top tier (that is, the lowest-priced tier). For example, a person that uses a tiered pricing structure with annual percentage rates of 8, 10, 12, and 14 percent would provide the risk-based pricing notice to each consumer to whom it grants, extends, or provides credit at annual percentage rates of 10, 12, and 14 percent.

(iii) *Five or more pricing tiers.* If a person using the tiered pricing method has five or more pricing tiers, the person complies with the requirements of paragraph (a) of this section by providing a risk-based pricing notice to each consumer to whom it grants, extends, or provides credit who does not qualify for the top two tiers (that is, the two lowest-priced tiers) and any other tier that, together with the top tiers, comprise no less than the top 30 percent but no more than the top 40 percent of the total number of tiers. Each consumer placed within the remaining tiers must receive a risk-based pricing notice. For example, if a person has nine pricing tiers, the top three tiers (that is, the three lowest-priced tiers) comprise no less than the top 30 percent but no more than the top 40 percent of the tiers. Therefore, a person using this method would provide a risk-based pricing notice to each consumer to whom it grants, extends, or provides credit who is placed within the bottom six tiers.

(c) *Application to credit card issuers*—(1) *In general.* A credit card issuer subject to the requirements of paragraph (a) of this section may use one of the methods set forth in paragraph (b) of this section to identify consumers to whom it must provide a risk-based pricing notice. Alternatively, a credit card issuer may satisfy its obligations under paragraph (a) of this section by providing a risk-based pricing notice to a consumer when—

(i) A consumer applies for a credit card either in connection with an application program, such as a direct-mail offer or a take-one application, or in response to a solicitation under 12 CFR 226.5a, and more than a single possible purchase annual percentage rate may apply under the program or solicitation; and

(ii) Based in whole or in part on a consumer report, the credit card issuer provides a credit card to the consumer with an annual percentage rate referenced in § 640.2(n)(1)(ii) that is greater than the lowest annual percentage rate referenced in § 640.2(n)(1)(ii) available in connection with the application or solicitation.

(2) *No requirement to compare different offers.* A credit card issuer is not subject to the requirements of paragraph (a) of this section and is not required to provide a risk-based pricing notice to a consumer if—

(i) The consumer applies for a credit card for which the card issuer provides a single annual percentage rate referenced in § 640.2(n)(1)(ii), excluding a temporary initial rate that is lower than the rate that will apply after the temporary rate expires and a penalty rate that will apply upon the occurrence of one or more specific events, such as a late payment or an extension of credit that exceeds the credit limit; or

(ii) The credit card issuer offers the consumer the lowest annual percentage rate referenced in § 640.2(n)(1)(ii) available under the credit card offer for which the consumer applied, even if a lower annual percentage rate referenced in § 640.2(n)(1)(ii) is available under a different credit card offer issued by the card issuer.

(3) *Examples.* (i) A credit card issuer sends a solicitation to the consumer that discloses several possible purchase annual percentage rates that may apply, such as 10, 12, or 14 percent, or a range of purchase annual percentage rates from 10 to 14 percent. The consumer applies for a credit card in response to the solicitation. The card issuer provides a credit card to the consumer with a purchase annual percentage rate of 12 percent based in whole or in part on a consumer report. Unless an exception applies under § 640.5, the card issuer may satisfy its obligations under paragraph (a) of this section by providing a risk-based pricing notice to the consumer because the consumer received credit at a purchase annual percentage rate greater than the lowest purchase annual percentage rate available under that solicitation.

(ii) The same facts as in the example in paragraph (c)(3)(i) of this section, except that the card issuer provides a credit card to the consumer at a purchase annual percentage rate of 10 percent. The card issuer is not required to provide a risk-based pricing notice to the consumer even if, under a different credit card solicitation, that consumer or other consumers might qualify for a purchase annual percentage rate of 8 percent.

(d) *Account review*—(1) *In general.* Except as otherwise provided in this part, a person is subject to the requirements of paragraph (a) of this section and must provide a risk-based pricing notice to a consumer in the form and manner required by this part if the person—

(i) Uses a consumer report in connection with a review of credit that has been extended to the consumer; and

(ii) Based in whole or in part on the consumer report, increases the annual percentage rate (the annual percentage rate referenced in § 640.2(n)(1)(ii) in the case of a credit card).

(2) *Example.* A credit card issuer periodically obtains consumer reports for the purpose of reviewing the terms of credit it has extended to consumers in connection with credit cards. As a result of this review, the credit card issuer increases the purchase annual percentage rate applicable to a consumer's credit card based in whole or in part on information in a consumer report. The credit card issuer is subject to the requirements of paragraph (a) of this section and must provide a risk-based pricing notice to the consumer.

§ 640.4 Content, form, and timing of risk-based pricing notices.

(a) *Content of the notice*—(1) *In general.* The risk-based pricing notice required by § 640.3(a) or (c) must include:

(i) A statement that a consumer report (or credit report) includes information

about the consumer's credit history and the type of information included in that history;

(ii) A statement that the terms offered, such as the annual percentage rate, have been set based on information from a consumer report;

(iii) A statement that the terms offered may be less favorable than the terms offered to consumers with better credit histories;

(iv) A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the report;

(v) The identity of each consumer reporting agency that furnished a consumer report used in the credit decision;

(vi) A statement that federal law gives the consumer the right to obtain a copy of a consumer report from the consumer reporting agency or agencies identified in the notice without charge for 60 days after receipt of the notice;

(vii) A statement informing the consumer how to obtain a consumer report from the consumer reporting agency or agencies identified in the notice and providing contact information (including a toll-free telephone number, where applicable) specified by the consumer reporting agency or agencies; and

(viii) A statement directing consumers to the Web sites of the Board and Federal Trade Commission to obtain more information about consumer reports.

(2) *Account review.* The risk-based pricing notice required by § 640.3(d) must include:

(i) A statement that a consumer report (or credit report) includes information about the consumer's credit history and the type of information included in that credit history;

(ii) A statement that the person has conducted a review of the account using information from a consumer report;

(iii) A statement that as a result of the review, the annual percentage rate on the account has been increased based on information from a consumer report;

(iv) A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the report;

(v) The identity of each consumer reporting agency that furnished a consumer report used in the account review;

(vi) A statement that federal law gives the consumer the right to obtain a copy of a consumer report from the consumer reporting agency or agencies identified in the notice without charge for 60 days after receipt of the notice;

(vii) A statement informing the consumer how to obtain a consumer report from the consumer reporting agency or agencies identified in the notice and providing contact information (including a toll-free telephone number, where applicable) specified by the consumer reporting agency or agencies; and

(viii) A statement directing consumers to the Web sites of the Federal Reserve Board and Federal Trade Commission to obtain more information about consumer reports.

(b) *Form of the notice*—(1) *In general.* The risk-based pricing notice required by § 640.3(a), (c), or (d) must be:

(i) Clear and conspicuous; and

(ii) Provided to the consumer in oral, written, or electronic form.

(2) *Model forms.* A model form of the risk-based pricing notice required by § 640.3(a) and (c) is contained in 16 CFR Part 698, Appendix B. Appropriate use of Model Form B–1 is deemed to comply with the content and form requirements of paragraphs (a)(1) and (b) of this section. A model form of the risk-based pricing notice required by § 640.3(d) is also contained in Appendix B of that part. Appropriate use of Model Form B–2 is deemed to comply with the content and form requirements of paragraphs (a)(2) and (b) of this section. Use of the model forms is optional.

(c) *Timing*—(1) *General.* Except as provided in paragraph (c)(3) of this section, a risk-based pricing notice must be provided to the consumer—

(i) In the case of a grant, extension, or other provision of closed-end credit, before consummation of the transaction, but not earlier than the time the decision to approve an application for, or a grant, extension, or other provision of, credit, is communicated to the consumer by the person required to provide the notice;

(ii) In the case of credit granted, extended, or provided under an open-end credit plan, before the first transaction is made under the plan, but not earlier than the time the decision to approve an application for, or a grant, extension, or other provision of, credit is communicated to the consumer by the person required to provide the notice; or

(iii) In the case of a review of credit that has been extended to the consumer, at the time the decision to increase the annual percentage rate (annual percentage rate referenced in § 640.2(n)(1)(ii) in the case of a credit card) based on a consumer report is communicated to the consumer by the person required to provide the notice, or if no notice of the increase in the annual percentage rate is provided to the consumer prior to the effective date of the change in the annual percentage rate (to the extent permitted by law), no later than five days after the effective date of the change in the annual percentage rate.

(2) *Application to certain automobile lending transactions.* When a person to whom a credit obligation is initially payable grants, extends, or provides credit to a consumer for the purpose of financing the purchase of an automobile from an auto dealer or other party that is not affiliated with the person, any requirement to provide a risk-based pricing notice pursuant to this part is satisfied if the person:

(i) Provides a notice described in §§ 640.3(a), 640.5(e), or 640.5(f) to the consumer within the time periods set forth in paragraph (c)(1)(i) of this section, § 640.5(e)(3), or § 640.5(f)(4), as applicable; or

(ii) Arranges to have the auto dealer or other party provide a notice described in §§ 640.3(a), 640.5(e), or 640.5(f) to the consumer on its behalf within the time periods set forth in paragraph (c)(1)(i) of this section, § 640.5(e)(3), or § 640.5(f)(4), as applicable, and maintains reasonable policies and procedures to verify that the auto dealer or other party provides such notice to the consumer within the applicable time periods. If the person arranges to have the auto dealer or other party provide a notice described in § 640.5(e), the person's obligation is satisfied if the consumer receives a notice containing a credit score obtained by the dealer or other party, even if a different credit score is obtained and used by the person on whose behalf the notice is provided.

(3) *Timing requirements for contemporaneous purchase credit.* When credit under an open-end credit plan is granted, extended, or provided to a consumer in person or by telephone for the purpose of financing the contemporaneous purchase of goods or services, any risk-based pricing notice required to be provided pursuant to this part (or the disclosures permitted under § 640.5(e) or (f)) may be provided at the earlier of:

(i) The time of the first mailing by the person to the consumer after the decision is made to approve the grant, extension, or other provision of open-end credit, such as in a mailing containing the account agreement or a credit card; or

(ii) Within 30 days after the decision to approve the grant, extension, or other provision of credit.

§ 640.5 Exceptions.

(a) *Application for specific terms*—(1) *In general.* A person is not required to provide a risk-based pricing notice to the consumer under § 640.3(a) or (c) if the consumer applies for specific material terms and is granted those terms, unless those terms were specified by the person using a consumer report after the consumer applied for or requested credit and after the person obtained the consumer report. For purposes of this section, "specific material terms" means a single material term, or set of material terms, such as an annual percentage rate of 10 percent, and not a range of alternatives, such as an annual percentage rate that may be 8, 10, or 12 percent, or between 8 and 12 percent.

(2) *Example.* A consumer receives a firm offer of credit from a credit card issuer. The terms of the firm offer are based in whole or in part on information from a consumer report that the credit card issuer obtained under the FCRA's firm offer of credit provisions. The solicitation offers the consumer a credit card with a single purchase annual percentage rate of 12 percent. The consumer applies for and receives a credit card with an annual percentage rate of 12 percent. Other customers with the same credit card have a purchase annual percentage rate of 10 percent. The exception applies because the consumer applied for specific material terms and was granted those terms. Although the credit card issuer specified the annual percentage rate in the firm offer of credit based in whole or in part on a consumer report, the credit card issuer specified that material term *before*, not *after*, the consumer applied for or requested credit.

(b) *Adverse action notice.* A person is not required to provide a risk-based pricing notice to the consumer under § 640.3(a), (c), or (d) if the person provides an adverse action notice to the consumer under section 615(a) of the FCRA.

(c) *Prescreened solicitations*—(1) *In general.* A person is not required to provide a risk-based pricing notice to the consumer under § 640.3(a) or (c) if the person:

(i) Obtains a consumer report that is a prescreened list as described in section 604(c)(2) of the FCRA; and

(ii) Uses the consumer report for the purpose of making a firm offer of credit to the consumer.

(2) *More favorable material terms.* This exception applies to any firm offer of credit offered by a person to a consumer, even if the person makes other firm offers of credit to other consumers on more favorable material terms.

(3) *Example.* A credit card issuer obtains two prescreened lists from a consumer reporting agency. One list includes consumers with high credit scores. The other list includes consumers with low credit scores. The issuer mails a firm offer of credit to the high credit score consumers with a single purchase annual percentage rate of 10 percent. The issuer also mails a firm offer of credit to the low credit score consumers with a single purchase annual percentage rate of 14 percent. The credit card issuer is not required to provide a risk-based pricing notice to the low credit score consumers who receive the 14 percent offer because use of a consumer report to make a firm offer of credit does not trigger the risk-based pricing notice requirement.

(d) *Loans secured by residential real property—credit score disclosure*—(1) *In general.* A person is not required to provide a risk-based pricing notice to a consumer under § 640.3(a) or (c) if:

(i) The consumer requests from the person an extension of credit that is or will be secured by one to four units of residential real property; and

(ii) The person provides to each consumer described in paragraph (d)(1)(i) of this section a notice that contains the following—

(A) A statement that a consumer report (or credit report) is a record of the consumer's credit history and includes information about whether the consumer pays his or her obligations on time and how much the consumer owes to creditors;

(B) A statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time to reflect changes in the consumer's credit history;

(C) A statement that the consumer's credit score can affect whether the consumer can obtain credit and what the cost of that credit will be;

(D) The information required to be disclosed to the consumer pursuant to section 609(g) of the FCRA;

(E) The distribution of credit scores among consumers who are scored under the same scoring model that is used to generate the consumer's credit score using the same scale as that of the credit score that is provided to the consumer, presented in the form of a bar graph containing a minimum of six bars that illustrates the percentage of consumers with credit scores within the range of scores reflected in each bar or by other clear and readily understandable graphical means, or a clear and readily understandable statement informing the consumer how his or her credit score compares to the scores of other consumers. Use of a graph or statement obtained from the person providing the credit score that meets the requirements of this paragraph (d)(1)(ii)(E) is deemed to comply with this requirement;

(F) A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the report;

(G) A statement that federal law gives the consumer the right to obtain copies of his or her consumer reports directly from the consumer reporting agencies, including a free report from each of the nationwide consumer reporting agencies once during any 12-month period;

(H) Contact information for the centralized source from which consumers may obtain their free annual consumer reports; and

(I) A statement directing consumers to the web sites of the Board and Federal Trade Commission to obtain more information about consumer reports.

(2) *Form of the notice.* The notice described in paragraph (d)(1)(ii) of this section must be:

(i) Clear and conspicuous;

(ii) Provided on or with the notice required by section 609(g) of the FCRA;

(iii) Segregated from other information provided to the consumer, except for the notice required by section 609(g) of the FCRA; and

(iv) Provided to the consumer in writing and in a form that the consumer may keep.

(3) *Timing.* The notice described in paragraph (d)(1)(ii) of this section must be provided to the consumer at the time the disclosure required by section 609(g) of the FCRA is provided to the consumer, but in any event at or before consummation in the case of closed-end credit or before the first transaction is made under an open-end credit plan.

(4) *Multiple credit scores*—(i) *In general.* When a person obtains two or more credit scores from consumer reporting agencies and uses one of those credit scores in setting the material terms of credit granted, extended, or otherwise provided to a consumer, for example, by using the low, middle, high, or most recent score, the notice described in paragraph (d)(1)(ii) of this section must include that credit score and the other information required by that paragraph. When a person obtains two or more credit scores from consumer reporting agencies and uses multiple credit scores in setting the material terms of credit granted, extended, or otherwise provided to a consumer, for example, by computing the average of all the credit scores

obtained, the notice described in paragraph (d)(1)(ii) of this section must include one of those credit scores and the other information required by that paragraph. The notice may, at the person's option, include more than one credit score, along with the additional information specified in paragraph (d)(1)(ii) of this section for each credit score disclosed.

(ii) *Examples.* (A) A person that uses consumer reports to set the material terms of mortgage credit granted, extended, or provided to consumers regularly requests credit scores from several consumer reporting agencies and uses the low score when determining the material terms it will offer to the consumer. That person must disclose the low score in the notice described in paragraph (d)(1)(ii) of this section.

(B) A person that uses consumer reports to set the material terms of mortgage credit granted, extended, or provided to consumers regularly requests credit scores from several consumer reporting agencies, each of which it uses in an underwriting program in order to determine the material terms it will offer to the consumer. That person may choose one of these scores to include in the notice described in paragraph (d)(1)(ii) of this section.

(5) *Model form.* A model form of the notice described in paragraph (d)(1)(ii) of this section consolidated with the notice required by section 609(g) of the FCRA is contained in 16 CFR Part 698, Appendix B. Appropriate use of Model Form B–3 is deemed to comply with the requirements of § 640.5(d). Use of the model form is optional.

(e) *Other extensions of credit—credit score disclosure*—(1) *In general.* A person is not required to provide a risk-based pricing notice to a consumer under § 640.3(a) or (c) if:

(i) The consumer requests from the person an extension of credit other than credit that is or will be secured by one to four units of residential real property; and

(ii) The person provides to each consumer described in paragraph (e)(1)(i) of this section a notice that contains the following—

(A) A statement that a consumer report (or credit report) is a record of the consumer's credit history and includes information about whether the consumer pays his or her obligations on time and how much the consumer owes to creditors;

(B) A statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time to reflect changes in the consumer's credit history;

(C) A statement that the consumer's credit score can affect whether the consumer can obtain credit and what the cost of that credit will be;

(D) The current credit score of the consumer or the most recent credit score of the consumer that was previously calculated by the consumer reporting agency for a purpose related to the extension of credit;

(E) The range of possible credit scores under the model used to generate the credit score;

(F) The distribution of credit scores among consumers who are scored under the same scoring model that is used to generate the consumer's credit score using the same scale as that of the credit score that is provided to the consumer, presented in the form of a bar graph containing a minimum of six bars that illustrates the percentage of consumers with credit scores within the range of scores reflected in each bar, or by other clear and readily understandable graphical means, or a clear and readily understandable statement informing the consumer how his or her credit score compares to the scores of other consumers. Use of a graph or statement obtained from the person providing the credit score that meets the requirements of this paragraph (e)(1)(ii)(F) is deemed to comply with this requirement;

(G) The date on which the credit score was created;

(H) The name of the consumer reporting agency or other person that provided the credit score;

(I) A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the report;

(J) A statement that federal law gives the consumer the right to obtain copies of his or her consumer reports directly from the consumer reporting agencies, including a free report from each of the nationwide consumer reporting agencies once during any 12-month period;

(K) Contact information for the centralized source from which consumers may obtain their free annual consumer reports; and

(L) A statement directing consumers to the web sites of the Federal Reserve Board and Federal Trade Commission to obtain more information about consumer reports.

(2) *Form of the notice.* The notice described in paragraph (e)(1)(ii) of this section must be:

(i) Clear and conspicuous;

(ii) Segregated from other information provided to the consumer; and

(iii) Provided to the consumer in writing and in a form that the consumer may keep.

(3) *Timing.* The notice described in paragraph (e)(1)(ii) of this section must be provided to the consumer as soon as reasonably practicable after the credit score has been obtained, but in any event at or before consummation in the case of closed-end credit or before the first transaction is made under an open-end credit plan.

(4) *Multiple credit scores*—(i) *In General.* When a person obtains two or more credit scores from consumer reporting agencies and uses one of those credit scores in setting the material terms of credit granted, extended, or otherwise provided to a consumer, for example, by using the low, middle, high, or most recent score, the notice described in paragraph (e)(1)(ii) of this section must include that credit score and the other information required by that paragraph. When a person obtains two or more credit scores from consumer reporting agencies and uses multiple credit scores in setting the material terms of credit granted, extended, or otherwise provided to a consumer, for example, by computing the average of all the credit scores obtained, the notice described in paragraph (e)(1)(ii) of this section must include one of those credit scores and the other information required by that paragraph. The notice may, at the person's option, include more than one credit score, along with the additional information specified in paragraph (e)(1)(ii) of this section for each credit score disclosed.

(ii) *Examples.* The manner in which multiple credit scores are to be disclosed under this section are substantially identical to the manner set forth in the examples contained in paragraph (d)(4)(ii) of this section.

(5) *Model form.* A model form of the notice described in paragraph (e)(1)(ii) of this section is contained in 16 CFR Part B, Appendix B. Appropriate use of Model Form B–4 is deemed to comply with the requirements of § 640.5(e). Use of the model form is optional.

(f) *Credit score not available*—(1) *In general.* A person is not required to provide a risk-based pricing notice to a consumer under § 640.3(a) or (c) if the person:

(i) Regularly obtains credit scores from a consumer reporting agency and provides credit score disclosures to consumers in accordance with paragraphs (d) or (e) of this section, but a credit score is not available from the consumer reporting agency from which the person regularly obtains credit scores for a consumer to whom the

person grants, extends, or provides credit;

(ii) Does not obtain a credit score from another consumer reporting agency in connection with granting, extending, or providing credit to the consumer; and

(iii) Provides to the consumer a notice that contains the following—

(A) A statement that a consumer report (or credit report) includes information about the consumer's credit history and the type of information included in that history;

(B) A statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time in response to changes in the consumer's credit history;

(C) A statement that credit scores are important because consumers with higher credit scores generally obtain more favorable credit terms;

(D) A statement that not having a credit score can affect whether the consumer can obtain credit and what the cost of that credit will be;

(E) A statement that a credit score about the consumer was not available from a consumer reporting agency, which must be identified by name, generally due to insufficient information regarding the consumer's credit history;

(F) A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the consumer report;

(G) A statement that federal law gives the consumer the right to obtain copies of his or her consumer reports directly from the consumer reporting agencies, including a free consumer report from each of the nationwide consumer reporting agencies once during any 12-month period;

(H) The contact information for the centralized source from which consumers may obtain their free annual consumer reports; and

(I) A statement directing consumers to the web sites of the Board and Federal Trade Commission to obtain more information about consumer reports.

(2) *Example.* A person that uses consumer reports to set the material terms of non-mortgage credit granted, extended, or provided to consumers regularly requests credit scores from a particular consumer reporting agency and provides those credit scores and additional information to consumers to satisfy the requirements of paragraph (e) of this section. That consumer reporting agency provides to the person a consumer report on a particular consumer that contains one trade line, but does not provide the person with a credit score on that consumer. If the person does not obtain a credit score from another consumer reporting agency and, based in whole or in part on information in a consumer report, grants, extends, or provides credit to the consumer, the person may provide the notice described in paragraph (f)(1)(iii) of this section. If, however, the person obtains a credit score from another consumer reporting agency, the person may not rely upon the exception in paragraph (f) of this section, but may satisfy the requirements of paragraph (e) of this section.

(3) *Form of the notice.* The notice described in paragraph (f)(1)(iii) of this section must be:

(i) Clear and conspicuous;

(ii) Segregated from other information provided to the consumer; and

(iii) Provided to the consumer in writing and in a form that the consumer may keep.

(4) *Timing.* The notice described in paragraph (f)(1)(iii) of this section must be provided to the consumer as soon as reasonably practicable after the person has requested the credit score, but in any event not later than consummation of a transaction in the case of closed-end credit or when the first transaction is made under an open-end credit plan.

(5) *Model form.* A model form of the notice described in paragraph (f)(1)(iii) of this section is contained in 16 CFR Part 698, Appendix B. Appropriate use of Model Form B–5 is deemed to comply with the requirements of § 640.5(f). Use of the model form is optional.

§ 640.6 Rules of construction.

For purposes of this part, the following rules of construction apply:

(a) *One notice per credit extension.* A consumer is entitled to no more than one risk-based pricing notice under § 640.3(a) or (c), or one notice under § 640.5(d), (e), or (f), for each grant, extension, or other provision of credit. Notwithstanding the foregoing, even if a consumer has previously received a risk-based pricing notice in connection with a grant, extension, or other provision of credit, another risk-based pricing notice is required if the conditions set forth in § 640.3(d) have been met.

(b) *Multi-party transactions*—(1) *Initial creditor.* The person to whom a credit obligation is initially payable must provide the risk-based pricing notice described in § 640.3(a) or (c), or satisfy the requirements for and provide the notice required under one of the exceptions in § 640.5(d), (e), or (f), even if that person immediately assigns the credit agreement to a third party and is not the source of funding for the credit.

(2) *Purchasers or assignees.* A purchaser or assignee of a credit contract with a consumer is not subject to the requirements of this part and is not required to provide the risk-based pricing notice described in § 640.3(a) or (c), or satisfy the requirements for and provide the notice required under one of the exceptions in § 640.5(d), (e), or (f).

(3) *Examples.* (i) A consumer obtains credit to finance the purchase of an automobile. If the auto dealer is the person to whom the loan obligation is initially payable, such as where the auto dealer is the original creditor under a retail installment sales contract, the auto dealer must provide the risk-based pricing notice to the consumer (or satisfy the requirements for and provide the notice required under one of the exceptions noted above), even if the auto dealer immediately assigns the loan to a bank or finance company. The bank or finance company, which is an assignee, has no duty to provide a risk-based pricing notice to the consumer.

(ii) A consumer obtains credit to finance the purchase of an automobile. If a bank or finance company is the person to whom the loan obligation is initially payable, the bank or finance company must provide the risk-based pricing notice to the consumer (or satisfy the requirements for and provide the notice required under one of the exceptions noted above) based on the terms offered by that bank or finance company only. The auto dealer has no duty to provide a risk-based pricing notice to the consumer. However, the bank or finance company may comply with this rule if the auto dealer has agreed to provide notices to consumers before consummation pursuant to an arrangement with the bank or finance company, as permitted under § 640.4(c).

(c) *Multiple consumers*—(1) *Risk-based pricing notices.* In a transaction involving two or more consumers who are granted, extended, or otherwise provided credit, a person must provide a notice to each consumer to satisfy the requirements of § 640.3(a) or (c). If the consumers have the same address, a person may satisfy the requirements by providing a single notice addressed to both consumers. If the consumers do not have the same address, a person must provide a notice to each consumer.

(2) *Credit score disclosure notices.* In a transaction involving two or more consumers who are granted, extended, or otherwise provided credit, a person must provide a separate notice to each consumer to satisfy the exceptions in § 640.5(d), (e), or (f). Whether the consumers have the same address or

not, the person must provide a separate notice to each consumer. Each separate notice must contain only the credit score(s) of the consumer to whom the notice is provided, and not the credit score(s) of the other consumer.

(3) *Examples.* (i) Two consumers jointly apply for credit with a creditor. The creditor grants credit to the consumers on material terms that are materially less favorable than the most favorable terms available to other consumers from the creditor. The two consumers reside at different addresses. The creditor provides risk-based pricing notices to satisfy its obligations under this part. The creditor must provide a risk-based pricing notice to each consumer at the address where each consumer resides.

(ii) Two consumers jointly apply for credit with a creditor. The two consumers reside at the same address. The creditor obtains credit scores on each of the two consumer applicants. The creditor grants credit to the consumers. The creditor provides credit score disclosure notices to satisfy its obligations under this part. Even though the two consumers reside at the same address, the creditor must provide a separate credit score disclosure notice to each of the consumers. Each notice must contain only the credit score of the consumer to whom the notice is provided.

PART 698—MODEL FORMS AND DISCLOSURES

■ 2. Revise the authority citation in part 698 to read as follows:

Authority: 15 U.S.C. 1681e, 1681g, 1681j, 1681m, 1681s, and 1681s–3; Public Law 108–159, sections 211(d), 214(b), and 311; 117 Stat. 1952.

■ 3. Amend § 698.1 by revising paragraph (b) to read as follows:

§ 698.1 Authority and purpose.

* * * * *

(b) *Purpose.* The purpose of this part is to comply with sections 607(d), 609(c), 609(d), 612(a), 615(d), 615(h) and 624 of the Fair Credit Reporting Act, as amended by the Fair and Accurate Credit Transactions Act of 2003, and sections 211(d) and 214(b) of the Fair and Accurate Credit Transactions Act of 2003.

■ 4. In Part 698, add a new Appendix B to read as follows:

Appendix B—Model Forms for Risk-Based Pricing and Credit Score Disclosure Exception Notices

1. This appendix contains two model forms for risk-based pricing notices and three model forms for use in connection with the credit score disclosure exceptions. Each of the model forms is designated for use in a particular set of circumstances as indicated by the title of that model form.

2. Model form B–1 is for use in complying with the general risk-based pricing notice requirements in § 640.3. Model form B–2 is for risk-based pricing notices given in connection with account review. Model form B–3 is for use in connection with the credit score disclosure exception for loans secured by residential real property. Model form B–4 is for use in connection with the credit score disclosure exception for loans that are not secured by residential real property. Model form B–5 is for use in connection with the credit score disclosure exception when no credit score is available for a consumer. All forms contained in this appendix are models; their use is optional.

3. A person may change the forms by rearranging the format or by making technical modifications to the language of the forms, in each case without modifying the substance of the disclosures. Any such rearrangement or modification of the language of the model forms may not be so extensive as to materially affect the substance, clarity, comprehensibility, or meaningful sequence of the forms. Persons making revisions with that effect will lose the benefit of the safe harbor for appropriate use of Appendix B model forms. A person is not required to conduct consumer testing when rearranging the format of the model forms.

a. Acceptable changes include, for example:

i. Corrections or updates to telephone numbers, mailing addresses, or web site addresses that may change over time.

ii. The addition of graphics or icons, such as the person's corporate logo.

iii. Alteration of the shading or color contained in the model forms.

iv. Use of a different form of graphical presentation to depict the distribution of credit scores.

v. Substitution of the words "credit" and "creditor" or "finance" and "finance company" for the terms "loan" and "lender."

vi. Including pre-printed lists of the sources of consumer reports or consumer reporting agencies in a "check-the-box" format.

vii. Including the name of the consumer, transaction identification numbers, a date, and other information that will assist in identifying the transaction to which the form pertains.

viii. Including the name of an agent, such as an auto dealer or other party, when providing the "Name of the Entity Providing the Notice."

b. Unacceptable changes include, for example:

i. Providing model forms on register receipts or interspersed with other disclosures.

ii. Eliminating empty lines and extra spaces between sentences within the same section.

4. If a person uses an appropriate Appendix B model form, or modifies a form in accordance with the above instructions, that person shall be deemed to be acting in compliance with the provisions of § 640.4 or § 640.5, as applicable, of this regulation. It is intended that appropriate use of Model Form B–3 also will comply with the disclosure that may be required under section 609(g) of the FCRA.

B–1 Model form for risk-based pricing notice.

B–2 Model form for account review risk-based pricing notice.

B–3 Model form for credit score disclosure exception for credit secured by one to four units of residential real property.

B–4 Model form for credit score disclosure exception for loans not secured by residential real property.

B–5 Model form for credit score disclosure exception for loans where credit score is not available.

BILLING CODE P

B-1. Model form for risk-based pricing notice

[Name of Entity Providing the Notice]
Your Credit Report[s] and the Price You Pay for Credit

What is a credit report?	A credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors.
How did we use your credit report[s]?	We used information from your credit report[s] to set the terms of the credit we are offering you, such as the [Annual Percentage Rate/down payment]. The terms offered to you may be less favorable than the terms offered to consumers who have better credit histories.
What if there are mistakes in your credit report[s]?	You have a right to dispute any inaccurate information in your credit report[s]. If you find mistakes on your credit report[s], contact **[insert name of CRA(s)]**, which [is/are] the [consumer reporting agency/consumer reporting agencies] from which we obtained your credit report[s]. It is a good idea to check your credit report[s] to make sure the information [it contains/they contain] is accurate.
How can you obtain a copy of your credit report[s]?	Under federal law, you have the right to obtain a copy of your credit report[s] without charge for 60 days after you receive this notice. To obtain your free report[s], contact **[insert name of CRA(s)]**: *By telephone:* Call toll-free: 1-877-xxx-xxxx *By mail:* Mail your written request to: **[Insert address]** *On the web:* Visit **[insert web site address]**
How can you get more information about credit reports?	For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at www.federalreserve.gov, or the Federal Trade Commission's web site at www.ftc.gov.

B-2. Model form for account review risk-based pricing notice

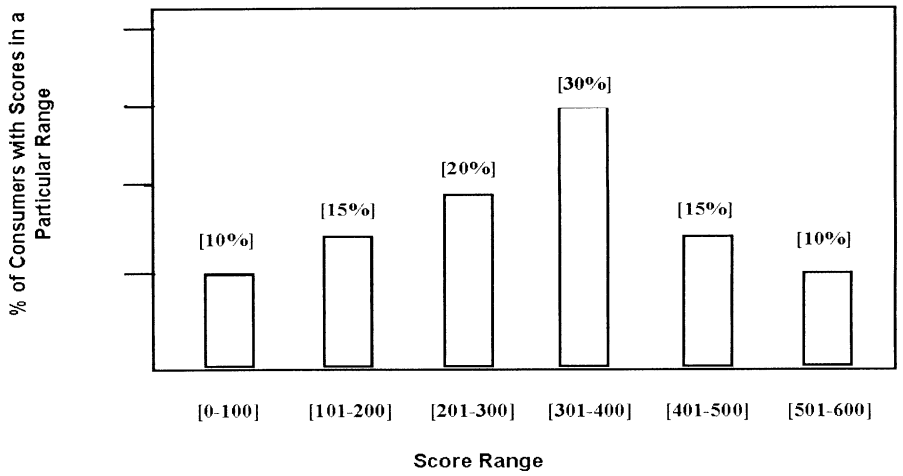
[Name of Entity Providing the Notice]
Your Credit Report[s] and the Pricing of Your Account

What is a credit report?	A credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors.
How did we use your credit report[s]?	We have used information from your credit report[s] to review the terms of your account with us. Based on our review of your credit report[s], we have increased the annual percentage rate on your account.
What if there are mistakes in your credit report[s]?	You have a right to dispute any inaccurate information in your credit report[s]. If you find mistakes on your credit report[s], contact **[insert name of CRA(s)]**, which [is/are] [a consumer reporting agency/consumer reporting agencies] from which we obtained your credit report[s]. It is a good idea to check your credit report[s] to make sure the information [it contains/they contain] is accurate.
How can you obtain a copy of your credit report[s]?	Under federal law, you have the right to obtain a copy of your credit report[s] without charge for 60 days after you receive this notice. To obtain your free report[s], contact **[insert name of CRA(s)]**: *By telephone:* Call toll-free: 1-877-xxx-xxxx *By mail:* Mail your written request to: **[Insert address]** *On the web:* Visit **[insert web site address]**
How can you get more information about credit reports?	For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at www.federalreserve.gov, or the Federal Trade Commission's web site at www.ftc.gov.

B-3. Model form for credit score disclosure exception for loans secured by one to four units of residential real property

[Name of Entity Providing the Notice]
Your Credit Score and the Price You Pay for Credit

Your Credit Score	
Your credit score	**[Insert credit score]** Source: **[Insert source]** Date: **[Insert date score was created]**

Understanding Your Credit Score	
What you should know about credit scores	Your credit score is a number that reflects the information in your credit report. Your credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors. Your credit score can change, depending on how your credit history changes.
How we use your credit score	Your credit score can affect whether you can get a loan and how much you will have to pay for that loan.
The range of scores	Scores range from a low of **[Insert bottom number in the range]** to a high of **[Insert top number in the range]**. Generally, the higher your score, the more likely you are to be offered better credit terms.
How your score compares to the scores of other consumers	 **[or]** [Your credit score ranks higher than [X] percent of U.S. consumers.]

Understanding Your Credit Score (continued)	
Key factors that adversely affected your credit score	**[Insert first factor]** **[Insert second factor]** **[Insert third factor]** **[Insert fourth factor]** **[Insert fifth factor, if applicable]**

Checking Your Credit Report	
What if there are mistakes in your credit report?	You have a right to dispute any inaccurate information in your credit report. If you find mistakes on your credit report, contact the consumer reporting agency. It is a good idea to check your credit report to make sure the information it contains is accurate.
How can you obtain a copy of your credit report?	Under federal law, you have the right to obtain a free copy of your credit report from each of the nationwide consumer reporting agencies once a year. To order your free annual credit report— *By telephone:* Call toll-free: 1-877-322-8228 *On the web:* Visit www.annualcreditreport.com *By mail:* Mail your completed Annual Credit Report Request Form (which you can obtain from the Federal Trade Commission's web site at http://www.ftc.gov/ bcp/conline/include/requestformfinal.pdf) to: Annual Credit Report Request Service P.O. Box 105281 Atlanta, GA 30348-5281
How can you get more information?	For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at www.federalreserve.gov, or the Federal Trade Commission's web site at www.ftc.gov.

Notice to the Home Loan Applicant

In connection with your application for a home loan, the lender must disclose to you the score that a consumer reporting agency distributed to users and the lender used in connection with your home loan, and the key factors affecting your credit scores.

The credit score is a computer generated summary calculated at the time of the request and based on information that a consumer reporting agency or lender has on file. The scores are based on data about your credit history and payment patterns. Credit scores are important because they are used to assist the lender in determining whether you will obtain a loan. They may also be used to determine what interest rate you may be offered on the mortgage. Credit scores can change over time, depending on your conduct, how your credit history and payment patterns change, and how credit scoring technologies change.

Because the score is based on information in your credit history, it is very important that you review the credit-related information that is being furnished to make sure it is accurate. Credit records may vary from one company to another.

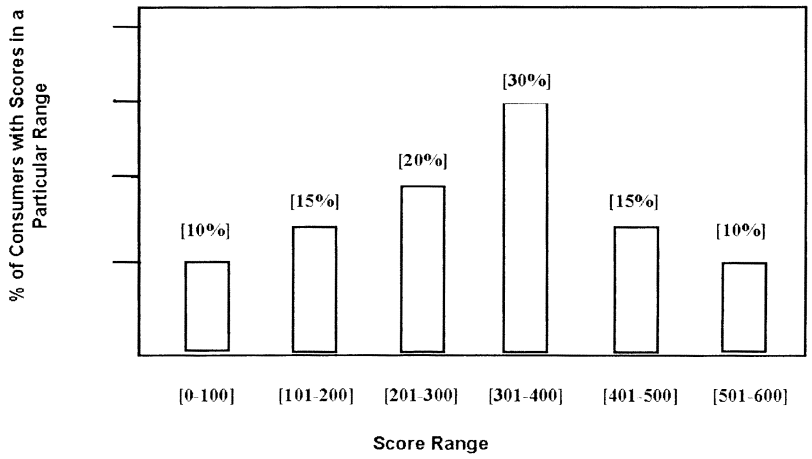
If you have questions about your credit score or the credit information that is furnished to you, contact the consumer reporting agency at the address and telephone number provided with this notice, or contact the lender, if the lender developed or generated the credit score. The consumer reporting agency plays no part in the decision to take any action on the loan application and is unable to provide you with specific reasons for the decision on a loan application.

If you have questions concerning the terms of the loan, contact the lender.

B-4. Model form for credit score disclosure exception for loans not secured by residential real property

[Name of Entity Providing the Notice]
Your Credit Score and the Price You Pay for Credit

Your Credit Score	
Your credit score	**[Insert credit score]** Source: **[Insert source]** Date: **[Insert date score was created]**

Understanding Your Credit Score	
What you should know about credit scores	Your credit score is a number that reflects the information in your credit report. Your credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors. Your credit score can change, depending on how your credit history changes.
How we use your credit score	Your credit score can affect whether you can get a loan and how much you will have to pay for that loan.
The range of scores	Scores range from a low of **[Insert bottom number in the range]** to a high of **[Insert top number in the range]**. Generally, the higher your score, the more likely you are to be offered better credit terms.
How your score compares to the scores of other consumers	 **[or]** [Your credit score ranks higher than [X] percent of U.S. consumers.]

Checking Your Credit Report	
What if there are mistakes in your credit report?	You have a right to dispute any inaccurate information in your credit report. If you find mistakes on your credit report, contact the consumer reporting agency. It is a good idea to check your credit report to make sure the information it contains is accurate.
How can you obtain a copy of your credit report?	Under federal law, you have the right to obtain a free copy of your credit report from each of the nationwide consumer reporting agencies once a year. To order your free annual credit report— *By telephone:* Call toll-free: 1-877-322-8228 *On the web:* Visit www.annualcreditreport.com *By mail:* Mail your completed Annual Credit Report Request Form (which you can obtain from the Federal Trade Commission's web site at http://www.ftc.gov/ bcp/conline/include/requestformfinal.pdf) to: Annual Credit Report Request Service P.O. Box 105281 Atlanta, GA 30348-5281
How can you get more information?	For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at www.federalreserve.gov, or the Federal Trade Commission's web site at www.ftc.gov.

B-5. Model form for loans where credit score is not available

[Name of Entity Providing the Notice]
Credit Scores and the Price You Pay for Credit

Your Credit Score	
Your credit score	Your credit score is not available from [**Insert name of CRA**], which is a consumer reporting agency, because they may not have enough information about your credit history to calculate a score.
What you should know about credit scores	A credit score is a number that reflects the information in a credit report. A credit report is a record of your credit history. It includes information about whether you pay your bills on time and how much you owe to creditors. A credit score can change, depending on how a consumer's credit history changes.
Why credit scores are important	Credit scores are important because consumers who have higher credit scores generally will get more favorable credit terms. Not having a credit score can affect whether you can get a loan and how much you will have to pay for that loan.
Checking Your Credit Report	
What if there are mistakes in your credit report?	You have a right to dispute any inaccurate information in your credit report. If you find mistakes on your credit report, contact the consumer reporting agency. It is a good idea to check your credit report to make sure the information it contains is accurate.
How can you obtain a copy of your credit report?	Under federal law, you have the right to obtain a free copy of your credit report from each of the nationwide consumer reporting agencies once a year. To order your free annual credit report— *By telephone:* Call toll-free: 1-877-322-8228 *On the web:* Visit www.annualcreditreport.com *By mail:* Mail your completed Annual Credit Report Request Form (which you can obtain from the Federal Trade Commission's web site at http://www.ftc.gov/bcp/conline/include/requestformfinal.pdf) to: Annual Credit Report Request Service P.O. Box 105281 Atlanta, GA 30348-5281
How can you get more information?	For more information about credit reports and your rights under federal law, visit the Federal Reserve Board's web site at www.federalreserve.gov, or the Federal Trade Commission's web site at www.ftc.gov.

By order of the Board of Governors of the Federal Reserve System, December 18, 2009.
Jennifer J. Johnson,
Secretary.

By direction of the Commission.
Donald S. Clark,
Secretary.

The Federal Trade Commission.

[FR Doc. E9–30678 Filed 1–14–10; 8:45 am]
BILLING CODE C

Reader Aids

Federal Register

Vol. 75, No. 10

Friday, January 15, 2010

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations	
General Information, indexes and other finding aids	**202–741–6000**
Laws	**741–6000**
Presidential Documents	
Executive orders and proclamations	**741–6000**
The United States Government Manual	**741–6000**
Other Services	
Electronic and on-line services (voice)	**741–6020**
Privacy Act Compilation	**741–6064**
Public Laws Update Service (numbers, dates, etc.)	**741–6043**
TTY for the deaf-and-hard-of-hearing	**741–6086**

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **http://www.gpoaccess.gov/nara/index.html**

Federal Register information and research tools, including Public Inspection List, indexes, and links to GPO Access are located at: **http://www.archives.gov/federal_register**

E-mail

FEDREGTOC-L (Federal Register Table of Contents LISTSERV) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **http://listserv.access.gpo.gov** and select *Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings);* then follow the instructions.

PENS (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html** and select *Join or leave the list (or change settings);* then follow the instructions.

FEDREGTOC-L and **PENS** are mailing lists only. We cannot respond to specific inquiries.

Reference questions. Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

Reminders. Effective January 1, 2009, the Reminders, including Rules Going Into Effect and Comments Due Next Week, no longer appear in the Reader Aids section of the Federal Register. This information can be found online at **http://www.regulations.gov.**

CFR Checklist. Effective January 1, 2009, the CFR Checklist no longer appears in the Federal Register. This information can be found online at **http://bookstore.gpo.gov/.**

FEDERAL REGISTER PAGES AND DATE, JANUARY

1–218 4
219–736 5
737–884 6
885–1012 7
1013–1268 8
1269–1524 11
1525–1696 12
1697–2052 13
2053–2432 14
2433–2784 15

CFR PARTS AFFECTED DURING JANUARY

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

Proclamations:
8469 885
8470 1265
8471 1267
8472 2051
Executive Orders:
12958 (Revoked by 13526) 707
13292 (Revoked by 13526) 707
13526 ..... 707, 1013
13527 737
13528 2053
Administrative Orders:
Memorandums:
Memorandum of December 15, 2009 1015
Memorandum of December 29, 2009 733
Orders:
Order of December 29, 2009 735

6 CFR

Proposed Rules:
27 ..... 1552, 2445

7 CFR

305 1
319 1
980 1269
984 1525
993 1269
1400 887
Proposed Rules:
205 1555
930 1724

9 CFR

94 1697

10 CFR

50 13
430 652
431 ..... 652, 1122
Proposed Rules:
32 1559
431 186

11 CFR

1 29
2 29
4 29
5 29
100 29
101 29
102 29
104 29
110 29
113 29
114 29
201 29
300 29

12 CFR

222 2724
229 219
925 678
944 678
1263 678
1290 678
Proposed Rules:
360 934
906 1289
1207 1289

13 CFR

Proposed Rules:
121 1296
124 1296

14 CFR

25 ... 32, 35, 37, 39, 1527, 2433, 2434
39 ..... 221, 224, 901, 904, 906, 910, 1017, 1527, 1529, 1533, 1536, 1538, 1697, 2055, 2057, 2060, 2062, 2064, 2067
71 ..... 42, 43, 226
97 ..... 915, 916
121 739
Proposed Rules:
25 ..... 75, 81
27 ..... 793, 942
29 ..... 793, 942
39 ... 89, 91, 258, 260, 262, 264, 801, 950, 1297, 1560, 1563, 1731
91 942
121 942
125 942
135 942

15 CFR

90 44
738 1028
744 1699
748 2435
902 ..... 554, 2198
Proposed Rules:
922 952

16 CFR

640 2724
698 2724
Proposed Rules:
312 1734

17 CFR

275 ..... 742, 1456

LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with ''P L U S'' (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.html*.

The text of laws is not published in the **Federal Register** but may be ordered in ''slip law'' (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

H.R. 4314/P.L. 111–123
To permit continued financing of Government operations. (Dec. 28, 2009; 123 Stat. 3483)

H.R. 4284/P.L. 111–124
To extend the Generalized System of Preferences and the Andean Trade Preference Act, and for other purposes. (Dec. 28, 2009; 123 Stat. 3484)

H.R. 3819/P.L. 111–125
To extend the commercial space transportation liability regime. (Dec. 28, 2009; 123 Stat. 3486)

Last List December 31, 2009

Public Laws Electronic Notification Service (PENS)

PENS is a free electronic mail notification service of newly enacted public laws. To subscribe, go to *http://listserv.gsa.gov/archives/publaws-l.html*

Note: This service is strictly for E-mail notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.